THE ZONING BOARD OF ADJUSTMENT IN NEW HAMPSHIRE
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A. INTRODUCTION

The purpose of this Article is to give you as a volunteer ZBA member a basic overview of the organization, powers, duties and relevant statutory and case law authority to make your service both more enjoyable and productive. I highly recommend the various materials made available to you through the New Hampshire Office of Energy and Planning, the New Hampshire Local Government Center, and the noted treatises of Portsmouth Attorney Peter Loughlin found in the New Hampshire Practice Guide Series, with Vol. 15 Land Use Planning and Zoning (3rd Ed., 2000) (cited hereafter as "Loughlin") being particularly useful for more in depth discussions on the topics covered by this Article as well as many related topics beyond the scope of this Article. I strongly suggest that you consult with your municipality's legal counsel on any specific question you may have as this article is not intended to give you legal advice on any particular set of facts which may be facing you.

B. ORGANIZATION OF THE ZBA

1. Establishment and Organization

Pursuant to RSA 673:1, IV, "Every zoning ordinance adopted by a legislative body shall include provisions for the establishment of a zoning board of adjustment." Thus, to have a valid zoning ordinance, you must have a ZBA to act as the "constitutional safety valve" in a quasi-judicial capacity to interpret the zoning ordinance for the protection of the citizens.

Per the terms of RSA 673:3, the ZBA shall consist of five (5) members who may be either elected or appointed in the manner prescribed by the local legislative body in the zoning ordinance. Each member must be a resident of the municipality in order to be appointed or elected. Furthermore, pursuant to RSA 673:5, II, the terms of ZBA members shall be for three (3) years on a staggered basis with no more than two (2) members being appointed or elected in any given year. Upon appointment or election, the ZBA members must take the oath of office set forth in Part II, Article 84 of the New Hampshire Constitution per RSA 42:1; and the municipal records should clearly state the dates of appointment/election and expiration of terms. While the provisions of RSA 673:3-a are not mandatory, it is recommended each member complete at least six (6) hours of training within six (6) months of assuming office for the first time.

By the terms of RSA 673:7, I and II, an elected or appointed planning board member may be a member of the ZBA as with any other municipal board or commission;

but this cannot result in two (2) planning board members serving on the same board or commission.

RSA 673:8 states that a chairperson shall be elected from the members and that other offices may be created as the ZBA deems necessary. The most frequent "other office" is that of "vice chair", so that a person is designated to conduct the meetings in the chairperson's absence. The term of the chairperson and any other officers is for one year but they may be reelected without term limit. RSA 673:9.

Meetings are held "at the call of the chairperson and at such other times as the board may determine"; and a majority of the members shall constitute a quorum to transact business at any meeting. RSA 673:10. This schedule differs from the planning board which is required by subsection II of this statute to hold at least one meeting every month.

2. Alternate Members

Up to five (5) alternate members may be provided for by the local legislative body to be either elected or appointed as the case may be. See, RSA 673:6. The terms of such alternate members shall also be three (3) years and staggered as with full members. Alternates serve in the absence of a "full" member and are appointed to sit on a particular case or meeting by the chairperson. RSA 673:11. If the "full" member is not just absent or disqualified for the meeting, then the procedures of RSA 673:12 concerning vacancies must be followed.

3. Filing Vacancies

The method for filling the vacancy depends upon the status of the member who is being replaced. Thus, if a member was elected, her vacancy is filled by appointment of the remaining board members for an interim term lasting until the next regular municipal election; and at that election, a successor is elected to either fill the unexpired term of the replaced member or a complete new term as the case may be. RSA 673:12, I.

If the member being replaced is either an appointed, ex officio or alternate member, her vacancy is filled by the original appointing (i.e., the Board of Selectmen or Town/City Council) or designating authority (i.e., the Chairperson of the ZBA), for the unexpired term. RSA 673:12, II.

4. Removal of Members

As with members of the planning board, appointed members of the ZBA may be removed by the appointing authority after a public hearing upon written findings of inefficiency, neglect of duty or malfeasance in office; and elected members or alternate members may be removed by the Selectmen for such cause after a public hearing. RSA 673:13, I and II. Note that the malfeasance complained of must be directly related to or connected with the performance of the member's duties. See, Williams v. City of Dover,

130 N.H. 527, 531 (1988)(reversing removal where planning board member's assistance of his employer's installation of a driveway and additional greenhouse without the necessary planning board approvals or permits was not directly related to the member's duties); and Silva v. Botch, 121 N.H. 1041, 1045 (1981)(remand for award of attorney's fees to ex officio member illegally removed from planning board - despite stipulation at trial court that both sides had acted in good faith).

A more common reason for considering the removal of a member is the member's failure to attend meeting. This problem can be addressed via the ZBA's rule making authority under RSA 676:1 whereby the excused or unexcused absence from a given number of meetings would be deemed a "malfeasance" or "neglect of duty" and thereby grounds for removal.

5. Rules of Procedure

Although RSA 676:1 does not prescribe the content of the ZBA's Rules of Procedure, this statute does mandate that the ZBA have such Rules. Such Rules must be adopted at a regular public meeting with a copy thereafter kept on file with the City, Town or Village District Clerk to be available to the public. A copy should also be available on the municipality's website and to an applicant with the application packet.

These Rules should cover both the ZBA's internal organization and how it conducts its public business. Items that can be covered include:

a. Authority of the Board, Election of Officers, and Designation of Alternates;
b. Requirements for a Complete Application;
c. Designation of Quorum and Rules for Disqualification;
d. Scheduling and Conduct of Meetings, including Order of Business and Policy on Nonpubic Sessions;
e. Notices of Decisions, Findings and Requests for Rehearings;
f. Creation of the Certified Record for any Appeals;
g. Joint Meetings with Planning Board; and
h. Process for Amending the Rules.

A set of model Rules of Procedure can be found on the website of the New Hampshire Office of Energy and Planning as Appendix A to The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OEP revised January 2006): www.nh.gov/oep/resourcelibrary/HandbooksandOtherPublications/htm.

C. POWERS AND DUTIES

1. Separation from Other Municipal Boards

As with the State and Federal Government, municipal government in New Hampshire operates under a system of "separation of powers" and "checks and balances".

Under this system, the local legislative body (whether the Town Meeting, the Town Council or the City Council) has the authority to enact and amend the Zoning Ordinance pursuant to the provisions of RSA 675. Note also that the Planning Board is given certain authority to suggest amendments to the Zoning Ordinance and to amend Subdivision Regulations and Site Plan Review Regulations under provisions of RSA 674 and 675.

The ZBA, however, does not possess such legislative functions. Indeed, its role is quasi-judicial in that it generally reviews decisions made by another municipal agent or body or evaluates whether an applicant merits a particular waiver, exception or variance from the ordinary application of the municipal ordinances.

The express powers of the ZBA are set forth in RSA 674:33, and include the power to hear administrative appeals, to grant variances and special exceptions, and, pursuant to RSA 674:33-a, the power to grant equitable waivers of dimensional requirements. In exercising such powers, the ZBA may reverse or affirm, wholly or in part, or may modify the order or decision appealed from and may make such order or decision as ought to be made "and, to that end, shall have all the powers of the administrative official". RSA 674:33, II. Moreover, in making any decision – whether to reverse an administrative official or grant an application – at least three (3) members of the ZBA must concur in the decision. Thus, when less than a full board of five (5) members and/or alternates is present, the Chairperson should apprise the applicant of this requirement and provide the applicant with an opportunity to continue the hearing until a date certain.

