

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

DOCKET NO. PEN-10-110

FRIENDS OF LINCOLN LAKES)	
Appellant)	
)	
V.)	PETITION FOR REVIEW OF
)	GOVERNMENTAL ACTION
)	UNDER Me. R. Civ. P. 80(B)
LINCOLN APPEALS)	
BOARD)	
Appellee)	
)	
EVERGREEN WIND LLC)	
Intervenor)	

On Appeal from the Lincoln Appeals Board

APPELLANT'S BRIEF

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Friends of Lincoln Lakes (FOLL) is an association of property owners, and other interested parties, in the Lincoln Lakes Region. At its creation in summer 2008, FOLL was known as the Friends of Rollins Ridge, since the aim of the group was to identify issues with the Rollins Wind Project proposal, a grid scale industrial wind project. An application was submitted to the Lincoln Planning Board for public hearing at the Planning Board's October 21, 2008 Planning Board meeting. App. at 70-73.

At the time of the October 2008 Town Council meeting, there was still some confusion about the group's name being changed, since the minutes of that meeting state that members of the Friends of Rollins Ridge testified at the meeting. An entire section of the minutes of this meeting was entitled "Discussion with the Friends of Rollins Ridge." In addition, within this section of the minutes, it was acknowledged that Brad Blake spoke on behalf of FOLL. App. at 51.

However, the November 10, 2008 Town Council minutes note, "the Planning board had heard the Friends of Lincoln Lakes request for a moratorium." At that same meeting, Mr. Tom Gardner "asked why they were asking for a moratorium." There was no mention of Friends of Rollins Ridge at this meeting, or at any time subsequently. App. at 62. At the November 17, 2008 Planning Board meeting, the last meeting at which the public was permitted to testify, FOLL members testified. App. at 75-76.

On December 1, 2008, the Lincoln Planning Board issued a permit for development of a portion of the Rollins Wind Project. App. at 86-87.

On December 15, 2008, Dr. Gary Steinberg, a member of FOLL, delivered a written appeal letter from FOLL to the Lincoln Town Office, appealing the December 1,

2008 decision of the Lincoln Planning board. Dr. Steinberg completed the cover sheet required by the town. The appeal letter was signed by the attorney for FOLL. App. at 88-90. On December 31, 2008, FOLL incorporated with the state of Maine. App. at 91-93.

A hearing on the FOLL appeal was scheduled for January 8, 2009. At that time, the Lincoln Board of Appeals (Board) challenged the legal identity of FOLL. FOLL members and the attorney for FOLL answered questions about the association, at least one member stated that she was a member of FOLL, the treasurer identified himself and offered a view of FOLL's bank statements and offered to provide more information about FOLL at a later date if requested. App. at 33-43. The Board requested membership lists (App. at 34), bylaws (App. at 33, 37), bank account information (App. at 33, 37) and an association vote supporting the appeal (App. at 38). While the treasurer offered to let the board view the bank statements and copies of checks, the Board requested that they be permitted to make copies. FOLL refused to permit copies to be made, for reasons of confidentiality. App. at 37-8. FOLL member Mary Nolette stated that she was a member of the group and provided a meeting place for FOLL. App. at 36.

The attorney for the Board offered three options for proceeding – continuing the hearing, holding the hearing and postponing the decision, pending receipt of additional information regarding standing from FOLL, or dismissing the appeal. App. at 38-9. Intervenor Evergreen LLC had no objection to proceeding with the appeal at that time, and putting aside the factual finding on standing to another date. App. at 41.

The attorney for FOLL asked the Board whether they would permit a substitution of parties. App. at 39. The chair ruled that they would not entertain any of the proposed options. App. at 48. The Board voted on January 8, 2009 to dismiss the FOLL appeal for

lack of standing. App. at 49.

The Appellants filed an appeal of the Board's dismissal with the Penobscot County Superior Court, on February 8, 2009. App. at 27-30. The decision was issued on February 3, 2010, affirming the action of the Board while also dismissing Plaintiffs' Rule 80(B) appeal.¹ App. at 1-26.

