

## **APPENDIX D: ZONING BOARD OF ADJUSTMENT CASE LAW**

The following are summaries of cases relevant to New Hampshire zoning boards of adjustment as compiled by OSI over time from various sources, many of which are cited throughout the text of this publication.

These are summaries only. For a complete copy of the case, please review the full decision. Each case includes a citation to New Hampshire reporter where available, and the electronic version of this document includes a hyperlink to each case.

### ***Gelinas v. Portsmouth*, 97 N.H. 248 (1952)**

The court first stated the present five conditions for a variance when they found that a residentially zoned lot in a low, swampy area used as a dump and adjacent to a newly constructed, heavily used four-lane highway was absolutely valueless unless used for commercial purposes. Furthermore, the lot was located in an area which was becoming commercial as a result of the construction of the new highway, creating a situation causing unnecessary hardship.

### ***Shell Oil Company v. Manchester*, 101 N.H. 76 (1957)**

The Manchester ZBA denied a permit to build a filling station. The court reversed the decision and determined that the permit was to be treated as a special exception and therefore the only function of the board was to determine if the special exception requirements of the ordinance had been met.

### ***Dumais v. Somersworth*, 101 N.H. 111 (1957)**

Somersworth ZBA revoked a permit issued by the building inspector for a three-stall garage in a residential district for the storage of “trucks and/or private cars.” The supreme court partially vacated the revocation deciding that the permit properly allowed construction and use of the building for the storage of private automobiles but confirming the revocation concerning the use of the garage for the storage of trucks. The court found that the appeal was timely filed since inquiry had been made to the building inspector as soon as the abutter became aware that construction was about to start.

### ***Jaffrey v. Heffernan*, 104 N.H. 249 (1962)**

Zoning ordinance was held to be invalid because of the failure of the ordinance to provide for a zoning board of adjustment.

### ***Bosse v. Portsmouth*, 107 N.H. 523, 226 A.2d 99 (1967)**

The court found spot zoning when the legislative body rezoned an area surrounded by single-family residential to light industrial although hundreds of acres of industrial property were vacant.

### ***Bourassa v. Keene*, 108 N.H. 261 (1967)**

Trucking company owner was ordered by the city to cease using the premises as the trucking company headquarters. The trucking company appealed directly to the superior court and the abutters intervened, seeking dismissal because the plaintiff failed to initially apply for a rehearing before the board of adjustment.

### ***Merriam v. Salem*, 112 N.H. 267 (1972)**

Board of adjustment’s denial of an application for a mobile home park was upheld by the trial court. During the trial, the plaintiff’s attorney called as his only witness, the chairman of the board of adjustment, and proposed various questions calling for interpretations of law and others designed to obtain his reasons for voting as he did, insisting that they have a right to examine board members’

“subjective and objective standards in granting and denying variances and exceptions.”

***Alcorn v. Rochester*, 114 N.H. 491 (1974)**

The board of adjustment had stated that it “lacked jurisdiction” in a particular case. The court remanded the case back to the board so that the real basis for the decision could be made. A year later, when the board had not clarified its decision, the court stated that the board’s action indicated a lack of basis for the denial and ordered the plaintiff’s appeal sustained unless the board complied with the order within 60 days.

***Trustees of Lexington Realty Trust v. Concord*, 115 N.H. 131 (1975)**

No meaningful review if no specific findings of facts are made.

***Hanson v. Manning*, 115 N.H. 367 (1975)**

Hardship scrutiny has been brought into the present era when the court found evidence that the zoning restrictions would make development of the plaintiff’s land more difficult because of the existence of ledge and wetlands. The court pointed out, however, that there was nothing to distinguish the plaintiff’s land from other land in the same area with respect to suitability for which it was zoned. It then went on to hold that “[a]lthough RSA 31:72 (now [RSA 674:33](#)) authorizes the granting of a variance when the literal enforcement of the ordinance will result in ‘unnecessary hardship,’ it does so only when that hardship is ‘owing to special conditions.’ Absent ‘special conditions’ which distinguish the property from other property in the area, no variance may be granted even though there is a hardship.”

***Society for the Protection of NH Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975)**

The Society for the Protection of NH Forests and the Audubon Society of New Hampshire appeal from the decision of the site evaluation committee, a State administrative agency, approving the location of a nuclear generating facility in Seabrook, New Hampshire. The court remanded the case for the limited purpose of requiring that the site evaluation committee provide basic findings of fact on the existing record to support the ultimate conclusions it has reached.

“A reviewing court needs findings of basic facts to understand administrative decisions and to ascertain whether the facts and issues considered sustain the ultimate result reached.”

“Where, as in this case, the administrative agency is required by statute to make not only general discretionary findings such as the effect of the nuclear facility on the aesthetics and historical sites, but also complex factual determinations of its effect on regional development, air and water quality, the natural environment and the public health and safety, the law demands that findings be more specific than a mere recitation of conclusions.”

“Finally, in the process of making basic findings the committee will be compelled to weigh with care the evidence before it and to delineate the basic facts supporting its conclusions, thereby rendering the process of public hearings more meaningful to the participants.”

***Foote v. State Personnel Commission*, 116 N.H. 145 (1976)**

Plaintiff, an employee of the New Hampshire Home for the Elderly at Glencliff, was terminated and appealed her dismissal to the State Personnel Commission who sustained her discharge. The New Hampshire Supreme Court remanded the matter to the commission for “findings setting forth the facts on which it concluded that the plaintiff’s conduct constitutes willful insubordination in sufficient detail so that we can determine the validity of its conclusion.” “Absent basic findings, we cannot determine on what part of the contradictory testimony the personnel commission ruled her conduct constituted willful insubordination. The commission’s ultimate and only order in this case was that

the employee's discharge was proper. 'Appeal denied' does not provide the answer."

"In order to properly perform its functions under RSA Ch. 541 this reviewing court needs findings of basic facts by the personnel commission so as to ascertain whether the conclusions reached by it were proper."

***Trottier v. City of Lebanon*, 117 N.H. 148 (1977)**

Board of adjustment was upheld in its interpretation that a right-of-way did not constitute a street and, therefore, building permit could not be issued.

***Shaw v. City of Manchester*, 118 N.H. 158 (1978)**

Where the ZBA originally denies a variance, the petitioner has 20 days to apply for a rehearing. If the rehearing is granted and the ZBA then grants the variance, new aggrieved party has 20 days to apply for another rehearing. If that request for a rehearing is denied, he then has 30 days to appeal to superior court.

***Ouimette v. City of Somersworth*, 119 N.H. 292 (1979)**

Somersworth ZBA granted a variance to build above-ground gasoline storage tanks so defendant, Agway Petroleum Co., could expand their business onto land they held an option on in the business district B. Testimony centered on the hardship to Agway if the variance were denied. Evidence was presented that Agway could find no other suitable lot with the correct dimensions and slope for its above-ground storage tanks. Abutting business owner appealed issuance of the variance raising the issue of the authority of the local zoning board to grant a variance when the only hardship alleged results from the special needs of an option holder of the property as opposed to special characteristics of the property. The court found for the plaintiff, holding, in part, that "[t]he hardship alleged by the defendants is that Agway cannot expand its business if barred from moving to this lot because of the zoning ordinance. Reliance on these factors to support a variance reflects a fundamental misconception of the function of a variance in a comprehensive zoning scheme. Agway's inability to move cannot support a variance from a comprehensive zoning scheme. The inability to use land for one particular purpose is irrelevant to whether a variance should be granted."

***Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541 (1979)**

Weeks Restaurant Corp., which is located in the interior of a traffic circle in Dover, was found to have standing to protest the construction of another restaurant which was near, but not immediately adjacent to the Weeks property.

***Sprague v. Acworth*, 120 N.H. 641 (1980)**

Owner of a small, oddly shaped lot on a lake was granted a variance to build. A new ordinance required various setbacks from the lake, road and side lot lines which resulted in a triangularly shaped buildable area of only 195 square feet. The court found that these factors would have essentially prevented any use of the lot.

***Fisher v. Dover*, 120 N.H. 187 (1980)**

McQuade Realty was granted a variance to convert a 32 room house into a multi-family apartment complex in 1973. The variance was appealed to superior court, remanded back to the ZBA who again granted the variance on December 5, 1974. A second appeal to superior court resulted in a second remand to the ZBA. On May 13, 1976, the ZBA now denied the variance and no appeal was made by McQuade Realty. On July 30, 1976, McQuade filed a second application for a variance which was substantially the same as previously requested which was now granted by the ZBA. After affirming the decision at a rehearing, the plaintiff once again appealed to superior court which upheld the variance noting that the plaintiff had not sustained her burden of overcoming the statutory

presumption that findings of a zoning board are prima facie lawful and reasonable.

Plaintiff appealed, and the court agreed, holding that “the board committed an error of law when it approved the defendant’s second application for a variance without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board.”

***Shaw v. City of Manchester*, 120 N.H. 529 (1980)**

V.H.S. Realty, Inc. was denied a variance and special exception for a grocery store/gasoline station in a residential zone. After a rehearing, the board granted the special exception and abutter *Shaw* appealed to superior court. V.H.S. moved to dismiss on the grounds that it had not been timely filed, but the superior court found for *Shaw*. V.H.S. appealed, lost, and the case was remanded for a trial on the merits. (*Shaw v. City of Manchester*, 118 N.H. 158 [1978]) During the trial, expert testimony was given concerning traffic effects that was not heard at the local level. A transcript was made and forwarded to the ZBA members who all stated they would not have changed their minds even if this testimony had been available to them. On July 31, 1979, the court found for *Shaw* and set aside the approvals as being “unreasonable.”

“This court has consistently held that upon review the trial court may hear any and all additional evidence presented that will assist in evaluating the reasonableness of a zoning board decision.”

“The effect of the proposed use on traffic was at the very heart of the court’s determination whether the zoning board acted reasonably. Therefore, the court’s examination of evidence relevant to possible traffic problems was not in error.”

***Barry v. Town of Amherst*, 121 N.H. 335 (1981)**

A 1979 amendment deleted injustice as a ground for a reversal of a ZBA decision. The board is required to hold a public hearing within 30 days of receipt of the notice of appeal. However, since the statute does not contain language providing for automatic approval if the hearing is not held within that time, no such provision exists.

***Barrington East Cluster Unit I Owner’s Association v. Barrington*, 121 N.H. 627 (1981)**

Trial court upheld a special exception for a shopping mall. Plaintiff owner’s association contended that the trial court erred in holding that the board found the existence of the factors set forth in the ordinance for a special exception. The New Hampshire Supreme Court disagreed with the trial court and remanded back to the ZBA.

No evidence was presented that the proposal would not be injurious to adjacent property, would not cause a substantial diminution of area property values and would not constitute a nuisance or a danger to the health, safety and general welfare of the community. On the contrary, there was testimony that the proposed mall would adversely affect the value of the condominiums and would cause serious traffic congestion.

“Although the board can rely on its personal knowledge of certain factors in reaching its decision, its decision must be based on more than the mere personal opinion of its members. Because the minutes of the hearing reveal that the board did not have sufficient information before it to make the required findings, we remand this case to the board for a rehearing, but do not suggest what results should then be reached.”

***Fisher v. Boscawen*, 121 N.H. 438 (1981)**

Plaintiff was denied a special exception for a gravel pit after the ZBA submitted the application to the planning board for its consideration. The planning board determined that the proposed location of the gravel pit was not appropriate and the ZBA's subsequent denial included as a reason that "[t]he special exception may not be permitted without approval of the site as an appropriate location by the Planning Board."

The plaintiff requested a rehearing and the board re-heard the case again denying it in a letter including the statement that the board had "considered the recommendation of the Planning Board" but had "made its own determination." The letter further stated that the decision of the planning board is "only advisory and not binding on the Zoning Board of Adjustment." The court held that the ZBA may use the rehearing process to correct its own mistakes and decide that the original reason for denial was erroneous and proceed to consider the application again and deny it for another reason.

***Governor's Island Club v. Town of Gilford*, 124 N.H. 126 (1983)**

A landowner requested a variance to subdivide a lakefront parcel into two lots, each with less than the square footage required by the zoning ordinance. The court found that no basis existed for a hardship, which must distinguish the parcel from other lots in the same area. "The land involved here fails to meet this test. It is undisputed that Gagne's shorefront parcel is entirely suitable for use as a residential lot; it has been so used at least since 1937. The zoning ordinance has the same effect on this parcel as it does on every other parcel smaller than 60,000 square feet; vis., to render a subdivision of that parcel impermissible. Any resulting injustice is general, rather than specific, and if it is to be remedied, that must be done by way of an amendment to the zoning ordinance rather than by a variance."

***Sklar Realty, Inc. v. Merrimack and Agway, Inc.*, 125 N.H. 321 (1984)**

Agway, Inc. sought to construct a dry feed plant in the Town of Merrimack. Agway submitted a site plan to the planning board and applied to the town's board of adjustment for a special exception to the zoning ordinance to allow it to build in a wetlands area. The board granted the exception with conditions. Later, Agway revised the plans to address concerns of the planning board. An abutter challenged whether the special exception was still valid after the plan had been revised. The court held that the plan must be resubmitted to the board of adjustment for a determination of whether the special exception granted to a wetlands ordinance survived the revision. The court also ruled that a compliance hearing must be held so abutters can be satisfied that any conditions set by the planning board to be fulfilled before final approval have, in fact, been met.

***Winslow v. Town of Holderness Planning Board*, 125 N.H. 262 (1984)]**

Since the planning board is a quasi-judicial body, a board member should be disqualified if he is not indifferent. The board's decision is voidable if the disqualified member participates. Speaking as a private citizen at a public hearing, Mr. Mastro spoke in favor of a proposed subdivision that did not meet the requirements of subdivision regulations. After Mr. Mastro became a member of the board, the board approved the subdivision proposal, with conditions, by a clear majority, 6-1. The supreme court applied the criteria used for disqualification of board of adjustment members: "standards that would be required of jurors in the trial of the same matter" because, in this case, the planning board was acting in a quasi-judicial capacity. Stricter rules of fairness are required than when a legislative function is involved.

A board member must be disqualified if the member is not indifferent to the controversy. Mr. Mastro's prior public comments indicated prejudgment, which constitutes cause for disqualification. Secondly, the court held that a decision of a board is voidable if a disqualified member participates, without reference to whether the result was produced by his vote.

***Davis v. Barrington*, 127 N.H. 202 (1985)**

The planning board denied an eight-unit condominium subdivision approval citing six reasons. After review by a master, the court agreed with his finding that two of the six stated reasons for denial were valid and that was all that was needed to deny the application.

***New London Land Use Assoc. v. New London*, 130 N.H. 510 (1988)**

Lakeside Lodge consists of 17 housekeeping units on a 17 acre parcel in a residential district that requires two acres per dwelling unit. Since the Lodge was in operation before the zoning ordinance was enacted, the nonconforming use on less than the required acreage was allowed to continue. The board of adjustment granted the owners a special exception to allow a planned unit development. The existing buildings would be razed and replaced with 17 condominium units and a clubhouse building. Although the number of dwelling units would remain the same, the living, storage and common space would more than double.