2. Appeals of Administrative Decisions

Pursuant to RSA 674:33, I(a) and RSA 676:5, the ZBA is charged with the duty to hear appeals "taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." RSA 676:5, I. An "administrative officer" is defined as "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." RSA 676:5, II(a). A "decision of the administrative officer" is further defined to include "any decision involving construction, interpretation or application of the terms of the ordinance" but does <u>not</u> include "a discretionary decision to commence formal or informal enforcement proceedings". RSA 676:5, II(b).

Thus, while the Selectmen's decision to bring an enforcement action against, for example, a junk yard operator for violations of the Junk Yard provisions of the zoning ordinance is not within the jurisdiction of the ZBA's review, any construction, interpretation or application of the terms of the ordinance "which is implicated in such enforcement proceedings" does fall within the ZBA's jurisdiction. RSA 676:5, II(b). Furthermore, per the terms of RSA 676:5, III, the ZBA has jurisdiction to review decisions or determinations of the Planning Board which are based upon the construction,

interpretation or application of the zoning ordinance, unless the ordinance provisions in question concern innovative land use controls adopted under RSA 674:21 and those provisions delegate their administration to the planning board. Thus, an applicant may well bring a "dual track" appeal of a planning board decision – one track to the Superior Court within 30 days of the planning board's decision under 677:15 and one track to the ZBA "within a reasonable time" of that decision under RSA 676:5, I.; and failure to do so may result in a waiver of that appeal. Hoffman v. Town of Gilford, 147 N.H. 85 (2001).

The definition of "a reasonable time" should be contained in the ZBA's Rules of Procedure and should be referenced in any decision of an administrative officer to provide fair notice to the potential appellant. That defined time period can be as short as 14 days. See, Daniel v. Town of Henniker Zoning Board of Adjustment, 134 N.H. 174 (1991); but in the absence of such definition, the Superior Court will determine whether the time taken by the appellant is reasonable. See, Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998) (appeal brought within 55 days was held to be outside a reasonable time); see also, 47 Residents of Deering, NH v. Town of Deering et al., 151 N.H. 795 (2005)(provision of zoning ordinance authorized ZBA to waive deadline for administrative appeal); Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006)(affirming dismissal of declaratory judgment action brought five months after planning board's site plan determination); and McNamara v. Hersh, ___ N.H. ___ (Docket No. 2007-225; Issued April 4, 2008)(affirming dismissal of declaratory judgment action brought eight months after ZBA denial of neighbor's appeal of administrative decision).

Furthermore, pursuant to RSA 676:6, an appeal to the ZBA has the effect of staying the action being appealed, unless, upon certification of the administrative officer, the action concerns "imminent peril to life, health, safety, property, or the environment". Thus, when an appeal is brought over the issuance of a building permit, the permit holder must cease and refrain from further construction, alteration or change of use. Likewise, when an appeal is brought from a notice letter from the Code Enforcement Officer, the Officer should refrain from further enforcement actions until the ZBA makes its determination.

Note also that appeals of administrative decisions may well include constitutional challenges against the applicable provisions of the zoning ordinance. See, Carlson's Chrysler v. City of Concord, Merrimack Co. Sup. Ct. Docket No. 05-E-412 (decided April 13, 2006; appeal accepted by Supreme Ct. May 31, 2006 – Docket No. 2006-362)(provisions of sign ordinance against auto dealer's moving, electronic sign found to be an unconstitutional infringement on commercial free speech); see also, Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633 (2006)(overturning prior Metzger standard of review and redefining the "rational basis test" to require that the legislation be only rationally related to a legitimate governmental interest without inquiry into whether the legislation unduly restricts individual rights or into whether there is a lesser restrictive means to accomplish that interest.); and Taylor v. Town of Plaistow, 152 N.H. 142 (2005)(ordinance provision requiring 1000 feet between vehicular dealerships upheld). Additionally, such appeals may involve claims of municipal estoppel, the law of which

has been in a considerable state of flux in light of the recent decision in Thomas v. Town of Hooksett, 153 N.H. 717 (2006)(finding of municipal estoppel reversed where reliance on prior statements of Code Enforcement Officer and Planning Board Chairman which were contrary to express statutory terms was not reasonable). Accordingly, the ZBA should seek advice of municipal counsel before voyaging into these rough and ever changing waters.

3. Special Exceptions

Pursuant to RSA 674:33, IV, the ZBA has the power to make special exceptions to the terms of the zoning ordinance in accordance with the general or specific rules contained in the ordinance. Cf., Tonnessen v. Town of Gilmanton, ___ N.H. ___ (Docket No, 2007-202; Issued March 13, 2008)(without referring to RSA 674:33, the Court upheld the Town's right to "regulate and control" via special exception aircraft takeoffs and landing under RSA 674:16,V). It is important to remember the key distinction between a special exception and a variance. A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5000 square feet is permitted in the zone so long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone (now termed a "use" variance), or to construct the new building partially within the side set-back line (an "area" variance); and as is set forth below in more detail, the standards for each type of variance are the subject of much judicial interpretation and flux.

In the case of a request for special exception, the ZBA may not vary or waive any of the requirements set forth in the ordinance. See, Tidd v. Town of Alton, 148 N.H. 424 (2002); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988). Moreover, the applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002). Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Section 23.02, page 288. Finally, as with variances, special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958); see also, Loughlin, §23.05, page 291.

4. Variances

As ZBA members across the State are aware, the changes to the standards for variances begun with the Simplex decision in December 2001 and modified with the Boccia decision in May 2004, have continued to evolve through the intervening years. A detailed analysis of the development of these standards is beyond the scope of this article; but I direct you to my article on this subject from the 2005 LGC Lecture Series "A Brief

History of Variance Standards", which is available on my Firm's website, DTCLawyers.com under Archived Articles.

a. The Basic Criteria

The basic statutory criteria for a variance as set forth in RSA 674:33, I(b), have not changed over the years; however, the Court's interpretation of such criteria has. In short, an applicant for any variance must provide evidence of five elements or criteria:

(a) the variance will not be contrary to the public interest;

(b) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship;

(c) the variance is consistent with the spirit of the ordinance;

(d) substantial justice is done by granting the variance; and

(e) granting the variance will not diminish the value of surrounding properties.

Simplex Technologies v. Town of Newington, 145 N.H. 727, 729-730 (2001). What has become apparent through the various decisions from Simplex to Boccia and beyond is that Municipal Board members are being called upon to evaluate each of the five required elements for any variance application that comes before them on an *ad hoc* basis with particular emphasis on how the variance would impact both the stated purposes of the municipal ordinance and the existing neighborhood involved. In short, the particular facts of a given application and the depth of the presentation to the Zoning Board of Adjustment may never have been more important. In all likelihood, the variance standards as set forth in these cases will be further refined and clarified as the Court receives the next wave of variance appeals.

b. Simplex and "Unnecessary Hardship"

Under the Simplex criteria for proving "unnecessary hardship", an applicant must provide proof that:

a) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;

(b) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on a property; and

(c) the variance would not injure the public or private rights of others.