Appellants filed a timely appeal of the lower court decision with the Law Court.

STATEMENT OF ISSUES FOR REVIEW

Was the Lincoln Board of Appeal's denial of standing to the Friends of Lincoln Lakes, and the consequent dismissal of the FOLL appeal of the Rollins Wind Farm permit, arbitrary and capricious, based on an error of law, based on findings not supported by substantial evidence in the record or an abuse of discretion?

SUMMARY OF ARGUMENTS

I. **THE LINCOLN BOARD OF APPEALS MADE AN ERROR OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE FRIENDS OF LINCOLN LAKES HAD NO STANDING TO APPEAL A DECISION OF THE LINCOLN PLANNING BOARD GRANTING A PERMIT FOR CONSTRUCTION OF THE ROLLINS RIDGE WIND FARM**

A. **The Lincoln Board of Appeals Erred in Deciding that Appellants' Unincorporated Status was a Bar to Standing**

The Lincoln Board of Appeals erred in relying on the holding in *Tisdale v.*

Rawson, 2003 ME 68, ¶ 15, 822 A.2d 1136, 1140, that unincorporated associations do

¹ The lower court included an odd duality in its decision. The court held that because FOLL allegedly had no standing before the Lincoln Appeals Board, FOLL likewise had no standing to bring the Rule 80(B) appeal. The entry at the end of the lower court decision states: (1) Decision of the Appeals Board of the Town of Lincoln dismissing the Friends of Lincoln Lakes administrative appeal for lack of standing is affirmed. However, the second part of the entry states: (2) The plaintiffs 80B appeal is dismissed because neither FOLL nor Don Smith has standing to bring the appeal. App. at 26. These two statements are inconsistent at best. If FOLL had no standing to bring the appeal, the lower court had no subject matter jurisdiction to hear the appeal and no authority to affirm the decision of the Lincoln Board of Appeals. By affirming the decision of the Lincoln Board of Appeals, the lower court also affirmed FOLL's standing to bring the 80(B) appeal and, by inference, FOLL's standing before the administrative tribunal.

not have the capacity to sue or be sued in their own name. Friends of Lincoln Lakes is not suing for monetary damages, but rather bringing an administration appeal before a municipal appeal board, which is not a comparable action.

B. The Lincoln Board of Appeals Erred in Placing the Initial Burden of Proving Standing on the Appellants

As this Court's decision in *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 14, 974 A.2d 903, 908 (Me. 2009) held, once a party before a municipal appellate board makes a prima facie case for standing, the burden shifts to the municipal board to provide evidence that the party does not have standing.

C. The Lincoln Board of Appeals Abused its Discretion by Refusing to give the Appellants an Opportunity to Provide Evidence of Standing

The Lincoln Board of Appeals refusal to give the Appellants an opportunity to gather additional evidence to support standing, or to make a substitution of parties, was an abuse of discretion, given this Court's broad view of standing, particularly in Rule 80 (B) appeals.

STANDARD OF REVIEW

When the Superior Court, as in this case, acts as an intermediate appellate court, the Law Court "review[s] directly the operative decision of the municipality."

Gensheimer v. Town of Phippsburg, 2005 ME 22, ¶ 7, 868 A.2d 161, 163. The Lincoln Board of Appeal's decision is the operative decision in this case. App. at 45-49.

Furthermore, "[a] party's standing to bring a Rule 80B appeal is a function of whether the party participated in the administrative process and whether the party will suffer a

particularized injury." *Norris Family Associates LLC v. Town of Phippsburg*, 2005 ME

102 ¶ 16, 879 A.2d 1007, 1012. See also *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 12, 973 A.2d 735, 739.