On appeal of the abutter, Land Use Association, the supreme court overruled the lower court's decision that upheld the granting of the special exception. The court stated that the nonconforming use was related to the commercial operation in a residential district. The court agreed with the Association that the nonconforming density cannot be used to satisfy density standards required for a special exception. In its decision, the court said: "Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the use at the time of enactment of the ordinance creating the nonconforming use. However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate."

***Jensen's v. City of Dover*, 130 N.H. 761 (1988)**

Special exception denial for an 86 unit mobile home park was upheld by the court on the basis that there was sufficient evidence on the issues of adverse effect on overall land values and traffic impact to support the board's denial.

***Devaney v. Windham*, 132 N.H. 302 (1989)**

Plaintiff owned a cottage on a lot that did not meet the setback requirements of the zoning ordinance at the time of purchase. When he began to remodel the camp without a building permit, the town issued a cease and desist order. He continued to add on to the camp, including a second story on the building, a two-story addition, and an unapproved septic system. A requested variance was denied, a further cease and desist order issued, but the work continued. Superior court granted the Town's request for an injunction that required the plaintiff to return the building to dimensions complying with the zoning ordinance.

On appeal, the supreme court affirmed the injunction. The court stated that while a "natural expansion" of a nonconforming use may be allowed, the expansion in this case was substantial enough to constitute a new use and could not be permitted. The court cited the principle that setback requirements are designed to prevent overcrowding on substandard lots. This expansion violated that principle and served to block an abutter's view of the water and sunsets and decreased the amount of sunlight coming into her house. See also *Stevens v. Town of Rye*, 122 N.H. 688 (1982); *New London v. Leskiemicz*, 110 N.H. 462 (1970).

***Crossley v. Town of Pelham*, 133 N.H. 215 (1990)**

If the land is reasonably suited for a permitted use, no hardship can be found and no variance can be granted, even if the other four parts of the five-part test for the granting of a variance have been met.

Landowners went before the Pelham ZBA for a variance to replace the one-car garage on their nonconforming lot with a larger two-car garage. Neighbors appealed the granting of the variance to the superior court, claiming that the requisite unnecessary hardship did not exist in this case, where the landowners simply wanted a larger garage. The superior court found hardship, but was overturned on appeal to the supreme court. The court noted that the hardship cited was a result of the landowners' personal circumstances; that a one-car garage or even no garage would still be a reasonable use consistent with the ordinance and that therefore the superior court erred as a matter of law in finding unnecessary hardship supporting the grant of a variance.

***Granite State Minerals v. Portsmouth*, 134 N.H. 408 (1991)**

Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid.

***Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992)**

A marina had been operating for several years as a viable commercial entity before requesting variance to expand; owner was clearly making reasonable use of his property and thus hardship justifying variance did not exist. The decision of the ZBA granting a variance to a nonconforming marina for construction of an additional boat storage facility was reversed. In order to validly grant a variance, a ZBA must make specific factual findings showing, among other things, that the deprivation resulting from a denial of a variance is so great as to deprive the owner of ANY reasonable use of his land, and that the hardship is the result of some unique condition of the land and not the personal circumstances of the owner. The party seeking the variance has the burden of producing evidence sufficient for the board to establish these requirements.

A nonconforming use may not form the basis for a finding of uniqueness to satisfy the hardship test, as the fact that the use is nonconforming has nothing to do with the land itself. Additionally, the proposed expansion of the marina would have a substantially different impact upon the neighborhood's scenic, recreational and environmental values in contravention of the purpose of the zoning ordinance, and thus would be beyond the scope of "natural expansion" allowed by law. Therefore the ZBA's grant of a variance was invalid.

***Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632 (1994)**

Plaintiff abutters appealed order of superior court upholding issuance by the ZBA of a special exception authorizing an apartment as an accessory use to a convenience store.

***Dziama v. City of Portsmouth*, 140 N.H. 542 (1995)**

RSA 677:3 (Rehearing by Board of Adjustment) requires an aggrieved party to file a new Motion for Rehearing that raises any new issues that result from the granting of an earlier Motion for Rehearing. If an applicant did not have to file a second Motion for Rehearing when conditions changed, the board would not have an opportunity to correct any errors that it may have made and the superior court would be limited to consideration of errors alleged in the original rehearing motion.

Plaintiff was denied relief by the ZBA on a procedural basis. ZBA granted motion for rehearing reversing itself on the procedural denial, but denying the request on a substantive basis. Plaintiff did not file an additional Motion for Rehearing, but appealed directly to the superior court. The superior court dismissed the appeal on the basis that the plaintiff should have filed a second Motion for Rehearing. The plaintiff took the position that under *Shaw v. City of Manchester*, 118 N.H. 158 [1978]

only one Motion for Rehearing need be filed. The supreme court found that the law was unclear and while indicating that from this point forward a second motion for rehearing must be filed if the reason for denial is changed, the plaintiff was allowed to go back to the board and file a Motion for Rehearing.

***Dube v. Town of Hudson*, 140 N.H. 135 (1995)**

The ZBA has explicit statutory authority to review a planning board's construction of the zoning ordinance. In construing a ZBA appeal, the superior court must treat all ZBA findings as prima facie lawful. The order or decision appealed from may not be set aside except for errors of law unless the court is persuaded by the balance of probabilities, on the evidence before it, that the decision is unreasonable. The supreme court will not overturn the superior court's decision unless it is unsupported by the evidence or legally erroneous.

***Husnander v. Town of Barnstead*, 139 N.H. 476 (1995)**

The variance is the safety valve of zoning administration (quoting 2 E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, 38.01 [1] [4th ed. 1994]). In determining whether a hardship exists sufficient to prevent the owner from making any reasonable use of the land, the operative use is "reasonable," a word that has been central to the development of the common law. Lot in this case had a strange configuration due to the shoreline and the only reasonable use of the property was for a single family home.

Plaintiff appealed decision of the superior court upholding the defendant's grant of a variance to the intervener to construct a single family home on Lower Suncook Lake. After reviewing evidence and taking a view, the trial court found that the granting of the variance was the only reasonable action that could have been taken under the circumstances. Because of setbacks, the building envelope on the lot was an elongated, somewhat curved strip roughly 70 feet long. The slope of the lot, abundance of ledge and remote location prevented other uses permitted under the ordinance. The supreme court affirmed.

***Healey v. New Durham ZBA*, 140 N.H. 232 (1995)**

In determining whether a structure complies with the terms of the zoning ordinance, courts will look at the structure's internal composition objectively rather than the subjective intent of the owners. A board of adjustment is authorized to place conditions on a variance and failure to comply with those conditions may be a violation. For purposes of determining whether vested rights exist, courts will examine the facts as they were when the relevant zoning ordinance amendment took effect and the landowner who claims a vested right bears the burden of proving all necessary elements establishing that right.

Intervener obtained a variance in 1988 to construct a one-family dwelling with a one-car garage and septic system on their property on Merrymeeting Lake. In March of 1990 the Town enacted a "Shorefront Conservation Area" ordinance which prohibited multi-family dwellings and limited the amount of impervious material permitted on a lot. After the enactment of the ordinance, the interveners paved their driveway causing the amount of impervious material to exceed the limits permitted. The status of the property was the subject of a hearing before the ZBA and on appeal of the ZBA decision, the trial court found that the interveners had violated the ordinance by building a two family dwelling and installing pavement in excess of the maximum allowed and violated the variance by constructing a two-car garage. The trial court ordered the modification of the garage and removal of certain pavement. The supreme court affirmed that the home, garage and driveway all violated the zoning ordinance.

***Ray's State Line Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995)**

Interveners appealed decision of superior court reversing the denial by the defendant of application of the plaintiff for permits to change two sign faces on existing signs and to make an internal change to about 100 square feet out of the 2,000 square foot nonconforming convenience store. The supreme court affirmed.

***Miller v. Town of Tilton*, 139 N.H. 429 (1995)**

Appeal by plaintiffs of superior court order denying their Motion for Summary judgment and validating the rezoning of their land by defendant Town of Tilton. The supreme court affirmed.

In 1989, plaintiffs purchased industrially-zoned property. The border of an agricultural buffer zone between residential and industrial land had shifted several times during the previous decade affecting the zoning of the land in question, and in 1990 an abutting residential property owner submitted a petitioned zoning article requesting the enlargement of the agricultural buffer zone to its original borders which included plaintiffs' land. The planning board opposed the petition, but it was approved by the voters. Plaintiffs argued that the petition for rezoning was not timely filed and that it constituted spot zoning.

***Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital*, 139 N.H. 450 (1995)**

Plaintiff, operator of a health club 1.7 miles from Exeter Hospital, appealed grant of site review for new athletic facility at the hospital to be open to patients and the general public. Plaintiffs requested certiorari from the superior court claiming standing to appeal on the basis that they owned property within the town and because the fitness center would compete against their businesses. Superior court denied certiorari, ruling they were not "persons aggrieved." ZBA denied separate administrative appeal on a similar basis. Superior court granted Defendant's Motion for Summary judgment and supreme court affirmed.

***Olszak v. Town of New Hampton*, 139 N.H. 723 (1995)**

***Geiss v. Bourassa*, 140 NH 629 (1996)**

In 1989, a special exception was granted allowing "office and storage and maintenance of the vehicles and equipment of Ken's Waste Disposal business." At the hearing, the applicant had stated that they would keep about twenty-five containers on the property and there would be no storage of garbage. No objections were raised. Over the years, more and more empty dumpsters became stored on the property, a mechanic occasionally worked on a truck late into the evening and from time to time a truck would be stored overnight loaded with garbage.

The now angry abutters sued, asking the court to enjoin the use on the grounds that it constitutes a nuisance and violates the conditions of the special exception. The superior court (and later the supreme court) ruled against the plaintiffs finding that there was no nuisance and it did not violate either implicit or explicit conditions of the special exception. Even if there were implied conditions that, arguably, had occasionally been violated, the character of the use had not been changed.

***Conforti v. City of Manchester*, 141 N.H. 78 (1996)**

A preexisting nonconforming 1912 movie theater in Manchester was renovated and the owner began holding live rock concerts. The city notified the owner that the live shows violated the zoning ordinance. This administrative decision was appealed to the ZBA which denied the appeal. This denial was upheld by both the superior and supreme courts stating that live rock concerts were not a permissible expansion of the nonconforming use as a movie theater.

***Peabody v. Town of Windham*, 142 N.H. 488 (1997)**

New owners of a former well drilling business (preexisting nonconforming use) began to bring asphalt

paving equipment onto the site and were told to stop by the building inspector and the property be returned “to those uses permitted by the zoning ordinance or the non-conforming use of a company that drills wells.” The plaintiff appealed the administrative decision and the ZBA denied the appeal and ordered that no paving equipment or vehicles with residual paving materials be parked or repaired on the property.

After a rehearing, the ZBA reaffirmed their decision with three specific limiting conditions. The plaintiffs appealed to superior court which ruled that the conditions imposed by the ZBA were unreasonable and beyond its authority. The town now appealed to the supreme court who reversed the lower court stating that as a general matter of law the ZBA also has the power to attach conditions to appeals from decisions of administrative officers involving nonconforming uses, provided the conditions are reasonable and lawful.

The court went on to affirm that although nonconforming uses are protected, the property owner’s rights to do as they please are not unlimited since the controlling policy of zoning law is to carefully limit the expansion of nonconforming uses with the goal of reducing them to conforming uses altogether. As a result, the court reversed all of the superior court’s rulings and upheld the limiting conditions attached by the ZBA.<sup>14</sup>

***Cormier v. Town of Danville ZBA*, 142 N.H. 775 (1998)**

The Town of Danville denied a special exception for an excavation asserting that the road the trucks would use was a “historic landmark” and “natural landmark” which the excavation would adversely impact, thus failing to meet two of the Danville special exception criteria. The plaintiff appealed to the superior court which agreed with the ZBA and upheld its denial, but the supreme court reversed.

The supreme court found there was nothing in the record to support the ZBA’s conclusion that the excavation would have an adverse impact on the road. The court reminded the board that “the law demands that findings be more specific than a mere recitation of conclusions.” Second, the court found that the road was not a historic landmark within the meaning of the ordinance. The court found little evidence as to its historic significance other than its age and the town’s assertion that “it provides a physical and aesthetic link to the 18<sup>th</sup> century Tuckertown settlement.” Lastly, the court was unable to conclude that the road was a “natural feature” and relied on the Webster’s dictionary definition of “natural” since it was not defined in the local ordinance. Because there were no supportable findings that the project would be incompatible with or have a detrimental impact on natural features or historic landmarks, the decisions of the ZBA and trial courts were reversed.<sup>15</sup>

***Tausanovitch v. Town of Lyme*, 143 N.H. 144 (1998)**

The landowner received a building permit for a bed and breakfast on June 12 and Tausanovitch did not file an appeal until August 6. The ZBA rules did not specify a time period within which appeals must be filed - only that they be done in “a reasonable time.” However, Tausanovitch already knew about the proposed bed and breakfast from the owner, a hearing notice, and seeing the posted building permit. The court ruled that in this context that the 55 day delay was not “reasonable.”

***Gray v. Seidel*, 143 N.H. 327 (1999)**

The Meredith ZBA denied a variance for a dock solely because the applicant failed to show any affirmative benefit to the public interest. The court noted that the statute itself (RSA 674:33, I(b)) only requires a showing that the variance “will not be contrary to the public interest.”

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<sup>14</sup> 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

<sup>15</sup> 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

***Hurley, et al v. Hollis*, 143 N.H. 567 (1999)**

In 1993 the Town of Hollis amended its zoning ordinance “to allow a certain reasonable level of alteration, expansion or change to occur by special exception” to preexisting nonconforming uses if certain factors were satisfied. In 1994 the ZBA granted a special exception to the owner of a nonconforming machine tool business that would allow the construction of a new 18,000 square foot building across the road from the original location of the business along with a 32-space parking lot that would accommodate the expansion of the operation from 12 to 25 employees. A group of abutters appealed the grant of the special exception to superior court and won, and won again when the business owner appealed to the supreme court.

The case turned on the court’s determination that both the language inserted into the zoning ordinance and the circumstances surrounding the adoption of the amendment by the voters demonstrated that it was not the intent to grant any greater expansion rights to nonconforming uses than are generally available under state law. (See [RSA 674:19](#) and the many supreme court cases that have referred to the statute in working out the details of how and to what degree a preexisting nonconforming use may be altered or expanded.)<sup>16</sup> Hollis voters subsequently approved an amendment to the zoning ordinance that broadened the rights of property owners to expand non-conforming uses, thus circumventing the supreme court’s opinion.

***Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001)**

Simplex wanted to use industrially zoned land for commercial purposes (a bookstore and a restaurant) in an area where the zoning permitted large shopping centers on the other side of the highway. While there were a limited number of commercial uses on the easterly side of the highway, the ZBA denied the variance, finding that none of the criteria for the granting of the variance had been met.

The trial court affirmed the ZBA’s denial on the basis that the hardship criterion had not been met. The court concluded, “We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property.” The court then announced the new three-part standard by which owners can demonstrate unnecessary hardship:

1. “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;
2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
3. The variance would not injure the public or private rights of others.”