Simplex, 145 N.H. at 731 - 732. The purpose stated by the Court for this "new" standard was, in part, that prior, more restrictive approach was "inconsistent with the

notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate." Simplex, 145 N.H. at 731, *citing*, Belanger v. City of Nashua, 121 N.H. 389, 393 (1981). In so changing the standard, the Court recognized again the "constitutional rights of landowners" so that zoning ordinances "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.'" Simplex, 145 N.H. at 731, *citing*, Town of Chesterfield v. Brooks, 126 N.H. 64, 69 (1985). The Court then summarized its rationale for this change of standard with the following statement of constitutional concerns:

> Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property. See N.H. CONST. pt. I, arts 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.

Simplex, 145 N.H. at 731. This balancing test should continue to be considered by ZBA members in all variance applications.

c. Boccia and Area Variances

With the decision in Boccia v. City of Portsmouth, 151 N.H. 85 (2004), the Court modified the "unnecessary hardship" criteria by creating for the first time a distinction in New Hampshire between "use" variances and "area" variance. The Court commented that a "use" variance would allow the applicant to undertake a use which the zoning ordinance prohibits, while:

> A non-use variance [would authorize] deviations from restrictions which relate to a permitted use … that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to the required yards. Variances made necessary by the physical characteristics of the lot itself are non-use variances of a kind commonly termed "area variances."

Id., at 90, *citing*, Matthew v. Smith, 707 S.W.2d 411, 413 (Mo. 1986). Noting that Simplex was decided primarily in the context of a "use" variance, the Court determined that the Simplex test for unnecessary hardship was inappropriate to apply when seeking an "area" variance. Boccia, 151 N.H. at 91. Accordingly, the Court created two new factors for consideration in the "area" variance hardship calculation. Specifically, these factors are:

> (1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and

> (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance…(which) includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner.

Id., at 92 (citations omitted).

In considering the first new factor of whether the variances are necessary to enable the applicant's proposed use, the Court noted that a landowner "need not show that without the variance, the land will be valueless." Id. In considering the record, the Court determined that the record supported a finding that the variances were needed to enable the proposed use of the property as a 100-room hotel as designed. Regarding the second factor, the Court noted that the issue was "whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances" and "whether an area variance is required to avoid an undue financial burden on the landowner." Id., at 93. While adverse effect must be more than a mere inconvenience, a landowner need not show that without the variance the land would be rendered valueless or incapable of producing a reasonable return. Accordingly, boards and courts must "examine the financial burden on the landowner, including the relative expense of available alternatives." Id.

d. Vigeant and the Applicant's Reasonable Use

The Supreme Court's decisions after Boccia have continued to add clarity (and possibly confusion) to the ZBA's efforts in considering variance applications. In the case of Vigeant v. Town of Hudson, 151 N.H. 747 (2005), the Court agreed in part with the Town's argument that the reasonableness of the proposed use must be taken into account and held that "it is implicit under the first factor of the Boccia test that the proposed use must be reasonable." Id., at 752. However, the Court limited that holding:

> When an area variance is sought, the proposed project is presumed reasonable if it is permitted under the Town's applicable zoning ordinance….If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.

Id., at 752 – 753. Furthermore, under the second Boccia hardship factor, the Court noted there must be no reasonable way for an applicant to achieve that proposed use without a variance; and in making in this determination, "the financial burden on the landowner considering the relative expense of available alternatives must be considered." Id., at 753. In the case of Vigeant's application, the ZBA had considered that the applicant could have made an alternate use with fewer dwelling units; but the Supreme Court rejected that argument out of hand: "In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material." Id. In light of the configuration and location of the lot in question, the Court determined that it was "impossible to comply with the setback requirements" such that an area variance is necessary to implement the proposed plan

from a "practical standpoint". Id. In so finding, the Supreme Court upheld the Trial Court's determination that the ZBA's denial of the variance was unlawful and unreasonable.

e. Harrington and the Distinction between Use and Area Variances with a Comment on "Substantial Justice"

In the case of Harrington v. Town of Warner, 152 N.H 74 (2005), the Court turned its attention to the issue of unnecessary hardship and provided an analysis of the distinction between a use and an area variance:

> The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction….If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction….Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue.

Id., at 78. The Court then analyzed the applicable provisions of the Warner zoning ordinance and found that it was a limitation on the intensity of the use in order to preserve the character of the area such that the provision was a use restriction requiring a use variance under the Simplex criteria. Id., at 80.

While not actually analyzing each prong of the "three-prong standard set forth in Simplex" for unnecessary hardship, the Court noted that Simplex first requires "a determination of whether the zoning restriction as applied interferes with a landowner's reasonable use of the property" and that "reasonable return is not maximum return". Id., at 80. Additionally, the Court held that, while the constitutional right to enjoy property must be considered, the "mere conclusory and lay opinion of the lack of…reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence" of such interference with reasonable use. Id., at 81.

The Court in Harrington continues with a "second" determination – whether the hardship is a result of the unique setting of the property; and the Court states that this requires that "the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property." While the property need not be the only one so burdened, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." Furthermore, that burden must arise from the property and not from the individual plight of the landowner. Furthermore, the Court considers the "final" condition – the surrounding environment, i.e., "whether the landowner's proposed use would alter the essential character of the neighborhood." Id., at 81.

The Court also considered the issue of "self-created hardship" and relied on its prior decision in Hill v. Town of Chester, 146 N.H. 291, 293 (2001) to find that self-

created hardship does not preclude the landowner from obtaining a variance since "purchase with knowledge" of a restriction is but a "nondispositive factor" to be considered under the first prong of the Simplex hardship test. Id., at 83. In addressing the other issues raised by the abutters, the Court gives the issues short shrift. The Court finds that the applicant showed that the variance was not contrary to the spirit of the ordinance and did not detract from the intent or purpose of the ordinance because: (1) mobile home parks were a permitted use in the district; (2) the mobile home park already exists in the area; (3) the variance would not change the use of the area; and (4) were he able to subdivide his land, the applicant would have sufficient minimum acreage for the proposed expansion. Additionally, the Court found that "substantial justice would be done" because "it would improve a dilapidated area of town and provide affordable housing in the area." Id., at 85.

This comment on "substantial justice" is one of the few found in the case law of variances. A previous statement suggests that the analysis should be whether the loss the applicant will suffer by its inability to reasonably use its land as it desires without the variance outweighs any gain to the public by denying the variance. See, U-Haul Co. of N.H. & Vt., Inc. v. Concord, 122 N.H. 910, 912-13 (1982) (finding that substantial justice would be done by granting a variance to permit construction of an apartment in the general business district since it would have less impact on the area than a permissible multi-family unit); see also, Loughlin, §24.11, page 308, citing the New Hampshire Office of State Planning Handbook as follows:

> It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications.

As more scrutiny is given to the "non-hardship" prongs of the variance criteria, we can expect further discussions on the element of "substantial justice". See, Subsection h, below, concerning Malachy Glen.

f. Chester Rod and Gun Club and an Analysis of "Public Interest", "Rights of Others" and "Spirit of Ordinance" Criteria

In the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005), the Supreme Court held that the Zoning Ordinance is the relevant declaration of public interest to be examined rather than any specific vote at Town Meeting. Id., at 581. In that case, the ZBA had been faced with two variance application for competing Cell Towers – one on the Club's property and one on the Town's. A previous March Town Meeting had passed an article stating that all Cell Towers should be on Town owned land; and the ZBA relied on that article to grant the Town's application and deny the Club's. On appeal, the Trial Court reversed the ZBA and ordered that it grant the Club's variance.