ARGUMENT

I. THE LINCOLN BOARD OF APPEALS MADE AN ERROR OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE FRIENDS OF LINCOLN LAKES HAD NO STANDING TO APPEAL A DECISION OF THE LINCOLN PLANNING BOARD GRANTING A PERMIT FOR CONSTRUCTION OF THE ROLLINS RIDGE WIND FARM

A. The Lincoln Board of Appeals Erred in Deciding that Appellants' Unincorporated Status was a Bar to Standing

Appellee Board argues that FOLL was not incorporated at the time their appeal was filed, and therefore had no standing to file such an appeal. However that argument is inconsistent with current case law, as even the lower court noted. App. at 9-11. At the time of the appeal hearing, the Board relied on *Tisdale v. Rawson* for the proposition that “[g]enerally, an unincorporated association does not have capacity to sue or be sued in its own name, absent specific statutory authorization.” *Tisdale v. Rawson*, 2003 ME 68, ¶ 15, 822 A.2d 1136, 1140 (quoting *Gulick v. Bd. of Env'tl. Prot.*, 42 A.2d 1202, 1202-3 n.1 (Me. 1981).

However *Tisdale* is easily distinguishable from other cases that support a broader view of standing. The issue in *Tisdale* was whether an unincorporated association could maintain a suit in court for money damages, while in this matter Appellants are bringing an administrative appeal before a municipal appeals board, a very different action. In addition, “whether a party has standing to bring an administrative appeal before an appeals board depends on the language of the governing ordinance.” *Nergaard at* ¶ 12. In this matter, the Ordinance’s definition of “aggrieved party” includes, *inter alia*, “a

group of persons that have suffered a particularized injury.” Ordinance § 1313.16(B). App. at 102. As the lower court noted, “[t]he Ordinance then defines the word “person” to include an “association.” Ordinance § 1313.16(A)(1)(a). App. at 101. The Ordinance itself does not distinguish between “incorporated” or ‘unincorporated’ association” The lower court goes on to restate the Law Court’s “broad view of standing at municipal appeals level:

[A]s the record in this case clearly indicates, matters before a local zoning board of appeals are conducted in a fashion far less formal than court proceedings or hearings. . . . To superimpose a formal structure of appearance, withdrawal, and substitution of parties upon otherwise open proceeding seems purposeless and unrealistic. This conclusion is reinforced by an obvious legislative attempt to allow appeals by persons aggrieved by the action of various administrative agencies.

Pride’s Corner Concerned Citizens Ass’n v. Westbrook Board of Zoning Appeals, 398 A.2d 415 (Me. 1979) (citation omitted).” App. at 11.

Under the standards articulated by this Court, FOLL, as an unincorporated association, had the ability to bring an administrative appeal before the Lincoln Board of Permit Appeals.

B. The Lincoln Board of Appeals Erred in Placing the Initial Burden of Proving Standing on the Appellants

The Lincoln Board of Appeals Procedural Rules state that “[t]he Board decides whether the applicant has a right to appear before the Board.” App. at 95. There is no further guidance regarding what documents a party must bring to the hearing before the Board in order to show standing. There is certainly no notice to a party that they must come armed with memberships lists, bank statements, bylaws and resolutions regarding the appeal, all of which were requested by the chair, or members, of the Board on January

8, 2009. Nor was FOLL notified to bring anything except a copy of their Articles of Incorporation.

This Court has consistently taken a broad view of standing, particularly in Rule 80(B) appeals, noting that [the court] “ha[s] refused to define party in the 80(B) setting “as a legal term of art, as the term is used in . . . M.R. Civ. P. [17-25 because] proceedings before a Board of Appeals are *far less formal* than a judiciary proceeding.” *Norris Family* at ¶ 16, citing *New England Herald Dev. Group v. Town of Falmouth*, 521 A.2d 693, 695-96, n.4 (Me. 1987) (Emphasis added).