***NBAC v. Town of Weare*, 147 N.H. 328 (2001)**

NBAC sought to establish a gravel operation in Weare. When it appeared before the ZBA for a special exception, NBAC presented information that indicated the property was not in the Town’s aquifer protection zone. The ZBA granted the special exception, then NBAC went to the Board of Selectmen for the excavation permit (under [RSA 155-E:1, III](#), the planning board is the “regulator” of gravel operations unless town meeting specifies otherwise - which was apparently the case in Weare).

As it turned out, the property was over an aquifer. The Town’s own experts, however, determined that the proposed gravel operation met the standards of the Town’s excavation ordinance. Nonetheless, the Board of Selectmen denied the permit on the grounds that:

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<sup>16</sup> 2000 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 6, 2000.

- It would be injurious to the public welfare and would be visible from the road;
- It could have a profoundly detrimental impact on the environment, a pond, and the aquifer;
- A false statement was presented to the ZBA;
- The operation was not in the best interests of the community;
- The application did not fully comply with the gravel ordinance; and
- It would have a long-term negative impact on the aquifer and would be injurious to the residents of the Town.

The Board of Selectmen did not go any further to establish findings of fact.

NBAC moved for a rehearing, which the Selectmen denied. NBAC appealed to superior court, arguing that there was insufficient evidentiary basis for the Selectmen’s decision, and that the Selectmen were collaterally estopped. (Remember this from *Old Street Barn v. Peterborough*? Collateral estoppel - the issue has already been decided and can’t be re-litigated by the same party in a different action.) The superior court upheld the Selectmen’s decision.

On appeal to the supreme court, NBAC argued that the Selectmen failed to provide adequate reasons for its decision, instead relying on the minutes of a public hearing. NBAC argued that this meant that the superior court had to speculate as to what portion of the public record the Selectmen were using as basis for their decision. The Town argued that this issue was waived as it was not raised in NBAC’s motion for rehearing by the Selectmen. The court agreed with the Town.

NBAC also argued that the superior court applied the wrong standard of review, with the suggestion that the court should have weighed all of the evidence to establish “on the balance of the probabilities” that the Selectmen’s decision was correct ([RSA 677:6](#) and [RSA 677:15](#)). Instead of putting all of the evidence into one pot and assessing it, the supreme court held that the individual points upon which the Selectmen based their decision should be assessed to determine “...if a reasonable person could have reached the same decision...” If any one of the findings of the Selectmen could be upheld, then its decision would stand. Here, the supreme court held that NBAC had failed to prove that all of the reasons used by the Selectmen were wrong.

Finally, NBAC argued that the Selectmen couldn’t decide upon the same issues considered and resolved by the ZBA (collateral estoppel). The court dodged this question sufficiently by saying that there were reasons supporting the Selectmen’s decision that had never been considered by the ZBA. (I don’t use “dodged” as a criticism; the court only decides those things it really must.)

### Some Thoughts:

**Fact Finding:** It’s clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time.

**More Fact Finding:** The important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good too, but you have to have the conclusions on the record - say what you mean and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason.")! Local boards must give any and all reasons.

***Bonnita Rancourt & a. v. City of Manchester*, 149 N.H. 51 (2003)**

In 2000, the Gately's bought a three (+/-) acre lot in Manchester after correctly determining that stabling horses was a permitted use in the relevant district. In 2001, they contracted to build a single family house then sought a permit to build a barn to stable two horses. To their surprise, they were informed that the city had recently amended its zoning ordinance to prohibit livestock (including horses) in the district. They filed for a variance, which the ZBA granted; Rancourt, an abutter, appealed to the superior court, and the court upheld the grant of variance. Rancourt appealed to the supreme court.

The supreme court recounted the standards that must be used by the superior court and by itself. The superior court should uphold the ZBA's decision unless it finds that the ZBA made errors of law or that the ZBA's decision was unreasonable based upon a balance of probabilities. Likewise, the supreme court will not reverse a superior court decision unless it finds that the court's decision is unsupported by evidence on the record or is legally erroneous. None of that happened here, and the supreme court upheld the superior court's decision and recounted some of the evidence that supported the ZBA's decision.

When going over the standard for a variance, the supreme court recounted its January 2001 decision in *Simplex v. Newington*, in which it altered 25 years of jurisprudence by changing the standard by which zoning boards are to judge variance requests. In *Simplex*, the court recited the variance criteria; thus, according to [RSA 674:33, I\(b\)](#), a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done (see [RSA 674:33 \[1996 & Supp. 2000\]](#)). In addition, the board may not grant a variance if it diminishes the value of surrounding properties. (See *Ryan v. City of Manchester Zoning Board*, 123 N.H. 170, 173, 459 A.2d 244, 245 [1983].)

In *Rancourt* however, this is how the court looked at the criteria: RSA 674:33, I(b) (1996) authorizes a zoning board of adjustment to grant a variance if the following conditions are met: (1) the variance will not be "contrary to the public interest;" (2) "special conditions" exist such that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship;" (3) "the spirit of the ordinance shall be observed;" and (4) "substantial justice" will be done.

In *Rancourt*, the supreme court omitted the variance criterion dealing with diminution of surrounding property values. Either the court made a mistake, or it has turned its back on its own 50-year-old standard (the "diminution of values" criterion originally appeared in *Gelinas v. Portsmouth*, 97 N.H. 248 [1952]). An alternative explanation, and I think a reasonable one, is that the court is simply lumping the diminution criterion into the third prong of the *Simplex* test for hardship, which is as follows:

1. **The zoning restriction, as applied to the applicant's property, interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.**

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.

**2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.**

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or “unnecessary” hardship.

**3. The variance would not injure the public or private rights of others.**

This is perhaps similar to a “no harm - no foul” standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance?

Certainly, if a person uses his/her property to the detriment of a neighbor’s property value, then it can be argued that the neighbor’s “private rights” have been injured.

Another point of interest in this case is the manner in which the court addressed the first prong of the *Simplex* hardship test - the reasonableness of the proposal in light of the unique setting of the property in its environment. Exactly what is meant by this test was fodder for a lot of discussion/debate when *Simplex* was decided. The court didn’t help much by way of explanation except to note in *Simplex* that the surrounding neighborhood had changed to such a degree that the limitations of the zoning ordinance were overly strict; i.e., that the requested variance should be granted in that case. It had little to do with the subject property itself. In *Rancourt*, the supreme court looked at how the property differed from others in the neighborhood (larger, hence could accommodate livestock more readily), and also recounted approvingly the nature of the property where the horses were proposed to be stabled (“thickly wooded buffer”). So it seems that an analysis of “setting of the property in its environment” should entertain considerations both of what the property itself is like and what’s going on in the surrounding neighborhood. (Benjamin Frost, Esq., NH OEP, January 2003)

***Hooksett Conservation Comm’n v. Hooksett Zoning Bd. of Adjustment.* 149 N.H. 63 (2003)**

The Hooksett Planning Board was hearing an application for a gas station/convenience store, and the conservation commission submitted to it a memo claiming that the use wasn’t permitted under the zoning ordinance. The Planning Board sought the opinion of the code enforcement officer (CEO), who determined that the use was permitted. The commission appealed that determination to the ZBA, which found in favor of the CEO. The commission’s motion for rehearing was denied by the ZBA. The commission then appealed to superior court. The ZBA moved to dismiss the case, arguing that the commission didn’t have standing to appeal to superior court. The court denied the motion. The ZBA appealed the denial of the motion to dismiss to the supreme court. The supreme court found in favor of the ZBA - meaning that the commission did not have standing to appeal to superior court - and reversed the lower court. Therefore, case dismissed. This seems simple enough but the supreme court’s opinion is a rich analysis of statutory history that warrants reading. It resulted in a

rare 3-2 split among the justices and an invitation to the legislature for clarification.

There are three basic steps in a ZBA appeal, each invoked by a different statute and each entitling different people to take action:

1. **Appeal to ZBA.** [RSA 676:5, I](#) - Appeals may be taken to the ZBA regarding anything within the board's jurisdiction by "any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." Here the conservation commission easily fits into this as a municipal "board" affected by the decision of the CEO.
2. **Motion for Rehearing.** [RSA 677:2](#) - Rehearing of the ZBA decision may be requested by "the selectmen, any party to the action or proceedings, or any person directly affected thereby." This is the crux of the matter, as you will soon see. Apparently, the Hooksett ZBA originally believed that the conservation commission had standing to move for a rehearing, as the ZBA denied the motion rather than refusing to consider it altogether (but this point is not clear in the supreme court's opinion).
3. **Appeal to Superior Court.** [RSA 677:4](#) - Appeal of a ZBA decision may be made by "Any person aggrieved by any order or decision of the zoning board of adjustment... For purposes of this section, 'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2."

In argument to the supreme court, the ZBA maintained that the conservation commission did not have standing to appeal to the superior court because it also did not have standing to request a rehearing by the ZBA - specifically, that the commission was not a "party to the action." The court found that among municipal boards, only the selectmen have the authority to request the ZBA to rehear a decision. To support this reasoning the court said:

"The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, 'the prompt and orderly review of land use applications...' would essentially grind to a halt. '...Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application...Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation...' Finally, '[t]o permit contests among governmental units...is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted...Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults.'" [citations omitted]

So even though it was the conservation commission that brought the original appeal to the Hooksett ZBA, it should not be considered "party" to the matter for the purpose of moving for rehearing or subsequent appeal to superior court. Among municipal boards, only the selectmen can act in that role.

I think that a different result might occur if the conservation commission could demonstrate that it was an abutter or had some other particularized interest in the matter being considered. So, if the conservation commission owned or held an easement on abutting property, or if it could demonstrate that land it controlled would be adversely impacted by a proposal even though not directly abutting, then the conservation commission might be able to demonstrate standing to move for rehearing and also to appeal to superior court. Note that the supreme court dismissed the notion that the conservation commission should be considered party to the action because it has a statutory duty to protect the town's natural resources. The court said that duty only allows it to appeal to the ZBA, not to take the action any further than that.

In her dissent, Justice Dalianis said “As the commission initiated the proceedings before the ZBA, it seems evident to me that the commission is a ‘party’ to [the proceedings before the ZBA]. Accordingly, the commission was entitled to appeal the ZBA’s decision to the superior court.” (Benjamin Frost, Esq., NH OEP, January 2003)

***Maureen Bacon v. Town of Enfield*, 150 N.H. 468 (2004)**

The New Hampshire Supreme Court recently handed down a deliciously complex opinion in *Bacon v. Enfield* that addresses (though does not necessarily clarify) some of the aspects of hardship delineated three years ago in *Simplex v. Newington*. Here, the court affirmed a superior court decision upholding the denial of a variance by the Enfield ZBA. The facts, briefly, are these: Bacon owned a shorefront home. The structure was legally non-conforming, as it did not comply with a 50-foot shoreland setback enacted subsequent to the construction of the building. Bacon hired a contractor to install a propane boiler and an attached shed to contain it - she was converting from wood and electric heat. The shed was on the shore side of the house. Neighbors complained after the construction was complete, and the application for a variance (presumably necessary before she could get a building permit for what she had already done) was the result. The ZBA denied the variance, finding with a touch of irony that it “(1) did not meet the ‘current criterion of hardship;’ (2) violated the spirit of the zoning ordinance; and (3) was not in the public interest” (ironic emphasis added). The ZBA denied a request for rehearing. Bacon appealed.

The superior court upheld the ZBA’s decision, finding that there were reasonable alternatives to the use proposed by Bacon and that there was a clear relationship between the purposes of the zoning ordinance generally and the specific 50-foot setback. The court said that granting the variance “would have some effect on the public rights of others in that it increases congestion along the shoreline and reduces minimally the filtration of runoff into the lake.” (Remember that lack of impact upon the public and private rights of others is one of the prongs of the hardship criterion in *Simplex*.) The court also determined that the variance requested was not within the spirit of the ordinance and that granting it would not do substantial justice. (It’s not clear that the ZBA decided that last point - substantial justice - so I don’t know why the superior court addressed it.)

Now we come to the good part - the supreme court’s handling of this case. Writing for the court, Chief Justice Broderick gave great deference to the superior court and focused solely on the court’s treatment of the “spirit of the ordinance.” To quote: “...the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance.

...We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon’s part and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA ‘acted reasonabl[y] and lawfully’ in denying the variance.” Having come to this conclusion with regard to the spirit of the ordinance, Broderick chose not to address the other variance criteria.

The trouble with Broderick’s opinion is that no other Justices agreed with him. Duggan wrote a concurrence, with which Dalianis joined, coming to the same conclusion but for different reasons.

Nadeau wrote a dissent, with which Brock (sitting by special appointment) joined. This decision looks like one of the characteristically split opinions of the U.S. Supreme Court, in miniature.

## **The Duggan Concurrence**

Although agreeing with Broderick's conclusion, Justice Duggan preferred to focus on the hardship criterion of variances. He did so for reasons that most ZBA members will appreciate: to give you guidance. Duggan noted that hardship is the highest hurdle to surmount in a variance request and that as a result of *Simplex* there was confusion. He said, "Because *Simplex* recently changed the unnecessary hardship standard, we believe that analysis of the unnecessary hardship factor in this case will provide guidance to trial courts and zoning boards when reviewing requests for variances." Duggan engaged in a fairly wide-ranging and extensively researched opinion, citing sources from other jurisdictions and academia. Despite the court's recent contrary treatment of a variance in *Rancourt v. Manchester*, Duggan felt that "Even under the *Simplex* standard, merely demonstrating that a proposed use is a 'reasonable use' is insufficient to override a zoning ordinance. Such a broad reading of *Simplex* would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations." He then suggested that variance analyses should reflect the kinds of considerations used when examining whether or not there has been a constitutional taking of private property (under either the N.H. or U.S. Constitutions). Finally, and perhaps most importantly, he concludes that "use" and "area/dimensional" variances should be treated differently. While the "use" variance goes to the heart of the purpose of zoning - the segregation of land according to use - "area" variances instead deal with matters that are to be regarded as "incidental limitations to a permitted use..." Merging these two lines of thought, he concluded "In considering whether to grant an area variance, courts and zoning boards must balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in *Simplex*."

Regarding the *Simplex* hardship prong that addresses the unique setting of the property in its environment, Duggan called for a comparison of the subject property to others similarly situated - which is really a pre-*Simplex* hardship test. He cites *Rancourt* as standing for this proposition (a variance for horses in a residential zone was okay because of the country setting, the unusual size of the lot, and the existence of a thick wooded buffer).

In conclusion, Duggan found that Bacon had failed to demonstrate unnecessary hardship. He suggested that there were other reasonable alternatives to the proposal (this too harkens back to a pre-*Simplex* analysis), finding that the proposal was a request of convenience, not one of necessity. Finally, he felt that there was nothing unique about Bacon's property in relation to other lakeside homes in the same district - they were similarly burdened by the setback requirement.

But remember, joining with Duggan was only Dalianis. Now for the dissent...