In reversing the Trial Court in part, the Supreme Court stated what we as practitioners in the field have long espoused: that the criteria of whether the variance is "contrary to the public interest" or would "injure the public rights of others" should be construed together with whether the variance "is consistent with the spirit of the ordinance". Id., at 580. More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. Id., at 581. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id.

However, the Supreme Court took the unusual step of reprimanding the lower court for improperly ordering the issuance of the variance. Instead, the Trial Court was instructed to remand the matter back to the ZBA for factual findings on all five prongs of the variance criteria.

g. Garrison and the Re-emphasis on "Uniqueness"

In the case of Garrison v. Town of Henniker, 154 N.H. 26 (2006), the Supreme Court upheld the reversal of variances granted for an explosives plant, which was to be located in the middle of 18 lots totaling 1,617 acres - all zoned "rural residential". The applicant had sought use variances to allow the commercial use in the residential zone and to allow the storage and blending of explosive materials where injurious or obnoxious uses are prohibited. After an extensive presentation of the nature of the applicant's business and the site, the ZBA voted 3-2 to grant the variances with two conditions: (1) the 18 lots had to be merged into one; and (2) the variances would terminate if the applicant discontinued the use.

Upon appeal by abutters, the Trial Court reversed the ZBA's decisions by finding that the evidence before the ZBA failed to demonstrate unnecessary hardship. In upholding that decision, the Supreme Court agreed with the Trial Court that, while the property was ideal for the applicant's desired use, "the burden must arise from the property and not from the individual plight of the landowner." Id., *citing*, Harrington v. Town of Warner, 152 N.H 74 (2005). In discussing the three-prong Simplex standard for unnecessary hardship, the Supreme Court focused on the first prong: that a zoning restriction "interferes with their reasonable use of the property, considering the unique setting of the property in its environment." Garrison, 154 N.H. at 30 - 31, *citing*, Rancourt v. City of Manchester, 149 N.H. 51, 53-54 (2003)(emphasis original). In doing so, the Court agreed with the Trial Court that the evidence failed to show that the property at issue was sufficiently different from any other property within the zone to be considered "unique".

As a minor "bone" to the applicant, the Supreme Court did agree that Harrington's requirement of "dollars and cents" evidence of lack of reasonable return may be met though either lay or expert testimony; but such evidence as presented was not

enough to convince the Court that the hardship resulted from the unique setting of the property. Garrison, 154 N.H. at 32.

Thus, the Court charged applicants to presenting sufficient evidence to allow the ZBA to determine that the use is reasonable and that the property is unique, i.e., distinguishable from surrounding properties in a manner that could justify use relief.

h. Malachy Glen and Analysis of the "Public Interest", "Spirit of the Ordinance", "Special Conditions", "Other Reasonably Feasible Method" and "Substantial Justice" Criteria

In Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007), the Supreme Court affirmed the trial court's reversal of the Town's ZBA and order that the area variance in question be granted. Malachy Glen had obtained site plan approval in 2000 for a self-storage facility on Dover Road (Route 4), which showed structures and paved surfaces within 100 feet of a wetland. At the time of approval, the Town did not have a wetlands ordinance; but prior to construction, the Town implemented such an ordinance creating a 100 foot buffer around all wetlands. Malachy Glen applied for a variance from this ordinance and was initially denied; and that decision was reversed and remanded by the trial court for failure to consider the proper standard.

On remand, the ZBA *sua sponte* bifurcated the application into two separate requests, granted the variance for the needed driveway and denied the variance to build the storage units within the buffer zone. The trial court found that the denial was unlawful and unreasonable, in part, because the ZBA "failed to consider the evidence placed before it."

On appeal, the Supreme Court noted that "where the ZBA has not addressed a factual issue, the trial court ordinarily must remand the issue to the ZBA," Id., at 105, *citing* Chester Rod & Gun Club. "However, remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion," Malachy Glen, 155 N.H. at 105, *citing* Simpson v. Young, 153 N.H. 471, 474 (2006)(a landlord/tenant damages case).

In addressing the variance criteria, the Court again cited to the Chester case that the requirement that the variance not be contrary to the public interest is "related to" the requirement of consistent with the spirit of the ordinance: "[T]o be contrary to the public interest…the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Malachy Glen, 155 N.H. at 105 - 106. In making that determination, the Court restated that the ZBA is to ascertain whether the variance would "alter the essential character of the locality" or "threaten the public health, safety or welfare." Id. The Court rejected the ZBA's finding that the variance would be contrary to the public interest and to the spirit of the ordinance because "it would encroach on the wetlands buffer". Id., at 106. The uncontroverted evidence was that this project was in an area consisting of a fire station, a gas station and a telephone company, that the variance for encroachment for the driveway had been

granted, and that applicant's wetlands consultant had testified that the project would not injure the wetlands in light of the closed drainage system, detention pond and open drainage system designed for the project to protect the wetlands. The Court also rejected the ZBA's argument that it is not bound by the conclusions of the experts in light of their own knowledge of the area, in part, because the ZBA members' statements were conclusory in nature and not incorporated into the "Statement of Reasons" for their denial: "The mere fact that the project encroaches on the buffer, which is the reason for the variance request, cannot be used by the ZBA to deny the variance." Id., at 107.

In examining the ZBA's treatment of the Boccia hardship standard for an area variance, the Court stated that "special conditions' requires that the applicant demonstrate that is property is unique in its surroundings. Id., *citing* Garrison, 154 at 32-35 (a use variance case). Additionally, the Court cited to Vigeant for the proposition that the proposed project is presumed reasonable if it is a permitted use and that an area variance may not be denied because the ZBA disagrees with the proposed use of the property. Malachy Glen, 155 N.H. at 107. Furthermore, the Court cited to the national treatise, 3 K. Young, Anderson's American Law of Zoning §20.36, at 535 (4th ed. 1996), for the proposition that satisfaction of unnecessary hardship peculiar to the property "is most clearly established where the hardship relates to the physical characteristics of the land." Id.

The Court also rejected the ZBA's argument that there were other reasonably feasible methods available to the applicant via the elimination of a number of the desired storage units. The Court clearly stated that "the ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application." Id., at 108, *citing* Vigeant, 151 N.H. at 753 ("In the context of an area variance…the question [of] whether the property can be used differently from what the applicant has proposed is not material" with emphasis in the original). While noting that if the proposed project could be built without the need for the area variance, then it is the applicant's burden to show that such alternative is cost prohibitive, the Court stated that "the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner." Malachy Glen, 155 N.H. at 108. In this case, the Court recognized that reducing the project by 50% would result in financial hardship to the applicant and that no reasonable trier of fact could have found otherwise. Id.