Most recently, in *Wister v. Town of Mt. Desert*, in which an abutter’s standing was challenged upon appeal, this Court noted that “[l]ocal citizens participating in zoning hearings need not present deeds, maps, or other proof of their status as abutters to justify their participation in such hearings.” The Court states that “[a] statement of abutter status, as occurred here, is enough to establish a prima facie showing of standing, absent evidence to the contrary...” and that “[o]nce Wister had made a prima facie showing of her standing to participate in the proceeding, the burden shifted to Moore to present evidence that Wister lacked standing.” (Emphasis added) *Wister* at ¶13.

In this matter, FOLL’s attorney stated that FOLL was a group of Lincoln landowners, many who had participated in the Lincoln Town Council and Planning Board hearings when the Rollins Ridge Wind Farm was discussed. This was in addition to referencing the minutes of those meetings during which testimony was given by a FOLL member, on behalf of the association. It was also noted that FOLL’s treasurer was present, and that bank statements were available to view, although not copy, as the Board demanded. Under *Wister*, these offers should have sufficed as a prima facie

demonstration of standing and the burden should have shifted to the Board to present evidence that FOLL lacked standing.

The Lincoln Board of Appeals had notice that certain community members were against the development and that they had formed an entity called Friends of Lincoln Lakes, since these community members had testified at various hearings, and had submitted written testimony. In *Norris Family Associates*, the lead plaintiff in a superior court appeal of a zoning board's decision had actively participated in the administrative proceeding below, while the other neighbors in the group had not. When the lead plaintiff withdrew from the suit, the other landowners were dismissed on standing grounds due to their lack of active participation in the administrative proceedings. This Court reversed, holding that “*the applicant and the board of appeals had sufficient notice that the lead plaintiff was also representing the interests of the other plaintiffs.*” *Norris* at ¶ 18. (Emphasis added). The *Norris* Court also held that the plaintiffs only had to meet a low burden of alleging particularized injury due the environmental harms that might result from the development.² *Id.* at ¶ 19.

As noted above, individual members of FOLL have repeatedly spoken at Town Council and Planning Board meetings, and identified themselves as members of FOLL. The Town Council and the Planning Board never disputed or questioned the standing of FOLL. Rather, minutes of Town Council meetings include sections entitled “Discussion with the Friends of Rollins Ridge.”³ Planning Board minutes reflect numerous

² Since the Board refused to grant FOLL standing, based on their conclusion that FOLL was not a legally ascertainable entity, the Board never addressed the issue of FOLL's participation in the administrative process or whether FOLL as an association, or through its individual members, would suffer a particularized injury.

³ As previously noted, the Friends of Rollins Ridge was the precursor of the Friends of Lincoln Lakes and both groups were duly noted in Town Council and Planning Board meeting minutes. In addition, a number

statements in which individual community members, who had stated at earlier meetings that they were testifying on behalf of the Friends of Rollins Ridge, stated that they were testifying on behalf of the Friends of Lincoln Lakes. Yet the Board stated in their written decision dated January 8, 2009, that they lacked sufficient evidence to ascertain the legal identify of the “Friends of Lincoln Lakes” as of either November 17, 2008 or December 1, 2008, the dates of Planning Board hearings on the project in question. Furthermore, they stated that they lacked sufficient evidence to determine whether the “Friends of Lincoln Lakes” existed in any legally cognizable and ascertainable form as of that date. Given the extent of the evidence supporting the existence of FOLL, the names of the leadership of FOLL, the consistent opposition of the FOLL members to the Rollins Ridge Wind Farm, and those members’ participation in the Town Council and Planning Board hearings on the application, FOLL clearly established a prima facie showing of standing and it was then that the burden shifted to the Board to submit evidence that FOLL did not have standing.⁴ This they did not do.

of those who testified under the auspices of Friends of Rollins Ridge were subsequent incorporators of the Friends of Lincoln Lakes, e.g. Bradbury Blake and Dr. Gary Steinberg. App. at 91-93.