## **Nadeau's Dissent**

The court's *Simplex* opinion, which was unanimously decided (Brock, Broderick, Dalianis, and Horton (upon whose Grey Rocks dissent the *Simplex* opinion was largely based)), was written by Justice Nadeau. You may recall that the impact of the decision was to effectively recast how ZBAs were supposed to deal with the hardship question in variances (the other criteria were not addressed in *Simplex*). The bottom line of *Simplex* can be found in this quotation from it, appearing in Nadeau's instant dissent: "...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.” And so, the pendulum swung back toward property rights.

Here, Nadeau made fairly quick work in dismissing Broderick’s opinion, suggesting that the “public interests” would only be affected by the proposal in a “de minimis” manner that was not worthy of the court’s consideration. He then focused the bulk of his energy on Duggan’s concurrence. The *Simplex* hardship test contains the following prong: (the variance should be granted if) “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.” In the current case, Nadeau stated that after *Simplex*, a comparison of “similarly situated properties” was no longer necessary. Rather, only those considerations that pertain to the property itself should be entertained. In support of this, Nadeau cites the *Rancourt* case, stating that among the factual findings - “country setting, unusually large lot size, the configuration of the lot, and thick wooded buffer” - only the lot size dealt with a comparison with other properties. (Note that Nadeau only explicitly addresses one prong of the hardship test - uniqueness - and purposely leaves the other two. Given the language of his quick dismissal of Broderick’s opinion, however, I believe that Nadeau would have found the proposal to be consistent with the other two prongs: no fair and substantial relationship between the ordinance and the specific restriction, and no injury to the private or public rights of others.)

So what are we to make of this case? It’s hard to say, and I’m reminded of law school analyses of complex opinions that center upon figuring out who carries the swing vote. Where’s the swing vote here? It could be suggested that Broderick is the swing vote, but there’s an untold complexity - not so much in this case, but in the court’s evolving views on hardship: the court’s opinion in *Simplex* overturned a decision of superior court judge Richard Galway, who has just been nominated to the supreme court by Governor Benson. My guess is that if Galway is appointed, he could provide the vote that swings the court’s pendulum back again. Time will tell. [Benjamin Frost, Esq., NH OEP, February 2004]

### ***Michael Boccia & a. v. City of Portsmouth & a.*, 151 N.H., 85 (2004)**

Here the New Hampshire Supreme Court created a new unnecessary hardship standard for area variances while limiting the application of the *Simplex* unnecessary hardship standard to use variances.

### ***Russell Shopland & a. v. Town of Enfield*, 151 N.H. 219 (2004)**

The Shoplands owned a seasonal cottage consisting of one room and a bathroom for a total of approximately 378 square feet of living space. They wished to expand the cottage by building a two-bedroom, one-bathroom addition, adding an additional 338 square feet of living space. The cottage was within the fifty-foot setback from Crystal Lake. Because the addition was an expansion of a nonconforming use within the fifty-foot setback, the Shoplands sought a variance.

The ZBA denied the variance because: (1) it was “contrary to the public interest in that further violating the setback might endanger the health of the lake and establish a bad precedent;” (2) denying the variance did not result in unnecessary hardship; and (3) the substantial justice provided to the Shoplands was “outweighed by the potential loss suffered by the general public if harm is done to the lake.” In finding that the Shoplands did not establish unnecessary hardship, the ZBA noted that “many of the other lots in the area suffer the same topographical problems.”

On appeal, the superior court vacated the ZBA’s decision. Applying the *Simplex* test (because *Boccia* had not yet been decided at the time of the superior court decision), the court decided that the applicants had satisfied the “hardship” requirement. The supreme court reversed and remanded the case back to the lower court with instructions to determine if the newly announced *Boccia* standard was met. The supreme court did not mention the “public interest” or “substantial justice” findings of

the ZBA, either of which were sufficient grounds for denial. It appears the supreme court viewed this case as an “area” variance case with seemingly no consideration that this might be a “use” variance.

***Leonard Vigeant v. Town of Hudson*, 151 N.H. 747 (2005)**

In this case, involving the denial by the Hudson Zoning Board of Adjustment of a setback variance, the court interprets the application of the new area variance criteria articulated in *Boccia*.

A developer proposed construction of a five-unit multifamily dwelling in a business zone where multifamily dwellings, defined by the ordinance as three or more attached dwelling units, are permitted. The 1.6 acre parcel was described as “long, narrow, [and] mostly rectangular.” An area of wetlands was located on the parcel’s southerly boundary, “created by drainage from Route 111 and failure to maintain the drainage ditch.” The zoning ordinance required a 50-foot setback from Windham Road, which bounds the property, as well as from any wetlands.

The developer sought a variance to allow development within 30 feet of Windham Road, as well as a special exception to allow temporary encroachment 10 feet into the wetlands during construction. The ZBA unanimously denied the variance request, finding no evidence of hardship, that the multifamily dwelling proposal was not consistent with the spirit of the zoning ordinance, that there would be a diminution of surrounding property values and that it would be contrary to the public interest. The special exception request was also denied.

The ZBA denied the developer’s request for a rehearing, which was accompanied by a letter from a real estate appraiser who stated that the multifamily development would not have an impact on the value of surrounding property. The developer appealed to the superior court, which overturned the ZBA’s denial of the variance. The trial court applied the *Simplex* variance standard because the supreme court had not yet reached its decision in *Boccia*, which established the new unnecessary hardship standard for area variances.

The trial court noted that the proposed five-unit multifamily dwelling was a permitted use of the property and found that the lot was “unique, not just in its setting, but in its very character and description.” The trial court wrote, “It would be difficult to envision any reasonable permitted use which could be made of this parcel of real estate. Any reasonable permitted use of this real estate would probably require at least similar relief from the setback requirements.”

The trial court also found no evidence that surrounding property values would be adversely affected by the variance, or that the variance would not be consistent with the spirit of the zoning ordinance, or that the variance was contrary to the public interest.

The town appealed the trial court’s decision to the supreme court, which noted that since *Simplex*, it had “further refined” the unnecessary hardship standard in *Boccia*. The *Boccia* unnecessary hardship standard requires the applicant for an area variance to satisfy two factors: “(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.”

Under the first factor, the court explained, “The landowner need not show that without a variance the land would be valueless. Rather, assuming that the landowner’s plans are for a permitted use, but special conditions of the property make it difficult or impossible to comply with applicable setbacks or other restrictions, then the area variance might be necessary from a practical perspective to implement the proposed plan.”

The court said that under the first factor “It is implicit that the proposed use must be reasonable. When an area variance is sought, the proposed project is presumed to be reasonable if it is a permitted use under the town’s applicable zoning ordinance.” An area variance cannot be denied because the ZBA disagrees with the proposed use of the property, the court said.

Because multifamily housing was a permitted use in the business zone, the court said, “The issue is whether the plaintiff has shown that to build five multifamily dwelling units it is necessary to obtain a setback variance, given the property’s unique setting in its environment.” The court pointed out the fact that the trial court had found that “because of the setback from Windham Road and the wetlands buffer zone... there would be an area of only approximately 20 to 25 feet in width and less than 200 feet in length which could be developed.” The court agreed with the trial court that “it would be difficult to envision any reasonable permitted use which could be made of this parcel of real estate.”

Under the second factor, the court said, “The question is whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances. Whether an area variance is required to avoid an undue financial burden on the landowner is determined by a showing of an adverse effect amounting to more than mere inconvenience... The applicant is not, however, required to show that without the variance the land will be rendered valueless or incapable of producing a reasonable return.”

The court explained that “There must be no reasonable way for the applicant to achieve what has been determined to be a reasonable use without a variance. In making this determination, the financial burden on the landowner considering the relative expense of available alternatives must be considered.”

The court said the Hudson ZBA incorrectly focused on whether fewer than five dwelling units were more suitable. “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,” the court wrote.

The court held that the developer satisfied the two *Boccia* hardship criteria for an area variance. Because the setback requirements from Windham Road and the wetlands buffer zone would leave a buildable space of only 20 to 25 feet wide and less than 200 feet long, the court wrote, “The evidence supports the conclusion that there is no reasonable way for the plaintiff to achieve the permitted use without a variance. We hold that the plaintiff’s proposed use is a permitted use and that special conditions of the property make it impossible to comply with the setback requirements. From a practical standpoint, an area variance is necessary to implement the proposed plan.” (Susan Slack, NHMA Legal Services Counsel, *New Hampshire Town and City*, April 2005.)

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## **Purpose of zoning regulation key to distinguishing use and area variances.**

### ***John R. Harrington & a. v. Town of Warner*, 152 N.H. 74 (2005)**

This case is another in a series of decisions from the New Hampshire Supreme Court concerning unnecessary hardship and the distinction between use and area variances. The applicant owned a 46-acre parcel in a medium density residential zone in which manufactured housing parks were permitted. There were 33 manufactured home sites and 54 campground sites located on 26 acres of the property. The owner wanted to add 26 manufactured home sites on the remaining 20 acres. Under the zoning ordinance, a minimum of 10 acres was required for manufactured housing parks and the number of sites was limited to 25. Town officials were uncertain whether the ordinance limited the number of sites to 25 per 10 acres, or 25 regardless of the size of the parcel, as long as the parcel was at least 10 acres. Because the parcel lacked required road frontage, the property owner was unable to subdivide

it, which would have given him two additional 10-acre parcels on which he could locate 25 sites each. Therefore, he applied for a variance.

The zoning board of adjustment granted the variance but limited the number of additional sites to 25, to be developed at no more than five sites per year. The abutters, the Harrington's, appealed to the superior court which affirmed the ZBA's decision, and then appealed to the supreme court, arguing that the applicant failed to show unnecessary hardship; created his own financial hardship because he purchased the property with knowledge of the zoning restrictions; and failed to prove other variance criteria, including that the variance was consistent with the spirit and intent of the zoning ordinance and that granting the variance would do substantial justice.

Distinguishing between a use or area variance isn't always simple, which didn't matter until the court's decision in *Boccia* establishing separate unnecessary hardship factors to apply to area variances while limiting the *Simplex* unnecessary hardship test to use variances.

In this case, the ZBA granted the variance before *Boccia* was decided and, therefore, the *Simplex* test applied regardless of whether the applicant sought a use or area variance. However, the case reached the supreme court after *Boccia*. The applicant sought a variance from the 25-site limitation and the court began its analysis by first determining whether to apply the *Boccia* factors or the *Simplex* test to the unnecessary hardship criterion.

“A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits,” the court wrote, while “[a]n area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such, an area variance does not alter the character of the surrounding area as much as a use not permitted by the zoning ordinance.”

The court said, “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.”

The court compared the manufactured housing park provision to another provision of the ordinance that permitted manufactured housing subdivisions on a minimum 12-acre lot. According to that provision, the maximum number of lots “in any manufactured housing subdivision shall not exceed 25.” The court emphasized the word “any” in this provision and interpreted it to mean that regardless of the size of a parcel, as long as it was a minimum of 12 acres, it was limited to 25 manufactured housing sites. “Thus, unlike an area restriction, the limitation on the number of manufactured housing sites is not related to the acreage or other physical attributes of the property,” the court wrote. “Rather, the restriction limits the intensity of the use in order to preserve the character of the area.”

In fact, the court added, the town's overall zoning scheme, with three residential districts, segregates land by types of uses as well as by intensity of use. For example, two-family dwellings were permitted uses in the village and medium density districts, but permitted only by special exception in the low-density district. “[G]iven the language and purpose of the zoning ordinance,” the court concluded that “the provision limiting the number of sites to 25 lots is a use restriction.”

The court then applied the *Simplex* unnecessary hardship factors: “1) the zoning restriction as applied interferes with the applicant’s reasonable use of the property, considering the unique setting of the property in its environment; 2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and 3) the variance would not injure the public or private rights of others.”

The court said a use variance generally “requires a greater showing of hardship than an area variance because of the potential impact on the overall zoning scheme” and said the first prong of the *Simplex* standard “is the critical inquiry for determining whether unnecessary hardship has been established.” Determining whether the zoning restriction as applied interferes with a landowner’s reasonable use of the property, the court stated, “includes consideration of the landowner’s ability to receive a reasonable return on his or her investment.” The court said a “reasonable return on investment” is not a maximum return, but requires more than a “mere inconvenience.” It “does not require the landowner to show he or she has been deprived of all beneficial use of the land.” In addition, “reasonable return” requires “actual proof, often in the form of dollars and cents evidence,” the court stated, citing a Missouri case.

*Simplex* also “requires a determination of whether the hardship is a result of the unique setting of the property,” which, the court said, “requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property,” but it “does not require that the property be the only such burdened property. [T]he burden must arise from the property and not from the plight of the individual landowner.”

Consideration of the surrounding environment is also required under the *Simplex* test. “This includes evaluating whether the landowner’s proposed use would alter the essential character of the neighborhood. Indeed, because the fundamental premise of zoning laws is the segregation of land according to uses, the impact on the character of the neighborhood is central to the analysis of a use variance.”

The court said the evidence was sufficient to establish that the applicant met the *Simplex* unnecessary hardship standard. The fact that manufactured housing parks were a permitted use in the zoning district was “most significant” in supporting the conclusion that the 25-site limit per parcel interfaced with the applicant’s reasonable use of the property, according to the court. Evidence supporting the conclusion that unique conditions of the property created a hardship included the fact that the applicant could not subdivide the parcel because of insufficient road frontage; the current location of the existing mobile homes; campground sites and swamp land made construction of a road with sufficient frontage “almost impossible;” and improvements to the park’s private road would not remedy the road frontage problem.

“[T]he ZBA implicitly found that the expansion of the park would not adversely affect the character of the area,” the court said, noting that the impact on schools, traffic and the availability of affordable housing were considered and that the ZBA limited the expansion to five new sites per year to lessen the impact on schools.

The abutters had also argued that because the zoning regulation was in place before the applicant purchased the property, any hardship experienced was self-created. The court cited its previous decision in *Hill v. Town of Chester*, 146 N.H. 291 [2001], which held that “purchase with knowledge” of the zoning restrictions does not preclude the landowner from obtaining a variance, but should be a factor considered under the first prong of the *Simplex* test.

According to the court, “To counter the fact that the hardship was self-created because the landowner

had actual or constructive knowledge of the zoning restrictions, the landowner can introduce evidence of good faith.” Among the ways an applicant can show good faith, the court said, are: compliance with rules and procedures of the ordinance; use of other alternatives to relieve the hardship before requesting a variance; reliance upon the representations of zoning authorities or builders; no actual or constructive knowledge of the zoning requirement.

In this case, the court said, the applicant was advised in writing by the selectmen before purchasing the property that the mobile home park could be expanded subject to planning board approval and compliance with the building code. Also, the court said, the ZBA was uncertain whether the 25-site limitation for mobile home parks applied per 10 acres or was an absolute maximum and, therefore, the applicant acted in good faith in applying for a variance.

The abutters also argued that the applicant did not prove that the variance was consistent with the spirit and intent of the zoning ordinance and would do substantial justice. The court disagreed, noting that mobile home parks are a permitted use under the ordinance, that a mobile home park already existed, and that the property owner could have established a second mobile home park if he had been able to subdivide the property.