On the issue of substantial justice, the Court quoted the passage from Loughlin as found at the end of Subsection (e), above. Malachy Glen, 155 N.H. at 109. Additionally, the Court noted that the ZBA should look at "whether the proposed development was consistent with the area's present use". Id. The Court expressly held that the ZBA's stated reason of "no evidence" that a scaled down version of the project would be economically unviable "is not the proper analysis under the 'substantial justice' factor." Id. Since the ZBA applied the wrong standard, the trial court is authorized to grant the variance if it found as a matter of law that the requirement was met. In this case, the trial court had found via uncontroverted evidence that the project was appropriate for the area,

did not harm the abutters or nearby wetlands, and that the general public would realize no appreciable gain from denying this variance.

i. Disability Variances

An additional authority granted to the ZBA by RSA 674:33, V concerns the ability to grant variances without a finding of unnecessary hardship "when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises". This statutory provision requires that the variance "shall be in harmony with the general purpose and intent" of the ordinance. RSA 674:33, V(a). Furthermore, the ZBA is allowed to include a finding in the variance such that the variances shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

5. Other Powers and Responsibilities

a. Equitable Waivers of Dimensional Requirements

Pursuant to the terms of RSA 674:33-a, the ZBA has the power to grant equitable waivers from physical layout, mathematical or dimensional requirements imposed by the zoning ordinance (but not use restrictions) when the property owner carries his burden of proof on four (4) criteria:

i. that the violation was not noticed or discovered by any owner, agent or municipal representative, until after the violating structure had been substantially complete, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. RSA 674:33-a, I(a);

ii. that the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith on the part of the owner or its agents, but was instead caused by either a good faith error in measurement or calculation made by the owner or its agent, or by an error of ordinance interpretation or applicability by a municipal official in the process of issuing a permit over which he has authority. RSA 674:33-a, I(b);

iii. that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and

iv. that due to the degree of construction or investment made in ignorance of the violation, the cost of correction so far outweighs any public benefit to be gained such that it would be inequitable to require a correction. RSA 674:33-a, I(d).

Accordingly, this provision is sometimes considered an escape hatch for an "honest mistake". Note also that the statute allows an owner to gain a waiver even without satisfying the first and second criteria if the violation has existed for more than 10 years and that no enforcement action, including written notice of violation, has commenced during such time by the municipality or any person directly affected. RSA 674:33-a, II.

Note that the statute also mandates that the property shall not be deemed a "non-conforming use" once the waiver is granted and that the waiver shall not exempt future use, construction, reconstruction, or additions from full compliance with the ordinance. RSA 674:33-a, IV. This section is expressly deemed not to alter the principle of an owner's constructive knowledge of all applicable requirements, nor does it impose any duty on municipal officials to guarantee the correctness of plans reviewed or property inspected by them. Id. Finally, applications for such waivers and hearings on them are governed by RSA 676:5 through 7; and rehearings and appeals are governed by RSA 677:2 through 14. RSA 674:33-a, III.

b. The Power to Compel Witness Attendance and Administer Oaths

Pursuant to RSA 673:15, the ZBA Chairperson (or acting Chairperson) has the authority to administer oaths. Additionally, the ZBA may, at its sole discretion, compel the attendance of witnesses; but the expenses of compelling such attendance shall be paid by the party requesting that the witness be compelled to attend. While there are no cases interpreting this statute, it may be safe to conclude that the ZBA may have to obtain a Superior Court order to enforce this authority in the event a particular witness refuses the summons. See, Loughlin, §21.07, page 254.

c. Staff and Finances

Per the terms of RSA 673:16, I, the ZBA is authorized to appoint "such employees as it deems necessary for its work who shall be subject to the same employment rules as other corresponding civil employees of the municipality." Additionally, this provision authorizes the ZBA to contract with "planners, engineers, architects and other consultants for such services as it may require." As a practical note, however, such employees or contractors can only be paid via funds allocated to the ZBA by the legislative body so that, in light of typically small ZBA budgets, such hiring must occur through the auspices of the Selectmen or Town/City Council. With the limited exception of when the ZBA and the Selectmen/Council are on opposite sides of a lawsuit, this usually means that ZBA will not have the ability to select its own counsel to handle ZBA issues. See, RSA 673:16, II; and Loughlin, §21.08, page 255. The ZBA is authorized, however, to expend fees collected from applicants for particular purposes (such as notice, mailings, and engineer review) on such purposes without approval of the local legislative body. RSA 673:16, II. This statute also mandates the procedures under which such funds are to be kept and disbursed.

D. PROCEDURES AND PROCESSES

1. Applications to the ZBA and Notification to Abutters and Others

As part of its responsibility to adopt Rules of Procedure, the ZBA should also adopt acceptable forms of applications so that both the applicant knows what information must be provided to the board and the board knows what it is being asked to consider. As with the model Rules of Procedure, the OEP has provided various forms as attachments to its The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OEP revised March 2008).

In addition to providing the basics of property location, identity of owner and applicant (if different), type of relief sought, and how the criteria for such relief are met in the eyes of the applicant, the application must also provide a complete and accurate mailing list of all abutters and holders of conservation/preservation restriction holders who are to receive notice. In this way, the ZBA can comply with the statutory requirements of RSA 676:7, I(a) to provide written notice of the date, time and place of the hearing to such persons and the applicant by certified mail at least five (5) days before the date fixed for the hearing. Additionally, a public notice must be published in a paper of general circulation in the area not less than five (5) "clear" days before the date fixed for the hearing. RSA 676:7, I(b) and RSA 675:7, I. The costs of such notices shall be paid by the applicant in advance; and failure to pay such costs constitutes valid grounds for the ZBA to terminate further consideration and to deny the appeal without public hearing. RSA 676:7, IV. Note that failure to provide proper notice to all appropriate persons or failure to properly describe the relief being sought invalidates the proceedings and requires a fresh hearing. See, Hussey v. Barrington, 135 N.H. 227 (1992); Sklar Realty, Inc. v. Merrimack, 125 N.H. 321 (1984); and Carter v. Nashua, 113 N.H. 407 (1973).

Furthermore, once the ZBA makes a determination (at a properly noticed public hearing) that the development being the subject of an appeal has potential regional impact, the board must follow the statutory notice procedures set forth in RSA 36:57. Note also that when in doubt, there is a statutory presumption that the development in question has a potential regional impact. RSA 36:56. This determination means that regional planning commissions and the potentially affected municipalities are afforded status as abutters for the purposes of providing notice and giving testimony. RSA 36:57, I. Within 144 hours of the ZBA making the determination that the appeal has potential regional impact, the board shall, by certified mail, furnish the affected commission(s) and municipalities with copies of the minutes of the meeting wherein the determination was made; and the ZBA shall at the same time submit an initial set of plans to the commission(s) with the costs borne by the applicant. RSA 36:57, II. Furthermore, the ZBA is obligated to notify the commissions and affected municipalities by certified mail at least 14 days prior to the hearing of the date time and place of the hearing and their right to testify. RSA 36:57, III; see also, Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642 (2000)(proper notice of hearing and right to testify given despite failure to mail minutes of determination hearing to abutting towns).

Two additional items that the ZBA may consider requiring in an application include (i) the decision of the Zoning Administrator or Code Enforcement Officer from which the appeal is brought, and (ii) copies of all prior ZBA and/or Planning Board decisions affecting the subject property. In this way, the ZBA members can be assured that they know the context in which the appeal is brought and that there has been a significant change in circumstances or the application itself to warrant the ZBA's acceptance of any reapplications. See, Fisher v. Dover, 120 N.H. 187, 190 (1980)("When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition.").

