

## Heartz v. Concord

Last week, the NH Supreme Court issued an opinion in [Heartz v. Concord](#), which is really two cases rolled into one.

This is a complex case, based on relatively simple facts.

The case revolved around the plans of a church to acquire an adjacent parcel, raze the building on it, and turn the land into a parking lot for use by the church. The church is located in a "Civic" district with an "Architectural Design" overlay district. Although this does not appear in the opinion, the Concord Zoning Ordinance states that "places of worship" and "commercial off-street parking" are permitted in the CV district by special exception, and "accessory parking ... for visitors of permitted non-residential uses" is permitted by right. The Ordinance defines "accessory use or structure" as "a use or structure on the same lot with, and of a nature incidental and subordinate to, the principal use or structure." But I'm getting ahead of myself.

The church filed a subdivision application, apparently for the purpose of merging the lots, but this is unclear from the opinion (Note: if it were just a merger, a public hearing would not be required, assuming that the merger would not create a zoning violation; the church would have to own both lots - see [RSA 674:39-a](#).) The church also filed a concurrent application for site plan review as a "large scale development," which has special standards and requirements for non-residential developments. The parcel proposed for the parking lot is accessed by an easement across an adjacent parcel owned by a private party, Johnson.

Prior to the planning board's public hearing, City staff met with the church's representatives and informed them that if the church were not the applicant, then the proposal to create the parking lot would not require a public hearing, but would go through a more streamlined approval process. Staff's judgment was apparently based upon an interpretation of the zoning ordinance. Consequently, the church withdrew its application, and revised the application to change the name of the applicant to a different party, Professional Realty Corporation (PRC). The parking lot application was reviewed and approved by the City's "Architectural Design Review Committee" (remember the overlay zone?), whose decision was subsequently endorsed by the planning board without anyone holding a public hearing or formally notifying abutters.

Abutters appealed to superior court and filed for summary judgment on various counts, including lack of notice and concerns relating to the easement. PRC also moved for summary judgment. On its own (*sua sponte*), superior court dismissed the case for lack of jurisdiction. The superior court said that the issues of notice should have gone first by appeal to the ZBA, and the issues relating to the easement should have come to the court as a declaratory judgment action. On reconsideration, the superior court granted PRC's motion for summary judgment on the issue of the easement (meaning that Johnson lost).

On appeal, the Supreme Court affirmed the decision all around. Discussing the need to go to the ZBA first, the court compared RSA 676:5 (appeals of planning board decisions to ZBA) with RSA 677:15 (appeals of planning board decisions to superior court). The important point here is that any decision by the planning board that is based upon an interpretation of the zoning ordinance MUST first be appealed to the ZBA. It simply cannot go to superior court first. Compare [RSA 676:5](#) (see III at the end) with [RSA 677:15](#) (see I, especially the last sentence). Here, the staff's interpretation of the zoning ordinance was in a sense imputed to the planning board; the planning board acted in response to it, and hence, interpreted the zoning ordinance.

While I think this decision is generally a correct application of the law, there are some things that are unclear to me: what is the role and statutory authority of the Architectural Design Review Committee? If it is a technical review committee, authorized by [RSA 674:43, III](#), then a streamlined review process is appropriate, BUT a public hearing is still required (the statute generally incorporates by reference the process in RSA 676:4, the infamous "Board's procedure on plats"--(e) "... no

application may be denied or approved without a public hearing on the application." The failure to hold a public hearing is not necessarily an interpretation of the zoning ordinance, so it is understandable why those contesting the planning board's decision were confused and went to superior court. The best approach here is to simultaneously appeal to the ZBA and to superior court; if either one is initially incorrect, by definition the other must be right.

I'm sure that the ZBA would have sorted this out, as well as other questions I have relating to the use of the lot for a parking lot, where that would be the sole use (hence, not "accessory"). If it were deemed a commercial use, then a special exception would be required. If the church had remained the applicant and merged the two lots, a new special exception might have been required for the expanded church use (even though an accessory parking lot was permitted by right). I don't profess intricate knowledge of the Concord zoning ordinance, and happily invite anyone to clarify my thoughts on this.

The second half of this case dealt with the contested use of the easement over Johnson's property to access the lot the church (or PRC) wanted to use as the parking lot. Johnson challenged this use of the easement because (1) it would benefit a third property, and (2) the proposed use would present an unreasonable burden. The Supreme Court looked to the language of the 1847 deed that created the easement, which said in pertinent part: "Excepting and reserving a right of way...with the right of free ingress and egress ... hereby conveyed at all times and for all purposes ..." The Court found that the language "at all times and for all purposes" was clear and unambiguous, and that there was no expressed limitation on how the easement would be used, except that it be used for ingress and egress, which is what the church (and PRC) proposed. In response to the argument that the proposed use presented an unreasonable burden, the Court said that while the standard to judge this question was one of reasonableness (which the Court said was not historically static--so the 1847 easement could apply to automobiles), Johnson had failed to demonstrate sufficient factual support--he had simply stated that his property "will be damaged."

This was a difficult opinion to wade through, but here are a couple lessons:

For people contesting planning board decisions, if there's a possibility that the board's decision involved an interpretation of the zoning ordinance, appeal both to the ZBA and to superior court.

Conclusory statements just don't cut the mustard. Have facts to support your opinions, or the court will see right through you. This applies equally to private citizens and public boards.

*Ben Frost, NH OSP, September 2002*