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**The ZBA should not add new reasons for original denial when the board votes to deny a motion for rehearing.**

***McDonald v. Town of Effingham ZBA*, 152 N.H. 171 (2005)**

Vicki McDonald sought an area variance to allow her to develop her quarter-acre, nonconforming lot. After a public hearing, the ZBA denied the application and McDonald filed a timely motion for rehearing, which the ZBA denied. In denying the motion for rehearing, the ZBA added an additional, independent reason for denying the requested variance (that McDonald had not filed a protective well radii form with her variance application to demonstrate that her proposed septic system was lawful).

McDonald filed an appeal to the superior court and the ZBA moved to dismiss the case, arguing that McDonald should have filed a second motion for rehearing and that because she had not, the superior court lacked jurisdiction to hear the appeal. The supreme court disagreed, ruling that if the ZBA’s argument were correct, it would mean that someone in McDonald’s position would have to appeal to superior court from the initial variance denial once the rehearing request was rejected, and also file a second motion for rehearing to challenge the issue that was newly raised by the ZBA in its decision denying the initial request for rehearing. The supreme court held that such an application of the appeal statutes would lead to absurd and wasteful results.

The court strongly suggested that if a ZBA just has that incredible itch to add new reasons for denying the application when it gets a motion for rehearing, it should grant the motion for rehearing, not deny it as the Effingham ZBA did in this case. Then, following the rehearing, the ZBA can issue its new decision and the applicant clearly will have an obligation to file a second motion for rehearing as to all the grounds relied upon by the ZBA to support its new denial of the application. See *Dzjama v. City of Portsmouth*, 140 N.H. 542 (1995).

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**Court defines “public interest.”**

***Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 (2005)**

One of the four tests other than “unnecessary hardship” that is applicable to both use and area variances is the requirement that granting the variance “will not be contrary to the public interest.” In this decision, the supreme court gave us some guidance on how “public interest” is defined.

At a special meeting in September 2001, the Chester Town Meeting approved a warrant article to authorize the selectmen to enter into a lease to allow a telecommunications tower to be located on the town’s transfer station property. In January 2003, AT&T Wireless and a tower builder applied for a use variance to construct a 150-foot tower on the Rod and Gun Club’s property which is located in a residential district where telecommunications towers are not a permitted use. Before the ZBA held a hearing on the variance application, AT&T Wireless negotiated a contract with the town to construct a tower at the transfer station. On July 1, 2003 the ZBA heard the variance application submitted by the Rod and Gun Club, and denied the variance. The ZBA’s reasons for the denial were as follows:

1. **Public Interest:** The Board of Selectmen appeared before the ZBA and presented convincing evidence that the public interest of the town was expressed by the citizens at the town meeting when they previously voted to locate a telecommunications facility on the town transfer station property. The town warrant and the existence of a lease agreement with the town for a telecommunications facility are both relevant to the question of public interest. The legislative body of a town is the ultimate law and policy making body and when the citizens vote as a legislative body, they express the public interest of the town. In light of the co-location requirements of the ordinance, the granting of a variance would frustrate the ability of the town to fulfill its pending lease agreement for a telecommunications facility on the town transfer station property, and would frustrate the public interest established by the town warrant article.
2. **Hardship:** The applicant has not shown that the granting of the variance would not injure the public or private rights of others. The town warrant and the subsequent lease agreement establish public rights of the town which will be injured by granting this variance.

The town and AT&T Wireless subsequently sought a variance to build a telecommunications tower on the town’s transfer station property which, like the property of the Chester Rod and Gun Club, is located in a residential district. The ZBA granted this variance!

The Chester Rod and Gun Club appealed the denial of its variance to the superior court, which ruled that the ZBA improperly relied upon the warrant article to conclude that granting the variance would be contrary to the public interest and would injure the public rights of others. The superior court reasoned that the town’s “contract for the construction of a similar tower on its property is not a basis for the Board finding that it was not in the public interest to grant the variance” to the Rod and Gun Club.

The town appealed to the New Hampshire Supreme Court, which began its analysis by noting that the requirement that the variance not be “contrary to the public interest” (an independent constituent of the five-part variance test) is “coextensive” with the requirement that granting the variance “will not injure the public rights of others” (which is part of the third piece of the *Simplex* test for “unnecessary hardship” for a use variance (that granting the variance “will not injure the public or private rights of others”)). Moreover, both of those requirements “are related to the requirement that the variance be consistent with the spirit of the ordinance.” The supreme court offered some explanation of these principles by quoting the following text from a well-known treatise, Anderson’s American Law of Zoning.

The standards which limit the power of administrative boards to vary the application of the zoning regulations in specific cases are intended to provide administrative relief in individual cases of unnecessary hardship without injury to the rights of landowners

other than the applicant, and without substantial interference with the community's plan for the efficient development of its land. Accordingly, an applicant for a variance must prove not only that a literal application of the ordinance will result in unnecessary hardship, but also that the variance he seeks will not harm landowners in the vicinity of his proposed site or prevent the accomplishment of the purposes of the zoning scheme. The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest.

The court went on to explain that the first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the zoning ordinance itself. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary to that public interest. Thus, to be contrary to the public interest or injurious to the public rights of others so as to justify the denial of the variance, the variance must unduly, and in a marked degree, conflict with the ordinance such that the variance violates the ordinance's basic zoning objectives.

The court then explained that one way to judge whether granting the variance would violate basic zoning objectives is to examine whether the variance would alter the essential character of the neighborhood. This is because the fundamental premise of traditional zoning restrictions is to segregate the land according to uses. Thus, the variance must be denied if the proposed use will alter the essential character of the neighborhood. Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety, or welfare, because the dominant design of any zoning act is to promote the general welfare.

The court concluded that the ZBA erred by looking to the vote upon the September 2001 warrant article as a declaration of the public interest. The relevant public interest is set forth in the applicable zoning ordinance. The record shows that the purpose of the ordinance creating the residential zone in which the plaintiff's property is located is to "recognize the unique scenic, historic, rural and natural characteristics" of this part of the town "while encouraging development... in a manner which will protect these important characteristics." Rather than examining whether the variance would unduly conflict with basic zoning objectives by altering the essential character of the neighborhood or by threatening the public health, safety, and welfare, the ZBA relied upon the effect that the variance would have upon the town's incipient plan to build a telecommunications tower elsewhere. This was also a mistake. Thus, the supreme court agreed with the trial court that the ZBA incorrectly defined the relevant public interest when it denied the variance. However, rather than order the ZBA to issue the variance as the trial court had done, the supreme court remanded the case back to the trial court with instructions that the variance case be sent back to the ZBA for further proceedings so that, presumably, the ZBA could rehear the case using the correct analysis of what constitutes "public interest" and the "public rights of others."

From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Spring Conference.

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### **Rehearing motion satisfies statute's requirement.**

#### ***Colla v. Town of Hanover*, 153 N.H. 206 (2006)**

This case examines the issue of what satisfies the requirement of [RSA 677:3, I](#) with regard to a party's obligation to "set forth fully every ground upon which is claimed that the decision or order complained

of is unlawful or unreasonable” when applying to the zoning board of adjustment for rehearing.

The plaintiff property owners initially applied to the ZBA for three variances to build an addition to their existing residence. The ZBA granted two of the variances but denied the third request, which was for an area variance to the side setback requirements so that the plaintiffs could build a screened deck on the north side of their home. The ZBA denied this variance on the grounds that there were “feasible alternatives” for achieving the desired benefit without a variance, including constructing an unroofed deck or by locating the deck in the front. The ZBA maintained that these changes would not create a substantial hardship on the plaintiffs.

The plaintiffs motioned for rehearing. RSA 677:3 requires a motion for rehearing to the ZBA to “set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable.” Additionally, no appeal of a ZBA decision may be taken without first making an application for rehearing and, according to RSA 677:4, no ground not set forth in the application for rehearing will be considered by a court unless the court for good cause shown shall allow the introduction of additional grounds. In their motion for rehearing, the plaintiffs stated that the ZBA denied their request for a variance of the zoning setback requirements to allow for a screened deck for their home. They included the reason given by the ZBA in its denial: that there were reasonable alternatives, and also gave the following grounds for rehearing: 1) the decision is unreasonable; 2) the decision denies them their constitutional rights to due process and equal protection of the laws; 3) the decision is contrary to *Boccia v. City of Portsmouth*, 151 N.H. 85, 104 [2004]; and 4) the decision is contrary to the ordinance.

The ZBA denied the motion for rehearing and the plaintiffs appealed to superior court pursuant to RSA 677:4. In their appeal to superior court, the plaintiffs identified that they were appealing the ZBA decision to deny the variance and subsequent denial of their motion for reconsideration and stated that the denials were “illegal and unreasonable” for the reasons set forth in their attached motion for rehearing to the ZBA. The town first answered by stating that the ZBA found no unnecessary hardship under *Boccia* because it found that feasible alternatives existed for the plaintiff to achieve the desired results without the benefit of a variance. The town later moved to dismiss the plaintiffs’ appeal on two grounds: 1) the motion for reconsideration to the ZBA failed to comply with RSA 677:3 in that it was so broad and non-specific that it was impossible for the ZBA to understand what errors it may have made and to address those errors; and 2) the appeal to superior court failed to comply with RSA 677:4 in that it merely incorporated, by reference, the insufficient motion for reconsideration. The superior court agreed with the town on both grounds and dismissed the appeal.

In deciding this case, the New Hampshire Supreme Court pointed out that the rehearing process is designed to give the ZBA an opportunity to correct any mistakes it may have made before an appeal to court is filed. This goal is accomplished by requiring applicants for rehearing to “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” In this case, the court found that the plaintiffs’ motion directly listed the grounds upon which it was based. The court wrote, “If nothing else, the plaintiffs’ motion put the ZBA on notice that the plaintiff believed that the ZBA has misinterpreted *Boccia* when it found that there were feasible alternatives to the screened deck they sought to build.” The court held that the motion for rehearing satisfied the spirit and letter of RSA 677:3.

The town next argued that the trial court decision should be affirmed because the court dismissed the plaintiffs’ appeal on the alternative ground that it did not comply with RSA 677:4 which governs appeals of ZBA decisions to superior court. The court disagreed, pointing out that the only reason the trial court found that the motion did not comply with RSA 677:4 was because it found that it did not comply with RSA 677:3. The court pointed out that the trial court ruled that incorporating the

motion for reconsideration to the ZBA “is an acceptable means of informing the trial court in an RSA 677:4 appeal of the specific grounds upon which the decision is alleged to be unreasonable or illegal.” Therefore, having previously resolved the question of whether the plaintiffs complied with RSA 677:3 in favor of the plaintiffs, the court concluded that the plaintiffs were also in compliance with RSA 677:4. The trial court’s dismissal of plaintiffs’ appeal was reversed and remanded.

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**The supreme court puts some teeth back into the “uniqueness” aspect of the unnecessary hardship test (two decisions).**

***Garrison v. Town of Henniker*, 154 N.H. 26 [2006]**

In this case, Green Mountain Explosives (GME), an enterprise which manufactures explosives for use in mining, quarrying, and construction, proposed to establish an explosives storage and blending facility on 20 acres centrally located in a parcel consisting of over 1,600 acres so as to provide the buffer zone required by the Bureau of Alcohol, Tobacco and Firearms (ATF). GME sought and received two use variances: one to allow a commercial use in a residential zone, and one to allow the storage and blending of explosive material where injurious or obnoxious uses are prohibited.

The angry abutters requested a rehearing before the ZBA, then appealed to the superior court when their request was denied. The superior court reversed the grant of the variances by the ZBA, finding that:

“The problem with GME’s application and the record in this case is that, while they support a conclusion that the zoning restrictions interfere with GME’s proposed use of the property, they do not support a finding that the restrictions interfere with the reasonable use of the property. That is, there is no evidence in the record that the property at issue is different from other property zoned rural residential. **While its size may make it uniquely appropriate for GME’s business, that does not make it unique for zoning purposes.**” (emphasis added)

GME appealed to the New Hampshire Supreme Court, which upheld the superior court’s decision to reverse the grant of the variances. For starters, the supreme court repeated that under the first prong of the three-pronged *Simplex* standard to show unnecessary hardship, GME had to demonstrate to the ZBA that the zoning restriction, as applied to its property, interferes with their reasonable use of the property, considering the unique setting of the property in its environment.

GME argued several points on appeal but the most important, for our purposes, was its claim that the evidence before the ZBA demonstrated that the property was unique. The court rejected this argument after setting forth the burden that GME had to meet:

As discussed above, to demonstrate “unnecessary hardship” applicants must show that “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.” *Simplex*, 145 N.H. at 731-32. The reasonable use factor “is the critical inquiry for determining whether unnecessary hardship has been established.” *Harrington*, 152 N.H. at 80. The reasonable use factor “requires a determination of whether the hardship is a result of the unique setting of the property.” *Id.* at 81. The applicant must show that “the hardship is a result of specific conditions of the property and not the area in general.” *Id.* The property must be “burdened by the zoning restriction in a manner that is distinct from other similarly situated property.” *Id.* While this does not require that the property be the only such burdened property, “the burden cannot arise as a result of the zoning ordinance’s equal burden on all property in the district.” *Id.* The burden must “arise from the property and not from the individual plight of the landowner.” *Id.*

The court went on to note that the following evidence had been introduced to the ZBA regarding the unnecessary hardship test:

The current residential zoning interferes with GME's proposed reasonable use for the property. Under current zoning, GME is unable to use the property to conduct its business in any way. The unique characteristics of this property make the proposed use reasonable. The fact that this parcel is extremely large and uninhabited makes it ideal for use by GME. GME must maintain its storage facilities a significant distance from any occupied structures according to [ATF] regulations. The size of the parcel at issue permits GME to meet this legal obligation. For the same reason, the proposed use of the property for storage and blending of explosives is reasonable. The central location of the facility within the proposed [site] will permit the facility to be both a safe distance from any other structures and out of view from any neighbors or the roadway.

Moreover, the court noted that GME's professional engineer stated to the ZBA that the property was unique in its environment and that the denial of the variances would result in unnecessary hardship. Also, the chair of the ZBA (who had driven through the site earlier in the day of the ZBA's public hearing), and the ZBA's town-planning expert, testified that the site would be difficult to develop as a residential subdivision.

In spite of the evidence presented, the superior court concluded that the record did not support the ZBA's decision on unnecessary hardship because the record did not demonstrate that the proposed site was unique. The supreme court agreed:

After reviewing the certified record, we agree that the record reasonably supports the superior court's conclusion that the evidence did not demonstrate uniqueness. GME directs us to no evidence in the record that would demonstrate that the proposed site was different from any other property in the rural residential district. Rather, the record merely demonstrates that the proposed site was large, difficult to develop because of its topography and relatively isolated location, and ideally suited to GME's needs because it could provide a buffer zone as required by the applicable ATF regulations. These factors alone, however, do not distinguish GME's proposed site from any other rural land in the area.

GME argued that this case should have the same result as in *Bonnita Rancourt & a. v. City of Manchester*, 149 N.H. 51 [2003] (reported in these materials, above). In *Rancourt*, the supreme court upheld the grant of a variance which allowed the landowners to stable two horses on its residential property although the zoning ordinance prohibited the keeping of livestock in that district. In responding to GME's argument the court quoted from *Rancourt*, as follows:

"Evidence before the [zoning board] showed that the intervenors' lot was located in a country setting. Evidence before the [zoning board] also showed that the lot was larger than most of the surrounding lots and was uniquely configured in that the rear portion of the lot was considerably larger than the front. The [zoning board] also had evidence that there was a "thick wooded buffer" around the proposed [stables] area. Further, the area in which the intervenors proposed to keep the two horses constituted an acre and a half which, according to the city's zoning laws, was more land than required to keep two livestock animals."