2. Public Hearings and Site Walks

The ZBA is statutorily required to hold the public hearing within thirty (30) days of the receipt of the notice to appeal. RSA 676:7, II. Note, however, that an applicant is not entitled to the relief sought merely because this time requirement is not met by the board. Barry v. Amherst, 121 N.H. 335 (1981)(finding that the legislature did not provide that such failure would constitute approval).

The applicant may address the board either in person or through its agent or attorney. RSA 676:7, III. The board must also hear from all direct abutters and those who can demonstrate that they are affected directly by the subject of the appeal. RSA 672:3, RSA 677:4 and 677:2 for definitions of "abutter" and "person aggrieved"; see also, Thomas v. Town of Hooksett, 153 N.H. 717 (2006) (gas station owner located approximately 1000 feet away from the subject property found to have standing despite the presence of an "anticompetitive motive"); and Portsmouth Advocates, Inc. v. City of Portsmouth, 133 N.H. 876 (1991)(citizens' group for historic preservation had standing to sue over rezoning affecting historic district). Furthermore, the board need not hear testimony for witnesses and experts first hand but may consider "offers of proof" from the applicant's attorney. Hannigan v. City of Concord, 144 N.H. 68 (1999).

It is advisable that the Chair maintain both order and decorum during the meetings. Speakers should neither be allowed to drone on without end nor directly argue with an opponent. Plans or drawings should be posted on an easel or bulletin board where they can be viewed by the participants; but reduced copies can and should be available to the board members to ease in their deliberations. Once the public hearing is concluded, no further public input should be allowed – from either the applicant or the other parties – unless in response to direct questions from the board.

There are frequently instances where the ZBA would benefit from a site walk of the subject property. Remember that such activities constitute a meeting of a quorum of the board so that all provisions of RSA 91-A must be complied with including notice and minutes. The notice provisions can be complied with by announcing the date and time of the site walk during the original public meeting; but an agenda for such site walk should

still be posted. If a significant portion of the interested parties have already left the original meeting by the time the board makes its determination to hold a site walk, a "best practice" is to mail notice of the walk to the same persons entitle to the original notice.

3. Joint Meetings/Hearings

Occasionally, an applicant may petition two or more land use boards to hold a joint meeting when the subject matter is within the responsibility of those boards. RSA 676:2 requires that each board adopt rules of procedure relative to joint meetings and hearings. Additionally, that statute authorizes the boards themselves to initiate the request for a joint meeting, but each board has the discretion as to whether or not to hold a joint meeting with another board. When a joint meeting is held, the planning board chair shall chair the joint meeting (unless the planning board is not involved), but each board is still responsible for rendering its decision on the subject within its jurisdiction. RSA 676:2, I and III. The procedures for the joint meeting/hearing on such subjects as testimony, notice and filing of decisions shall be consistent with the procedures established by the individual boards. RSA 676:2, II.

4. Notice of Decisions, Findings and Conditions of Approval

Pursuant to the requirements of RSA 676:3, the ZBA must issue a final written decision which either approves or disapproves an application; and if the application is denied, the board "shall provide the applicant with written reasons for the disapproval." RSA 676:3, I. Moreover, the minutes of the meeting together with a copy of the written decision containing the reasons shall be placed on file in the board's office and available for public inspection within 144 hours of the vote; and in towns where the ZBA does not have an office with regular business hours, the copies shall be filed with the town clerk. RSA 676:3, II.

In Thomas v. Town of Hooksett, 153 N.H. 717 (2006), the Supreme Court vacated the Trial Court's reversal of the ZBA's grant of a variance and remanded the matter for further proceedings. In part, the Trial Court's reversal had been based on the fact that the ZBA had made no finding as to why a departure from the ordinance was justified. In reviewing the decision, the Supreme Court noted that the applicant had addressed the five elements for a use variance in its application and that the ZBA "briefly discussed the variance and ruled unanimously in favor of granting it." Moreover, the Supreme Court held that "the ZBA's decision to grant the variance amounted to an implicit finding by the board that the Simplex factors were met." Id., at 724, *citing*, Pappas v. City of Manchester Zoning Board, 117 N.H. 622, 625 (1977). In concluding on this point, the Court noted the following:

> Although disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefore, is not in and of itself error.

Id., *again citing*, Pappas. The Court noted that, while it disagreed with the Trial Court's determination that the ZBA was required to set forth specific findings to support its decision to grant the variance, the matter should be remanded back to the ZBA since it gave only cursory consideration to the variance criteria in light of the companion appeal of administrative decision concerning a revoked building permit. See also, Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998)(ZBA denial reversed because it failed to support both its finding of adverse effect of pit access road and its finding that existing town road was on historic or natural landmark).

Under the authority of RSA 674:33, II, the ZBA is entitled to attach conditions to its grant of relief and any failure to comply with the same may constitute a violation. Healey v. New Durham, 140 N.H. 232 (1995). If conditions are imposed, clarity and specificity are required for both performance and enforcement purposes. Geiss v. Bourassa, 140 N.H. 629 (1996).

5. Requests for Rehearing

Under the provisions of RSA 677:2, as amended effective August 14, 2005, a motion or request of rehearing must be filed with the ZBA within 30 days after any order or decision of the ZBA. The 2005 amendment modifies how the 30 day period is to be calculated – now in calendar days "beginning with the date following the date upon which the board voted to approve or disapprove the application." This avoids the "30 means 29" trap that has caught more than one applicant (and attorney) unawares. See, Ireland v. Town of Candia, 151 N.H. 69 (2004); and Pellitier v. City of Manchester, 150 N.H. 687 (2004). If the minutes of the meeting, including the written decision, were not filed within 144 hours of the vote, then the applicant shall have the right to amend the motion/request and the grounds therefore within 30 days after the date the decision is filed; but this still requires that the original time line must have been met. See, DiPietro v. City of Nashua, 109 N.H. 174 (1968)(decided under former statute).

The motion or request for rehearing is required to set forth fully every ground upon which it is claimed that the decision or order is unlawful or unreasonable. RSA 677:3. This statute further provides that:

> No appeal from any order or decision…shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

Thus, the motion/request for rehearing is a jurisdictional prerequisite to an appellant's right to bring suit in Superior Court and a jurisdictional limitation on what claims the Court can consider. See, McNamara v. Hersh, ___ N.H. ___(Docket No. 2007-225; Issued April 4, 2008)(rejecting attempt to couch late filed appeal of administrative decision as a declaratory judgment action); and Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642 (2000)(appeal correctly dismissed where plaintiff

failed to file a request for rehearing on special exception); but see, Colla v. Town of Hanover, 153 N.H. 206 (2006)(reversing dismissal of Superior Court appeal where request for rehearing listing such grounds as "the decision is unreasonable", "the decision denies their constitutional rights to equal protection and due process", "the decision is contrary to Boccia", and "the decision is contrary to the ordinance" was deemed to be sufficient).

Once a motion or request for rehearing has been filed, the ZBA is obligated to either grant or deny the application (or suspend the order or decision complained of pending further consideration) within 30 days. The purpose of a request for rehearing is to afford the ZBA the opportunity to correct its own mistakes; and a board is entitled to reconsider its prior ruling and upon reconsideration make the same decision for the same or different reasons. See, Fisher v. Town of Boscawen, 121 N.H. 438 (1981)(decided under former statute). The board's decision must be entered upon its records and should be communicated to the applicant in writing, but the board is not required by statute to state its reasons or to hold a public hearing on the subject (although the decision must be made at a public meeting). See, Loughlin, §21.16, page 268. If the board takes no action within the 30 day period and does not request an extension of time, it may be assumed that the motion has been denied and that the applicant should proceed to Superior Court. Id., *citing*, Lawlor v. Salem, 116 N.H. 61 (1976)(town ordinance provided that if motion for rehearing was not acted upon within 10 days it was automatically considered to have been denied).