⁴ During the lower court proceedings, the Board suggested that the failure of FOLL incorporators to indicate on their Articles of Incorporation that they had “members” is evidence that they had no members, and therefore could neither rely on members’ own standing to establish FOLL’s standing, or to substitute a member as a party. The Board misconstrues the meaning of “member” on the Articles of Incorporation form submitted to the Secretary of State when incorporating a non-profit corporation. According to Title 13-B §402(1), “[a] corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation. If the corporation has no members, that fact shall be set forth in the articles of incorporation. A corporation may issue certificates evidencing membership therein.” This section defines the procedure for establishing a non-profit corporation wherein the “members” are the governing body of the organization, either constituting the board or choosing the board. The alternative model is a non-profit with a self-perpetuating board, whereby the current board nominates and votes on an incoming board. Frequently, however, these organizations are “membership organizations,” where the members pay a membership fee, sometimes vote on policy decisions, attend organizational functions, and the like. Some examples of these organizations include the ACLU, Amnesty International, and the NRA. Many grassroots associations, too, utilize this model, having a governing Board of Directors, and a general membership that suggests, but does not dictate, policy decisions. This is the model that FOLL utilizes.

C. The Lincoln Board of Appeals Abused its Discretion by Refusing to give the Appellants an Opportunity to Provide Evidence of Standing

The Board's denial of standing to FOLL flies directly in the face of this Court's expansive definition of standing. Even assuming, for the sake of argument, that FOLL was unable to present sufficient evidence on January 8, 2009, to make a prima facie case of standing and satisfy the Board's confusion about whether FOLL even existed at all, the Board refused to utilize one of two alternative options offered by their own counsel – either reschedule the hearing and order FOLL to come armed with evidence of standing, or hold the hearing and delay the decision until FOLL submitted evidence of standing acceptable to the Board, both legally acceptable actions. Even Intervenor Evergreen LLC had no objection to these options. Nor did the Board choose an option suggested by counsel for FOLL - substituting an individual member of FOLL as the appellant. At least two members of FOLL have standing, since they are abutters to the project and had been present at the January 8, 2009 hearing. The Board could have heeded the suggestion of FOLL's counsel and substituted one or both of these individuals as plaintiffs.

The Board's action was clearly contrary to those principles of standing expressed by this Court as well as the United States Supreme Court,⁵ which consistently grant standing in land use cases when there appears any possible way it can legally be done. (“[P]roceedings before a Board of Appeals are *far less formal* than a judiciary proceeding.” *Norris Family Associates* at ¶ 16; “To superimpose a formal structure of appearance, withdrawal, and substitution of parties upon otherwise open proceeding seems purposeless and unrealistic.” *Pride's Corner Concerned Citizens Ass'n* at 415;

“[l]ocal citizens participating in zoning hearings need not present deeds, maps, or other proof of their status as abutters to justify their participation in such hearings.” *Wister* at ¶ 13.

The Board ignored judicial precedent in applying a narrow view of standing by refusing to either meet its burden by rebutting FOLL’s prima facie showing of standing, hearing evidence on January 8, 2009 and continuing the finding of standing, or continuing the entire hearing until such information that was demanded could be produced.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court:

1. Find that the Friends of Lincoln Lakes have standing to appeal the Lincoln Planning Board’s grant of a permit to Evergreen LLC to build the Rollins Wind Project.
2. Remand this matter to the Lincoln Appeals Board for proceedings consistent with this Order.

Dated: April 12, 2010

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⁵ See *Pennell v. City of San Jose*, 485 U.S. 1, 7-8, 108 S.Ct. 849, 855 - 856 (U.S. Cal. 1988) (The Court accepts as true statements first made during *oral arguments*, grants standing and states that the “application of the constitutional standing requirement [is not] a mechanical exercise...” (Emphasis added)

CERTIFICATE OF SERVICE

I certify that on April 12, 2010, I caused two copies of the Brief of Appellants to be served on the following counsel of record for Appellee and Real Parties In Interest by pre-paid first class mail at the following addresses:

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