In rejecting GME's arguments, the supreme court simply offered the conclusion that in *Rancourt*, the size, configuration, location, and buffer made the property unique, as compared to the surrounding lots. But the evidence presented by GME "simply did not demonstrate that its proposed site was similarly unique in its setting."

**EDITORIAL COMMENT: Although like most folks I would not be overjoyed at the prospect of living next to an explosives blending and storage facility, I do not believe that the supreme court's decision explains as well as it should have done why the property in Rancourt passed the uniqueness test and the property in this case did not. We can't say that the large size of GME's parcel simply doesn't count because the size of the parcel in Rancourt did count. It seems to me that the size of GME's parcel did make it unique, "as compared to the surrounding lots," but it is true that there did not seem to be any other factors that could also be said to contribute to uniqueness as there were in the Rancourt case. Perhaps what we are essentially taught by this case is expressed in the statement of the superior court about the parcel: "While its size may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."**

In *Community Resources For Justice, Inc. v. City of Manchester* (January 24, 2007), as in the *Garrison* case reported above, the New Hampshire Supreme Court found that the landowner failed to meet the first prong of the *Simplex* unnecessary hardship test, and upheld the denial of a use variance by the Manchester ZBA. A brief description of the case follows.

The landowner, Community Resources For Justice, Inc. (CRJ) is a private organization that operates residential transition centers or "halfway houses" under contracts with the Federal Bureau of Prisons. CRJ purchased a building in the central business district on Elm Street in Manchester which houses both commercial and residential uses, intending to renovate part of the second floor and the entire third floor for the halfway house, leaving the rest of the building undisturbed. The building permit was denied because the building commissioner determined that the proposed use was for a "correctional facility" which is not a permitted use in any of the city's zoning districts.

After some legal maneuvering, the ZBA denied CRJ's application for a use variance. The superior court reversed the ZBA and the city appealed to the New Hampshire Supreme Court. On appeal, the supreme court found that the record did not show that CRJ had met the first prong of the unnecessary hardship test, which it articulated as follows:

As our cases since *Simplex* have emphasized, the first prong of the *Simplex* standard is the critical inquiry for determining whether unnecessary hardship has been established. (John R. Harrington & a. v. Town of Warner, 152 N.H. 74, 80 [2005]) To meet its burden of proof under this part of the *Simplex* test, the applicant must demonstrate, among other things, that the hardship is a result of the property's unique setting in its environment. This requires that the zoning restriction burden the property in a manner that is distinct from other similarly situated property. While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the landowner. Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. As we explained in *Bonnita Rancourt & a. v. City of Manchester*, 149 N.H. 51, 54 [2003], "hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable'."

The court found that the evidence CRJ presented did not demonstrate that its proposed site was unique, as compared to the surrounding lots. While there was evidence that the property was located near public transportation and treatment facilities, as well as other city services that the residents of

the halfway house might need, there was no evidence that CRJ's property was unique in this respect. "Presumably," the supreme court noted, "all of the buildings in this location share these characteristics."

Finally, the court concluded the discussion of the use variance by noting that because CRJ had failed to demonstrate it met the first prong of the *Simplex* unnecessary hardship standard, it was not necessary to determine if the evidence supported a finding that CRJ met the other prongs of the test – the familiar rule here is that "[i]f any one of the ZBA's reasons supported its denial of a variance, CRJ's appeal of that decision fails."

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### **Citizen has no standing to seek court enforcement of zoning ordinance.**

#### ***Goldstein v. Town of Bedford*, 154 N.H. 393 (2006)**

Mr. Goldstein was upset because he believed that a Mr. Evans had violated the town's zoning ordinance governing the merger of two nonconforming lots. The town's zoning administrator looked into the matter, contacted the town's legal counsel, and decided not to pursue an enforcement action.

Mr. Goldstein filed an appeal with the ZBA challenging the decision of the zoning administrator. At the public hearing, Mr. Goldstein acknowledged that he had no interest in the zoning enforcement matter different from any other citizen in the town and that he was "just a Bedford resident who would like to see the zoning ordinance enforced."

Even before he got to the ZBA, Mr. Goldstein filed a petition in the superior court seeking a Writ of Mandamus against the town (such a writ is simply an order of the court that orders the town officials to carry out a mandatory duty that is imposed upon them by law, thus mandamus). The town filed a motion to dismiss the case, claiming that Mr. Goldstein had no standing to seek such relief from the court.

The superior court granted the motion to dismiss, and the NH Supreme Court agreed. The court reasoned that if Mr. Goldstein didn't have the right to appeal the ZBA decision to the courts, he also would lack the right to seek a Writ of Mandamus, so the court first considered whether he had standing under the statutes to appeal from the ZBA. The court explained its reasoning as follows:

Pursuant to RSA 676:5, I, "any person aggrieved" by any decision of an administrative officer may appeal to the ZBA. "[T]he selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing" within thirty days after a decision of the ZBA (RSA 677:2). An appeal from the ZBA's decision on the motion for rehearing may then be brought in the superior court within thirty days by "[a]ny person aggrieved" by the order or decision of the ZBA. RSA 677:4 [Supp. 2006]. The same statute defines "person aggrieved" as "any party entitled to request a rehearing under RSA 677:2." To demonstrate that he is a "person aggrieved," the plaintiff must show some "direct definite interest in the outcome of the proceedings." *Caspersen v. Town of Lyme*, 139 N.H. 637, 640 [1995]. "[S]tanding will not be extended to all persons in the community who might feel that they are hurt by" a local administrator's decision. *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450, 452 [1995] (quotation and ellipsis omitted). "Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case." *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 544-45 [1979]. The pertinent statutes plainly limit standing to appeal a decision of an administrative official concerning enforcement of a zoning ordinance either to the ZBA (RSA 676:5) or to the superior court (RSA 677:4) to

“persons aggrieved.” At oral argument, the plaintiff conceded that under the *Nautilus* decision, he did not qualify as an aggrieved person under the statutory scheme. He argues, however, that he has standing as a town resident and taxpayer to seek mandamus relief to require the town to enforce its zoning ordinance. We disagree.

The court went on to find that because Mr. Goldstein was not a “person aggrieved” under the statutes, he lacks standing to appeal to the ZBA and he therefore also lacks standing to bring a mandamus action in the superior court. To hold otherwise would allow him to circumvent the clear intent of the legislature to limit standing for zoning appeals to persons aggrieved.

*2007 Land Use Law Update*, Timothy Bates, Esq., OEP Spring Conference, April 28, 2007.

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### **Court upholds variance conditions.**

#### ***Michelle J. Robinson v. Town of Hudson*, 149 N.H. 255 (2006)**

The petitioner owned a lot in a six-lot subdivision approved in 1970. The approved subdivision plan indicated that an existing cul-de-sac would be extended (the Mark Street Extension) to Wason Road. The Mark Street Extension was roughed out but never paved. The petitioner’s lot had only 50 feet of frontage on Wason Road, but the town had a 150-foot frontage requirement. The plaintiff applied for and was granted a frontage variance to which the ZBA attached four conditions.

The petitioner challenged two of the conditions, known as the “cost condition” and the “liability condition.” The cost condition required the property owner of record to pay a pro rata share of the cost of constructing the Mark Street Extension “[i]f and when” it is built. The liability condition required the petitioner to record at the registry of deeds a notice of the limits of municipal liability, specifically that the town did not assume responsibility for the maintenance of the Mark Street Extension or liability for damages resulting from its use.

The ZBA denied the petitioner’s motion for rehearing, and she appealed to the superior court claiming that the cost condition was arbitrary because the terms “pro rata share,” “cost” and “built” were not defined. The petitioner also argued that the cost condition was unreasonable because she was the only lot owner required to contribute to the cost of Mark Street Extension and because it applied to the land owner, rather than the land, thus exceeding the ZBA’s authority. The petitioner also challenged the liability condition as unreasonable.

The superior court dismissed the petitioner’s argument that the cost condition was arbitrary for lack of defined terms because she had failed to raise the issue in her motion for rehearing before the ZBA. The lower court had found that the ZBA was concerned about potential safety issues if Mark Street Extension is never built because other lot owners might use the petitioner’s driveway to access their lots via the unfinished road. The lower court held that the cost condition was reasonable in that it was intended to encourage the owners of the subdivision property to construct Mark Street Extension. The lower court also held that the liability condition was reasonable and similar to one of the conditions upheld in *Wentworth Hotel v. Town of New Castle*, 112 N.H. 21, 28 [1972].

The petitioner appealed to the New Hampshire Supreme Court, which affirmed the lower court ruling. The court reiterated previous case law holding that despite the fact that there is no express statutory provision permitting the ZBA to attach conditions to the grant of a variance, “reasonable conditions necessary to preserve the spirit of the ordinance” will be upheld and that “[c]onditions are reasonable when they relate to the use of the land and not to the person by whom such use is to be exercised.”

On the petitioner's argument that terms of the condition were not defined, the court agreed with the lower court's dismissal of this claim, noting that RSA 677:3 requires the motion for rehearing to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable" and prohibits a party from appealing a ZBA decision on grounds that were not set forth in the rehearing motion "unless the court for good cause shown shall allow the appellant to specify additional grounds." The court held that the petitioner's argument that the cost condition imposed an "unspecified" penalty on the lot owner is "not the same as arguing that the specific terms used in the condition are vague." The court held that the petitioner's case was different from *Colla v. Town of Hanover*, 153 N.H. 206, 208-209 [2006], in which the court held that the plaintiff in that case had met the statute's requirements even though he submitted to the superior court identical questions raised in the ZBA motion for rehearing.

The court dispensed with the petitioner's argument that the cost condition was unreasonable because she alone was required to pay a pro rata share of constructing the road while other lot owners were not. The court noted that the petitioner was not required to pay for the entire road, but only her share of the cost of construction if the road were built. The court added that it was reasonable for the ZBA to consider the petitioner's lot as part of a six-lot subdivision in which four of the lots were not buildable for lack of street frontage and that, but for the variance, her lot too would be unbuildable for lack of adequate frontage. The court noted that the ZBA was concerned about safety, in that other lot owners could access their lots by way of the petitioner's driveway rather than a completed Mark Street Extension, that the petitioner's lot was unbuildable prior to the granting of the variance, and that the cost condition did not render the lot worthless or drastically reduce its sale price. Therefore, the court held, it was reasonable for the ZBA to impose on the petitioner her pro rata share of the cost of construction of the road.

The petitioner also argued that the cost condition was an impermissible monetary penalty aimed at her rather than designed to regulate the use of the property. The court disagreed, noting that the condition runs with the land and the requirement to pay a pro rata share of construction applied to "the owner of the lot at the time the road is constructed, whether the owner is the petitioner or another individual."

Regarding the liability condition, the court agreed with the town's argument that requiring the property owner to record an acknowledgment of limited municipal liability for Mark Street Extension mirrors the requirement of [RSA 674:41](#) and was a reasonable condition based on the town's concerns for safety. The court further noted that the requirement protects the town from liability for damages resulting from the use of Mark Street Extension. However, the court said it would not express an opinion now about whether the condition would continue to be reasonable if construction of Mark Street Extension is completed.

Please be advised that the foregoing case summary is based upon a supreme court slip opinion. Slip opinions are subject to change following motions for rehearing and/or motions for reconsideration. The court may also modify the opinion without motion. The final version of the court's opinion is that which appears in the *New Hampshire Reports*.

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### **Court addresses "public interest," "spirit of the ordinance," unnecessary hardship," and "substantial justice."**

#### ***Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007)**

Here's an area variance case with something for everyone! Ignoring the rather convoluted procedural background and wrangling, the applicant proposed to construct a self-storage facility and applied for variances to place the paved access road and the storage unit structures within the 100-foot wetlands

buffer zone established in the Chichester Zoning Ordinance. The ZBA granted a variance to allow the access road but denied the variance to allow the storage unit structures. The superior court reversed the denial of the second variance and the New Hampshire Supreme Court agreed with the trial court that the ZBA should have granted the area variance. Let's explore how it all happened.

### **Public interest and spirit of the ordinance are related.**

In a classic but by no means unique example of circular reasoning to which other ZBAs have fallen prey, the Chichester ZBA found that the variance would be contrary to the public interest and to the spirit of the ordinance (two of the five variance criteria) because the project would “encroach on the wetland buffer.” Well, if the construction didn't encroach into the wetlands buffer, the landowner wouldn't need to apply for a variance, right?

To begin, the New Hampshire Supreme Court, citing the *Chester Rod and Gun Club* case that is reported below in these materials, stated that the requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance. Here are some guidelines the court cited from *Chester* that address the question of whether a variance would or would not be contrary to the public interest:

[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.** One way to ascertain whether granting the variance would violate basic zoning objectives is to examine **whether it would alter the essential character of the locality**... Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine **whether granting the variance would threaten the public health, safety or welfare.** (emphasis added)

The superior court found on the record and the supreme court agreed that:

1. The self-storage facility is a conforming commercial project in a commercial area;
2. The project did not violate the zoning ordinance's basic objectives because the project would not alter the essential character of the locality (the record showed that the properties in the area consist of a fire station, a gas station, and a telephone company); and
3. The project will not injure the health, safety, or welfare of the public because: (a) the ZBA granted a variance for access to the property, which will encroach more into the wetlands buffer than the structures would; and (b) the ZBA had before it “credible and uncontroverted evidence” from the applicant's consultant that this project will not injure the wetlands. (The project includes a closed drainage system, a detention pond, and an open drainage system – all designed to protect the wetlands, and the applicant's expert certified that the wetlands would not be adversely affected.)

Based upon the evidence in the record, the supreme court concluded that no reasonable ZBA could have concluded that the proposed project did not satisfy the public interest and spirit of the ordinance factors.

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### **Unnecessary hardship – two factors.**

#### 1. Special Conditions of the Property

In considering the first prong or factor of the *Boccia* test for unnecessary hardship for an area variance, the *Malachy Glen* court stated flatly (quoting from *Garrison v. Town of Henniker*, a USE variance case reported above in these materials) that “Special conditions requires that the applicant demonstrate

that its property is unique in its surroundings.”

The court noted that nearly 65% of the property consists of wetlands or the 100-foot wetlands buffer, and that the configuration of the wetlands further reduces the buildable area. The court found that this evidence was sufficient to show that “special conditions” exist on the property that satisfy the first factor for an area variance.

## 2. Other Reasonably Feasible Methods

Under the second prong or factor for an area variance, the applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use without the variance. That analysis includes a consideration of whether the area variance is required to avoid an undue financial burden on the applicant, which includes examination of the relative expense of alternative methods. The court further explained this requirement as follows:

If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost prohibitive. Under this factor, **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.**

The supreme court had no trouble agreeing with the trial court that absent the variance, *Malachy Glen* “would have to reduce its project by more than 50% and that this would result in financial hardship.” Thus, there was no other reasonably feasible method of effectuating the proposed use without the area variance.