In MacDonald v. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171 (2005), the Supreme Court addressed the issue of whether a second motion for rehearing is required when the ZBA ruled on a new issue in its denial of the motion for rehearing. The Court concluded that the statutory scheme does not anticipate that a zoning board will render new findings or rulings in the denial of a rehearing motion, and, accordingly, held that when a ZBA denies a motion for rehearing, the aggrieved party need not file a second motion for rehearing to preserve for appeal any new issues, findings or rulings first raised by the ZBA in that denial order. Id., at 174-175. The Court did note that "a better practice for the ZBA to take when it identifies new grounds for its initial decision and intends to make new findings and rulings on them in response to a motion for rehearing would be for it to grant the rehearing motion without adding new grounds for denying the variance application." Id., at 176. In that way, after the rehearing and new order citing new grounds for denial, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon, at that time, to preserve them for appellate review. The Court also noted that the superior court may consider on appeal an issue not first set forth in a motion for rehearing under the "good cause" exception in RSA 677:3, I. Id. In so holding, the Court reversed the dismissal of McDonald's appeal and related claims and remanded the matter to the superior court .

Additionally, the Supreme Court has recently recognized the right of a ZBA and other municipal boards have the authority to reconsider decisions to deny a rehearing within the thirty-day limit. 74 Cox Street, LLC v. City of Nashua, ____ N.H. ____ (Docket No. 2006-829; issued September 21, 2007)

6. Appeals to Superior Court

Under RSA 677:4, "any person aggrieved by any order or decision" of the ZBA may file a petition with the Superior Court within 30 days of the date upon which the board voted to deny the motion for rehearing. This statute provides that "person aggrieved" includes any party entitle to request a rehearing under RSA 677:2; and while the use of the word "includes" implies that such list is not exhaustive, the Court has determined that such does not include all possible municipal boards. Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment, 149 N.H. 63 (2003). The petition to the Court must specify the grounds upon which the decision or order of the ZBA is claimed to be illegal or unreasonable. As with motions for rehearing, there is a right to amend the original petition in the event the ZBA fails to file its minutes and decision within 144 hours of the vote. In light of the property rights involved, the Legislature has mandated that these cases shall be given priority on the Court's docket. RSA 677:5.

Pursuant to RSA 677:6, the burden of proof in such cases rests upon the party seeking to set aside the ZBA's order or decision to show that it is unlawful or unreasonable; and countless cases have restated this statute's requirement of the limited nature of the Court's review in zoning cases:

> The factual findings of the ZBA are deemed *prima facia* lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is persuaded, based upon a balance of probabilities, on the evidence before it, that the ZBA's decision is unreasonable.

See, Harrington v. Town of Warner, 152 N.H 74, 77 (2005), *citing*, Duffy v. City of Dover, 149 N.H. 178, 180 (2003).

Since cases on appeal have had a significant prior life before the ZBA, an appeal to the Superior Court seldom comes as a shock to the board. Hopefully, the municipal attorney has been previously involved in the matter; but, even if not, it is advisable that the attorney for the municipality be authorized to accept service of the Orders of Notice and Petition in the case. This affords the attorney prompt notice of the complaint and avoids the unfortunate event that the petition is delayed or even mislaid in the paper shuffle. Sometimes these cases are simply styled in the name of the municipality or in the name of the municipality and its ZBA. In either case, there is in essence only one defendant – the municipality as it has acted through its ZBA.

The Orders of Notice from the Court will usually set forth three dates: (a) the date by which an Appearance must be filed; (b) the date by which the Answer and Certified Record must be filed; and (c) the date of the hearing on the merits. See, RSA 677:8 and RSA 677:12. The Appearance is a relatively benign form by which the municipality's attorney officially identifies himself/herself to the Court and the opposing parties. The Answer is a more detailed document wherein each paragraph of the petition

is either admitted, denied, or further explained in some way. This document should be prepared by the attorney with the active participation of the ZBA Chair and Secretary who should have the requisite knowledge. The Certified Record should be prepared in the same way so as to contain a full and complete copy of the ZBA's file on the matter. The Certified Record should contain not only the underlying application and any documents received into evidence by the ZBA, but also all notices, minutes of meetings, decisions and the request for rehearing.

Note that unlike the effect of filing the original appeal to the ZBA, there is no automatic stay of any enforcement proceeding via the filing of a petition with the Superior Court. RSA 677:9. This statute does authorize, however, the Court, "on application and notice, for good cause shown" to grant a restraining order against such enforcement pending the outcome of the case. If such relief is requested by an appealing party, the Orders of Notice will also include a date for a preliminary hearing on whether the restraining order is warranted, which will usually include a requirement of a showing of irreparable harm.

Hearings on the merits before the Superior Court are usually conducted on "offers of proof", whereby the attorneys for the parties present a summary of what the witnesses would testify to if they took the stand and arguments based upon the Certified Record and relevant case law. This ability to summarize testimony is contingent upon the requirement that the potential witness must be physically present in the Courtroom at the time; and if such person is not present, the opposing party is entitled to object to such summarized testimony being given. RSA 677:10 loosens the rules of evidence in such proceedings to allow the Court to consider the evidence received by the ZBA, but this does not allow the Court to make a *de novo* review of the proceedings since the statutory standard of review set forth in RSA 677:6 controls. See, Lake Sunapee Protective Ass'n v. New Hampshire Wetlands Board, 133 N.H. 98 (1990). Likewise, RSA 677:13 allows the Court to appoint a referee to hear the case and report her findings of fact and conclusions of law to the Court.

The judgment of the Superior Court shall either dismiss the appeal, vacate the order or decision in whole or in part, and, if so vacated, remand the matter back to the ZBA for further proceedings not inconsistent with the decree. RSA 677:11. Costs are not to be awarded against the municipality unless the ZBA is found to have "acted in bad faith or with malice or gross negligence" in making its decision. RSA 677:14. From such decree, the as-yet-unsatisfied party may still bring a further appeal to the Supreme Court by filing a Notice of Appeal within 30 days of the date of the Superior Court Clerk's Notice of Decision; but such proceedings are beyond the scope of this article.