### **Substantial justice.**

The court quoted with approval Attorney Peter Loughlin’s formulation of the squishy “substantial justice” criteria, that “any loss to the individual that is not outweighed by a gain to the general public is an injustice.” The court also noted that in an earlier case, “we also looked at whether the proposed development was consistent with the area’s present use.” Combining these elements, the New Hampshire Supreme Court quoted the superior court’s decision on this point with approval:

[T]he project is a storage facility in a commercial area that poses no further threat to the wetlands in the area. Since the project is appropriate for the area and does not harm its abutters or the nearby wetlands, the general public will realize no appreciable gain from denying this variance.

The supreme court summed up the “substantial justice” inquiry by noting that “there was uncontroverted evidence that the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district. Accordingly, the trial court did not err in finding the plaintiff had established [the substantial justice] factor.”

From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Conference.

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## **Land use boards can reconsider their decisions.**

### ***74 Cox Street, LLC v. City of Nashua*, 156 N.H. 228 (2007)**

In a decision issued on September 21, 2007, the New Hampshire Supreme Court ruled that land use boards have the inherent authority to reconsider their decisions within the statutory time period for appeal to the superior court. Although the decision concerned the Nashua ZBA, the breadth of the court’s reasoning logically extends this authority to reconsider decisions to all land use boards.

In *74 Cox Street, LLC*, the Nashua ZBA had granted a variance in September of 2005, and aggrieved abutters filed a timely motion for rehearing. On December 6, 2005, the Nashua ZBA denied the rehearing motion. On December 13, 2005, the Nashua ZBA received a letter from aggrieved abutters complaining that the Board had not received documents that accompanied their original motion for rehearing, and they asked the ZBA to reconsider its decision. At its meeting on December 13, 2005, the ZBA voted to reconsider the denial of the motion for rehearing and scheduled a hearing for January 10, 2006 where the ZBA would consider whether to grant or deny the original motion for rehearing. In effect, the ZBA revived the original motion for rehearing. At its meeting of January 10, 2006, the ZBA voted to grant the motion for rehearing and scheduled a date for the rehearing hearing. Before that rehearing hearing could be held, the party that had been originally granted the variance appealed to the superior court.

The New Hampshire Supreme Court held that it was proper for the Nashua ZBA to reconsider its decision because it had acted to grant the reconsideration request before the 30 day appeal period had expired. In so doing, the court again reaffirmed that a local land use board should have the first opportunity to correct any errors in its decisions before any appeal is heard in the superior court.

Practice pointers:

1. The ability to reconsider a decision must be exercised before the statutory appeal period has run. For a ZBA, that means within the 30 days after the day of the ZBA's decision on the motion for rehearing. For the Planning Board that means within 30 days from the date the Board approved or denied a plat or plan.
2. The ZBA should adopt a bylaw prescribing the period of time when a motion to reconsider can be filed. The Planning Board could either adopt a bylaw or insert a reconsideration provision in the subdivision and site plan regulations.

From Municipal Law Lecture #3, Fall 2007, "Legal Issues for Land Use Board Members," Edmund J. Boutin, Esq., Boutin & Altieri, PLLC and Stephen C. Buckley, Esq., Hodes, Buckley, McGrath & LeFevre, PA.

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***Naser*, use of conservation easement space in yield plan, and analysis of the "public interest" and "spirit of the ordinance" criteria.**

In *Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment*, 157 N.H. 322 (2008), the supreme court affirmed in part, reversed in part, and remanded the trial court's decision which upheld the ZBA. The ZBA decision denied a variance and also found that the open space subdivision application did not comply with the zoning ordinance. At issue was the applicant's usage in its yield plan of approximately fifty acres previously burdened by a conservation easement given to the town. The planning board had determined that this usage was improper, and the applicant appealed that decision to the ZBA and applied for a variance to allow the usage in the yield plan.

In first analyzing the yield plan issue, the supreme court looked to the zoning ordinance's definitions of "buildable area" and "yield plan:" respectively, "the area of a site that does not include slopes of 25% or more, submerged areas, utility right-of-ways, wetlands and their buffers" and "a plan submitted... showing a feasible conventional subdivision under the requirements of the specific zoning district..." The court agreed with the town that under these definitions, the yield plan showing development of lots within the Conservation Easement Area was neither "feasible" nor "realistic"

since such land could not be developed. Thus, the court found that there was no error in finding that the yield plan did not comply with the ordinance.

However, in examining the denial of the variance, the supreme court noted that the ZBA found that the applicant failed to meet all but the “diminution in value” criterion and that the trial court focused only upon the “public interest” and “spirit of the ordinance” criteria. Relying heavily on its *Malachy Glen* decision, the court looked to the objectives listed under the relevant portion of the zoning ordinance, which included conservation of agricultural and forestlands, maintenance of rural character, assurance of permanent open space and encouragement of less sprawling development.

Since the applicant was seeking to develop 14 lots on the remaining 27 acres, the court stated that “We fail to see how permitting the plaintiff to use the conservation land in this manner would unduly, and in a marked degree *conflict* with the ordinance” (citing *Malachy Glen*, 155 N.H. at 105 (quotations omitted; emphasis added)). The court continued by holding “as a matter of law, that this in no way *conflicts* with the ordinance’s basic zoning objectives to conserve and preserve open space.” Thus, the trial court’s decision on the variance was reversed and remanded for consideration of the unnecessary hardship and substantial justice criteria.

Note two additional points of import in this case: (1) the supreme court effectively merged the “public interest” and “spirit of the ordinance” criteria into one discussion and implicitly found that these two prongs had been met (since they were not the subject of the remand); and (2) the court did not state whether this was a “use” or “area” variance. This first point could be viewed as the continuation of a trend started with *Chester Rod & Gun Club*, supra. Indeed, in one recent “3JX” decision, (i.e., one decided by a panel of three justices and thereby not considered “binding precedent”) Justices Dalianis, Duggan and Galway remanded a case back to the ZBA in part because the board found that the request did not conflict with the public interest so that it “could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance.” *Zannini v. Town of Atkinson*, (Docket No. 2006-0806; issued July 20, 2007)

From *The Five Variance Criteria in the 21st Century*, Municipal Law Lecture Series, 2009, by Cordell A. Johnston, Esq., New Hampshire Municipal Association and Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC.

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### ***Nine A*, area and use variances associated with replacement of non-conforming use.**

In *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 (2008), the supreme court upheld the denial of both area and use variances for a lakefront development. The parcel in question totaled approximately 86 acres bifurcated by Route 9A: six acres bordering the lake in the Spofford Lake Overlay District (which allows single family dwellings only and imposes two-acre minimum lot size and building and impermeable coverage limitations), and 80 acres in the Residential District (which allows duplexes and cluster developments). The applicant sought various area and use variances to develop the six acres into either seven single-family lots (with the 80 acres remaining undeveloped) or a condominium cluster development of seven detached homes (together with three duplexes on 24 of the 80 acres). In either case, the applicant argued that it was benefiting the area by removing the vacant, non-conforming 90,000 square foot rehabilitation facility on the six-acre parcel.

In affirming the denials, the supreme court noted with favor the lower court’s finding that the number of pre-existing, nonconforming lots around the lake was not a basis for bypassing the zoning ordinance requirements. Additionally, the court stated that the spirit of the ordinance was to “limit density and address issues of over-development and overcrowding on the lake.” Once again, the court

relied heavily upon its decision in *Malachy Glen* and stated that the factors of “alter the essential character of the locality” or “threaten public health, safety or welfare” are not exclusive. In combining its analysis of the “public interest” and “spirit of the ordinance” criteria, the court addressed the applicant’s argument that its replacement of a nonconforming use with a “less intensive, more conforming use” is consistent with the public interest and spirit of the ordinance: “We recognize that there may be situations where sufficient evidence exists for a zoning board to find that the spirit of the ordinance is not violated when a party seeks to replace a nonconforming use with another nonconforming use that would not substantially enlarge or extend the present use.” However, this was not such a case. The court also noted (with an erroneous reading that *Malachy Glen* did not involve a change in the ordinance) that the town had the ability to change its ordinance to take the current character of the neighborhood into account, including the unique natural resource of the lake.

From *The Five Variance Criteria in the 21st Century*, Municipal Law Lecture Series, 2009, by Cordell A. Johnston, Esq., New Hampshire Municipal Association and Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC.

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### ***Daniels* and the impact of the Telecommunications Act on use and area variances.**

In *Daniels v. Londonderry*, 157 N.H. 519 (2008), the supreme court upheld the grant of use and area variances for the construction of a cell tower on a 13-acre parcel in the town’s agricultural-residential zone. Public hearings included testimony from the applicant’s attorney, project manager, site acquisition specialist, two radio frequency engineers (as well as the ZBA’s own radio frequency engineer) concerning the necessity of the tower to fill a gap in coverage, as well as two competing property appraisers. Thereafter, the ZBA granted the three variances with conditions including placement of the tower on the site, placement of the driveway, and maintenance of the existing tree canopy.

The court rejected the abutters’ contentions that the ZBA unlawfully and unreasonably allowed the Telecommunications Act of 1996 (“the TCA”) to preempt its own findings regarding the statutory criteria. The supreme court noted that the ZBA correctly treated the TCA as an “umbrella” that preempts local law under certain circumstances but which still requires the application of the five variance criteria in this instance. The court commented that the applicant had shown that the unnecessary hardship resulting from specific conditions of the property, since it was this property that filled the significant gap in coverage: “that there are no feasible alternatives to the proposed site may also make it unique.” Additionally, the court found no error in the trial court’s failure to explicitly address each of the *Simplex* factors in light of the “generalized conclusions applicable to these factors.”

Concerning the “diminution in value” criterion, the court held that the ZBA is “not bound to accept the conclusion” of the tower company’s site specific impact study or of any witness (but the court did not specifically address its contrary ruling in *Malachy Glen* where the uncontroverted evidence of the expert was erroneously ignored by the board). Rather, the court looked at the “substantial evidence” on property values tendered in the form of numerous studies, testimony of at least one expert, “the lack of abatement requests in comparable areas,” and the members’ own knowledge of the area and personal observations to uphold the decision. Finally, in one paragraph, the court addressed the remaining criteria relying heavily on the fact that this tower would fill the existing coverage gap.

From *The Five Variance Criteria in the 21st Century*, Municipal Law Lecture Series, 2009, by Cordell A. Johnston, Esq., New Hampshire Municipal Association and Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC.

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### ***Farrar*, unnecessary hardship for mixed use and “substantial justice.”**

The court’s most recent analysis of the variance criteria prior to these materials going to press is *Farrar v. City of Keene*, No. 2008-500, N.H. (May 7, 2009). Here, the city’s ZBA granted both use and area variances to allow for the mixed residential and office usage of a historic 7000 sq. ft. single-family home located on a 0.44-acre lot in the city’s office district, which abutted the central business district. The use variance was needed since the district allowed both multi-family and commercial offices, but did not clearly allow the proposed mixed use. The area variance was to address a lower number of on-site parking spaces based on that configuration. (The ordinance would have required 23, the applicant wanted only 10. The ZBA granted the variance with a requirement to create 14 spaces.)

The abutters appealed. The superior court affirmed the area variance but vacated the use variance based on a finding that the applicant had failed to submit sufficient evidence on the first prong of the *Simplex* unnecessary hardship criteria - that the zoning restriction as applied interferes with the applicant’s reasonable use of the property considering its unique setting in the environment. The applicant and the city appealed, contending that the trial court had overlooked the evidence - particularly the large size of the house and the lot size compared with the number of available parking spaces and the usual layout of the district - and that the trial court did not give sufficient deference to the ZBA and its members’ personal knowledge. The abutters in turn argued that the applicant’s financial hardship in retaining the property as a single-family residence was personal, unrelated to any unique characteristic of the property, and unsupported by any “actual proof.”

In addressing the first prong of the *Simplex* unnecessary hardship criteria, the supreme court noted that this issue is “the critical inquiry” for determining whether such hardship exists. The court pointed to the *Harrington v. Warner* decision for several “non-dispositive factors:” first, whether the zoning restriction as applied interferes with the owner’s reasonable use of the property; second, whether the hardship is the result of the unique setting of the property; and third, whether the proposed use would alter the essential character of the neighborhood. The supreme court reviewed the evidence, including the size of the lot, the size of the house, the allowed uses in the district, and the fact that the adjacent historic homes had been turned into professional offices with their commensurate higher traffic volume than the proposed use, and held that “the ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, the zoning restriction still interferes with [the applicant]’s reasonable use of the property as his residence.” The court noted that the applicant’s minimal evidence of a reasonable return on his investment was sufficient since that issue was only one of the nondispositive factors for the ZBA to consider. In closing its analysis of this first prong of the *Simplex* unnecessary hardship test, the court acknowledged that this is a “close case” and that in such instances “where some evidence in the record supports the ZBA’s decision, the superior court must afford deference to the ZBA” whose members have knowledge and understanding of the area.

In addressing the second prong of the *Simplex* unnecessary hardship test, the supreme court affirmed the lower court’s reasoning that the criteria had been met since the desired mixed use was allowed in the adjoining district and that the variance would not alter the composition of the neighborhood. As to the third prong - that the variance would not injure the public or private rights of others - the supreme court again noted that “this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance” - namely that the variance would not be contrary to the public interest and the variance is consistent with the spirit of the ordinance. In making its analysis of these issues, the court looked to the purpose statement in the city’s zoning ordinance for the office district, which included references to “low intensity” uses and serving as a buffer between higher density commercial areas and lower density residential areas. The court upheld the lower court’s

finding that the proposed use would be of lower intensity than a full-office use allowed in the district, that such office use would have more traffic, and that the abutters' concerns were over a commercial use of the property.

Finally, the supreme court addressed the "substantial justice" criteria and cited the *Malachy Glen* decision, above, for the standard that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (1) the use would not alter the character of the neighborhood, injure the rights of others or undermine public interest; (2) the applicant currently resides at the property and wished to remain; (3) the applicant had made substantial renovations to the historic structure; (4) the structure would not be economically sustained as a single family residence; (5) the residential appearance of the building would not change; (6) adjoining buildings are currently offices; and (7) if the property was used entirely as offices, the traffic and intensity of usage would be greater.

From *The Five Variance Criteria in the 21st Century*, Municipal Law Lecture Series, 2009, by Cordell A. Johnston, Esq., New Hampshire Municipal Association and Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC.

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### **Appeal period from planning board to ZBA begins to run at conditional approval.**

#### ***Atwater v. Plainfield*, 160 N.H. 503 (2010)**

Occasionally, during subdivision or site plan review, a planning board makes a decision "based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance..." Appeals from such decisions must be taken to the zoning board of adjustment. This opinion and *Saunders v. Kingston* (discussed below) both addressed the time at which the appeal period from a planning board to a ZBA begins to run.

In this case, the planning board conditionally approved an application for site plan review. Final approval was granted 14 days later. The petitioners filed an appeal to the ZBA 28 days after the original conditional approval had been issued. The ZBA denied the appeal, finding that it had been filed 13 days late. The superior court upheld this decision and the petitioners appealed to the supreme court. The supreme court agreed, holding that the 15-day appeal period found in the local zoning ordinance began to run as soon as the conditional approval was issued.