7. RSA 91-A

The ZBA, by definition found in RSA 91-A:1-a, I(d), is a "public proceeding" and is thus subject to the provisions of this statute. See also, RSA 673:17. Accordingly, all meetings must be properly noticed at least 24 hours in advance and be open to the public unless qualified as either a "non-meeting" under RSA 91-A:2, I, or as a "non-public

session" under RSA 91-A:3. While a detailed discussion of this statute is beyond the scope of this article, it is important to remember that there is a presumption that the meeting is to be open to the public unless the session qualifies under one of the express statutory exceptions (which will be strictly construed by the Court on review). Orford Teachers Ass'n v. Watson, 121 N.H. 118 (1981); see also, N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003) (concerning presumption of public records). Additionally, minutes of each land use board meeting must be available for public inspection not more than five (5) business days after the public meeting per RSA 91-A: 2, II and within 72 hours of any non-public session (unless sealed by vote of two-thirds of the board) per RSA 91-A:3, III. A "business day" is defined by RSA 91-A:2, II as "the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays." In light of the negative ramifications of a violation of RSA 91-A, ZBA's should err on the side of caution and limit "non-public" sessions to those "non-meetings" with counsel to discuss legal matters. It has been suggested that where an "ex-parte" communication occurs in violation of the statute, such a contact could theoretically be cured by disclosing the substance of the contact to all interested parties and allowing them an opportunity to respond. See, Paul G. Sanderson, *Ex Parte Communications and Land Use Boards*, New Hampshire Town and City, Oct. 2007, at 34; but this concept has not yet been the subject of Court scrutiny. A word of caution, however: when the Court has been asked to scrutinize a municipal board's conduct under RSA 91-A, the relief sought is sweeping and expensive. See, e.g., ATV Watch v. New Hampshire Department of Resources and Economic Development, ___ N.H. ___ (Docket No. 2006-020; Issued May 11, 2007) Note that this statute is the subject of much on-going debate in the State Legislature so particular attention should be paid to amendments that may/will be made in each session.

8. Disqualification of Members

RSA 673:14, I states the following:

> No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission or agricultural commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

RSA 673, I (emphasis added); see also, Webster v. Town of Candia, 146 N.H. 430 (2001); and City of Dover v. Kimball, 136 N.H. 441 (1992). The Supreme Court has decided that a member of a land use board who is acting in a quasi-judicial, as opposed to a legislative, capacity must be disqualified if he or she is "not indifferent" to the outcome of the application. Winslow v. Town of Holderness, 125 N.H. 714 (1984). Members act in a "quasi-judicial" capacity when they apply the law (including local land use

regulations and provisions of State law that may be applicable) to a particular set of facts, and render a decision on a proposed use of land. They act in a legislative capacity, for example, when they debate and decide the content of local land use regulations, or decide what recommendation to make to the voters about that content.

Thus, when the board members are acting in their "quasi-judicial" capacity, potential disqualification rests upon an analysis of two distinct but basically "common sense" areas: (a) is the member directly interested in the outcome of the board's decision in a personal or financial way, and (b) would the member be "stricken for cause" from serving as a juror if the matter was before the Court.

The first analysis takes into account that the member's interests must be different from those of the citizenry at large – e.g., concerns over increasing taxes or decreasing property values are common concerns of the citizenry and thereby not likely grounds for disqualification; however, concerns over the impact of development adjacent to the member's property (and that of close relatives) would likely be grounds for disqualification.

The second analysis takes into account various "juror standards" used in trial court proceedings, which basically would prevent a person from serving as a juror on a matter where the person: (a) expects to gain or lose upon the disposition of the case; (b) is related to either party; (c) has advised or assisted either party; (d) has directly or indirectly given an opinion or formed an opinion; (e) is employed by or employs any party; (f) is prejudiced to any degree; or (g) employs any of the counsel appearing in the case. See, RSA 500-A:12.

Additionally, there is no single statutory definition of what constitutes a conflict of interest. Bourne v. Sullivan, 104 N.H. 348, 351 (1962). As general rule, however, a conflict of interest will be found to exist when a board member has a direct personal and pecuniary interest in the matter before the board that is immediate, definite and capable of demonstration, as opposed to being speculative, uncertain, contingent or remote. If the member has some connection to the matter before the board, but the interest is such that individuals of ordinary capacity and intelligence would not be influenced by it, then there is no impermissible conflict. Atherton v. Concord, 109 N.H. 164 (1968).

A distinction must be made between preconceived points of view and prejudgment of a matter. Preconceived points of view about certain principles of law or a predisposed view about certain public policies (e.g. planning board members favoring or opposing growth control as a general matter) is not necessarily disqualifying. But a prejudgment concerning issues of fact in a particular case certainly disqualifies an individual from sitting in a quasi-judicial capacity in the review of such an application. New Hampshire Milk Dealers Ass'n v. Milk Control Board, 107 N.H. 35, 339 (1966). State v. Laaman, 114 N.H. 794 (1974).

As Attorney Peter Loughlin states in his treatise:

> Common sense must be applied because, unlike a jury pool which may be drawn from a county of more than 100,000 persons, the board of adjustment may be composed of volunteers from a town of less than 1,000 persons. Board members are going to know the applicant and the abutters. They may gain or lose from the decision in a particular case in that the granting or denying of relief may affect the tax rate of the community or they may have advised a potential applicant of the proper procedure for applying to the board. Board members may well have expressed an opinion on a very similar application during deliberations on a previous application. In such case, they are acting in a capacity which is more akin to that of a judge who has previously ruled on a similar case than a juror who will normally never have seen a similar fact situation….The key element …is whether or not the board member can be indifferent.

Loughlin, §20.07, page 244. Note, however, that even individuals who have formed opinions are not necessarily disqualified if they can set aside their opinions and decide the case impartially on the evidence before them. This is true even where the person is sitting as a juror in a criminal prosecution. State v. Aubert, 118 N.H. 739 (1978); State v. Laaman, 114 N.H. 794 (1974).

By way of procedure, the issue of disqualification may be raised by the applicant, an abutter and any interested person; however, the issue must be raised prior to the Board's vote otherwise the issue may be deemed waived. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Bayson Properties v. City of Lebanon, 150 N.H. 167 (2003); Sanderson v. Town of Candia, 146 N.H. 598 (2001); Bradley v. City of Manchester, 141 N.H. 329 (1996); and Appeal of Cheney, 130 N.H. 589 (1988).

Additionally, if there is a question on whether a member should be disqualified, RSA 673:14, II provides that such member or another member of the board (but no one else unless the board's Rules of Procedure otherwise provide) may request a vote of the board on the issue; and while such vote must occur, it is advisory only and not binding on the member being reviewed. That being said, there are at least two instances where a board member will be deemed automatically disqualified: where the member is an abutter per Totty v. Grantham, 120 N.H. 388 (1980), and where a member has publicly taken a position on an application other than in ruling on a prior similar application per Winslow v. Holderness Planning Board, 125 N.H. 262 (1984). Note also that per the Winslow decision, if a disqualified person takes part in the decision of the board, the decision itself will be invalid – even if that member's vote was not determinative of the outcome.

D. CONCLUSION

The law which land use board members are asked to apply in their volunteer capacities is constantly changing – more so than in possibly any other area of municipal activity. While the job of the board members is not necessarily to say "yes" to every application coming before them, the members are charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the "bureaucratic maze" of regulations, ordinances and hearings, while not expressly advising them. See,

Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 91992). Moreover, the ZBA is charged via the Simplex and Boccia lines of cases with being the "constitutional safety valve" to protect both the municipality as a whole and the individual applicant's property rights; and more and more, the ZBA will have to be conscious of legislative and regulatory changes that impact their quasi-judicial activities, e.g., RSA 91-A and the Comprehensive Shoreland Protection Act to name but two. These can be daunting tasks to say the least.

As we began, so shall we end. This article is intended to be a brief overview of the subject area and not to provide substantive legal advice on any particular issue facing any particular land use board. For actual applications of these statutes and decisions to any fact patterns facing particular boards, we urge the Chairs to contact their legal counsel.