The confusion stemmed from the fact that there are two avenues of appeal from a decision of a planning board with two different appeal periods, depending upon the nature of the claim. One appeal is directly to the superior court under RSA 677:15, I, for "any decision of the planning board concerning a plat or subdivision..." That appeal period is 30 days from the issuance of the planning board's decision, and only begins to run after the planning board has issued a final approval. If the board issues a conditional approval, an appeal to the superior court cannot be filed until the conditional approval is converted into a final approval. (The petitioners in this case had filed such an appeal, and that case was resolved in an earlier opinion found at 156 N.H. 265 [2007].)

The other course of appeal, which was under consideration in this case, is to the ZBA under RSA 676:5, III. These appeals must be filed "within a reasonable time, as provided by the rules of the board..." RSA 676:5, I.

In this case, the zoning ordinance provided that the appeal period to the ZBA was 15 days. The court was asked to determine when it began to run. The petitioners argued this appeal was just like a direct

appeal to the superior court under [RSA 677:15, I](#), and that the appeal period did not begin to run until the planning board issued its final approval. The court disagreed, noting there was no indication in previous cases or in the statute that the parties must wait for final approval of a site plan before they bring an appeal to the ZBA challenging the planning board's interpretation or application of a zoning ordinance. On the contrary, "allowing or requiring parties to wait until a final vote of the board before challenging zoning determinations would be inefficient, and would impose significant hardship on applicants seeking site plan approval. As a practical matter, it makes far more sense to resolve the question of whether a planning board's interpretation or application of the zoning ordinance is accurate as early as possible in the application review process."

From *New Hampshire Town and City*, September 2010.

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## **Determining whether non-abutter has standing to appeal administrative decision to the ZBA.**

### ***Golf Course Investors of NH, LLC v. Jaffrey*, 161 N.H. 675 (2011)**

In order to appeal an administrative decision to the zoning board of adjustment, a person must have standing to appeal; that is to say, the person must be "aggrieved" by that decision (RSA 676:5, I). This case examines the factors to be considered when determining whether applicants have standing as "persons aggrieved" for purposes of an appeal to the ZBA. The ZBA cannot exercise jurisdiction over an appeal unless it finds that the appealing party is aggrieved according to RSA 676:5, I.

The property owner, Golf Course Investors of NH (GCI) sought subdivision and site plan approval to allow conversion of an existing building into a four-unit condominium with two detached garages. The planning board voted that a special exception was not required to allow the proposed four-unit condominium.

Seven residents appealed the planning board's decision to the ZBA, contending that the planning board allowed a smaller lot than was required by the zoning ordinance and, also, that a special exception was required. None of the seven applicants was an abutter as defined by [RSA 672:3](#). At the ZBA public hearing, the applicants did not address the issue of how their property would be affected by the proposal. Instead, they discussed their concerns that the planning board had erroneously allowed "too much housing, being four condominium units, on too little land, being 1.75 acres, within the rural/mountain zone." In fact, they were actually in favor of the project, with the exception of the size of the proposed lot. During deliberations, it was noted that none of the applicants qualified as abutters and that only one had even attended the planning board hearing on the matter now being appealed. Nevertheless, the ZBA ultimately voted that the applicants were "aggrieved" and granted the appeal, finding that the special exception was required to allow the multi-family use. GCI appealed the ZBA's decision to superior court. The trial court ruled that the residents lacked standing to bring their appeal before the ZBA and vacated the ZBA's decision. The town appealed to the supreme court.

To establish standing, an appealing party must show "some direct, definite interest in the outcome of the action or proceeding." Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party's property to the property for which approval is sought; (2) the type of change being proposed; (3) the immediacy of the injury claimed; and (4) the appealing party's participation in the administrative hearings (*Weeks Restaurant Corp. v. Dover*, 119 N.H. 541 [1979]). Applying the four factors to the residents, the court found that the residents failed to demonstrate that they were aggrieved. With regard to proximity, the residents' properties ranged from 450 feet to 2,400 feet from the GCI property. The type of change being

proposed was not dramatic in that the footprint of the building was not being changed, and, importantly, the residents expressed their approval of the improvements proposed for the building. With regard to the immediacy of the injury claimed, the residents did not identify any injury they might face as a result of the planning board's approval. And only one of the residents even attended the planning board proceedings, and that participation was minimal.

This case illustrates the importance of findings of facts. The court is obligated to accept the ZBA's factual findings as prima facie lawful and reasonable, "except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it that said order or decision is unreasonable." Here, the court pointed out that the ZBA did not include any discussion of how they arrived at the conclusion that the residents were "aggrieved" and, thus, the court was not obligated to defer to the ZBA's findings.

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### **Doctrine of expansion of nonconforming use not applicable to use by special exception.**

#### **Applicant may ask for a variance from one or more special exception requirements.**

#### ***1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 (2011)**

A property owner was granted a special exception and a variance to use some of his existing building as office space and the remaining part of the building as storage space. Nearly 10 years later, he sought site plan approval to utilize the entire building for office space. The planning board determined that the property owner would need ZBA approval to increase the space used for offices. The property owner appealed the planning board decision to the ZBA, claiming that the use of the building entirely as office space was within the original ZBA approvals or, if not, it was a permissible expansion of a nonconforming use.

The ZBA determined that its previous decision was specific concerning the use of part of the building as storage space, and any change from that would require additional approvals from the ZBA after notice and public hearing. The court upheld the ZBA's determination, pointing out that although the original ZBA approval did not contain an express limitation on the square footage to be used for office space, representations made at the public hearing, and recorded in the meeting minutes, show that the applicant intended to use only a certain area of the building for office space.

It is important to point out that the decisions by the ZBA and planning board were made prior to the amendment of [RSA 676:3, II](#), which now requires that all conditions of approval be included in the written decision. Where an application does not specify the scope of a proposed project, it is risky for a land use board to rely on statements at the public hearing. Limitations should be made clear in the written decision.

Next, the court examined the applicant's contention that the ZBA should apply the doctrine of expansion of nonconforming uses to its plan to expand the use of office space within the building, which was originally permitted by special exception. Valid nonconforming uses are permitted to expand to some extent. The court pointed out that it has distinguished between nonconforming uses and special exceptions, noting that "the review standard appropriate to the scope of variances or nonconforming uses" does not apply to special exceptions. The court rejected the applicant's claim, ruling that the doctrine of expansion of nonconforming uses does not apply to uses by special exception.

From *New Hampshire Town and City*, June 2011.

## Court examines the new hardship standard.

### *Harborside Associates, L.P. v Parade Residence Hotel, LLC*, 162 N.H. 508 (2011)

On September 22, 2011, the supreme court issued its opinion in *Harborside Associates, L.P. v Parade Residence Hotel, LLC*, 162 N.H. 508 (No. 201-782). Herein the court, for nearly the first time, examines a variance case applying the new hardship standard codified under SB147. The court also provides a useful discussion of the “spirit of the ordinance,” “public interest,” and “substantial justice” criteria.

In *Harborside*, Parade Residence Hotel (“Parade”) obtained variances from the Portsmouth Zoning Board of Adjustment to install two parapet and two marquee signs on its hotel and conference center. Neither type of sign is permitted in the zoning district in which Parade’s hotel is located. On appeal, the trial court upheld the ZBA’s grant of a variance for the marquee signs. The trial court, however, reversed the parapet sign variances on the basis that “[t]he only apparent benefit to the public” from having the parapet signs installed “would be an ability to identify [Parade’s] property from far away.” This purpose, the trial court stated, “does not outweigh the clear provision of the ordinance.” Both parties appealed to the supreme court seeking a partial reversal of the trial court’s decision.

In analyzing the trial court’s reversal of the parapet sign variances, the court interpreted the trial court’s ruling that “[t]he only apparent benefit to the public would be an ability to identify [Parade’s] property from far away; however that purpose does not outweigh the clear provision of the ordinance...” to mean that the trial court had found that the parapet variances do not meet the “spirit of the ordinance,” “public interest,” and “substantial justice” criteria.

The court noted that for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance’s “basic zoning objectives,” and that there are two methods for ascertaining whether granting a variance would do this. One way is to examine whether granting the variance would “alter the essential character of the neighborhood,” and the other “is to examine whether granting the variance would threaten the public health, safety or welfare.” The trial court, however, erred by employing the wrong test: eschewing the “essential character of the neighborhood” and “threat to public safety” analysis, the trial court instead examined whether allowing the signs would serve the public interest and weighed that against the “clear provision of the zoning ordinance.”

From *Granite State Planner*, Timothy Corwin, Fall 2011.

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## **Applicant for a variance need not affirmatively plead the threshold question of whether variance is necessary; trial court must consider it when ruling on variance issues.**

### *Stephen Bartlett & a. v. City of Manchester*, 164 N.H. 634 (2013)

This case clarifies that a superior court may rule on whether a variance is necessary at all, even if the applicant doesn’t ask the court that question. However, this may only be done if the record developed at the ZBA level contains enough facts on which the court can base its decision.

The applicant, a church (“Brookside”), sought a permit to allow a “work-based, self-help organization” to occupy a portion of the carriage house on the property. The City denied the application saying the proposed use violated a portion of the City’s zoning ordinance. The denial letter noted that further action on the application could only be taken under [RSA 674:33](#). (This is the statute giving the Zoning Board of Adjustment the authority to grant variances from the zoning ordinance.) Brookside applied

for a variance from the ZBA, which was granted. Bartlett, an abutter, appealed the grant of the variance to the superior court.

The superior court reviewed the ZBA's approval of the variance and found that the evidence did not support the ZBA's conclusion that Brookside had satisfied all five of the criteria necessary to obtain a variance. In particular, the court ruled the ZBA had unlawfully found that literal enforcement of the provisions of the ordinance would cause Brookside unnecessary hardship (this is the fifth criteria for a variance). RSA 674:33, I(b).

This is where it gets interesting. The superior court then went on to find that the proposed use was actually a "lawful accessory use" under the City's zoning ordinance and the common-law accessory use doctrine. Based on this finding, the court ruled that no variance had been necessary in the first place. In essence, Brookside was free to obtain its permit and go ahead with the plan. Bartlett appealed that decision to the New Hampshire Supreme Court.

The supreme court had two questions to answer. First, did the superior court have "subject matter jurisdiction" to find that the variance wasn't necessary? The applicant had never raised that issue. Second, was the proposed use a lawful accessory use?

As to the first question, the court held that the superior court did have subject matter jurisdiction to consider whether the proposed use was permitted as a matter of right as an accessory use. Unnecessary hardship may only be found if literal enforcement of the ordinance would cause such a hardship. Therefore, in deciding whether the variance application satisfied the requirement for unnecessary hardship, the court correctly determined that the superior court had to consider the permissible uses of the property under the ordinance, including the accessory use provision. As a result, the superior court could rule on the necessity of the variance even if the applicant had not raised that specific question in its appeal.

On the second question, the court found that the record before the ZBA did not include enough facts for the superior court to have decided that the proposed use was a lawful accessory use. As a result, it remanded the case back to the superior court, with orders that it be sent down to the ZBA for a further hearing on the accessory use issue. This underscores the importance of the record developed during the initial proceedings before a ZBA or planning board.

From [New Hampshire Municipal Association Court Updates](#), 2013.

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### **Filing deadlines that fall on a weekend or legal holiday.**

#### ***Steve Trefethen & a. v. Town of Derry*, 164 N.H. 754 (2013)**

The Derry ZBA granted a special exception and the abutters, Trefethen, filed a motion for rehearing which the ZBA denied on January 6, 2011. Trefethen then filed an appeal in superior court on Monday, February 7, 2011, 32 days after the date the ZBA denied the motion for rehearing. The superior court rejected the appeal citing lack of jurisdiction because it was filed 32 days after the action of the ZBA, 2 days beyond the 30 day window set forth in RSA 677:4. Trefethen appealed to the supreme court.

The supreme court reversed the superior court and remanded the case back to the ZBA. In doing so, the court relied on the plain language of [RSA 21:35, II](#) which states, "If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day." Since the 30

day window for filing an appeal fell on Saturday, February 5th, an appeal filed on the next business day, Monday, February 7th, was timely filed.

The town had relied, in part, on *Radziejewicz v. Town of Hudson*, 159 N.H. 313 [2009], where the supreme court held that 30 days was 30 days as far as RSA 677:4 was concerned and if the 30th day fell on a weekend or holiday, there was no extension to the next business day. Radziejewicz had relied on superior court Rule 12(l) which the court said did not apply to appeals under RSA 677:4. “*The trial court ruled that notwithstanding Rule 12(1), the plain language of RSA 677:4 does not allow for filing an appeal beyond thirty days when the thirtieth day falls on a Saturday. We agree.*” The second paragraph of RSA 21:35 was added by the legislature in 2008 and became effective on January 1, 2009, well after Radziejewicz had filed their appeal.

The lesson: if the last day for “filing documents or paying fees” falls on a Saturday, Sunday or legal holiday, they will be deemed timely filed if received by the next business day.

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**Because the ZBA does not have authority to adjudicate an equitable estoppel claim, administrative remedies need not be exhausted before bringing suit.**

***Daryl Dembiec & a. v. Town of Holderness*, 167 N.H. 130 (2014)**

The New Hampshire Supreme Court reversed the decision of the superior court and held that the petitioners were not required to exhaust administrative remedies before bringing their equitable estoppel claim in court.

Daryl and Mary Dembiec obtained a permit from the Town of Holderness to build a single-family home on their property which, at the time, consisted only of a two-story boathouse equipped with living quarters. When the home was substantially completed, the compliance officer informed the Dembiecs that he would not issue a certificate of compliance because the boathouse contained a dwelling unit, and the zoning ordinance allowed only one dwelling per lot. The compliance officer informed them that they would either need to remove the plumbing from the boathouse or obtain a variance.

The Dembiecs applied to the ZBA for an equitable waiver, which was originally granted and then denied on rehearing. The Dembiecs also applied for a variance, which was denied. At the same time, they filed suit in superior court seeking a declaration that the Town was estopped from enforcing the one dwelling unit-per-lot zoning restriction because the Town had previously issued a building permit. The Town moved to dismiss on the grounds that the Dembiecs had not raised this argument below and had failed to exhaust their administrative remedies. The superior court dismissed.

The Dembiecs appealed the New Hampshire Supreme Court. The court stated that the rule regarding exhaustion of administrative remedies was flexible and does not prohibit judicial relief in two circumstances. First, a petitioner does not need to exhaust administrative remedies and may bring a declaratory judgment action to challenge the decisions of municipal officers and boards when the action raises a question that is peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available. Such a situation often occurs where the constitutionality or validity of an ordinance is in question. Second, where further appeal would be useless – including where the administrative board does not have the authority to resolve the issues presented – exhaustion of administrative remedies is not necessary.

The court held that exhaustion of administrative remedies was not required because the ZBA did not have the authority to take the requested action and, therefore, further administrative action was

useless. A ZBA's authority is conferred by statute, which gives a ZBA authority to hear appeals from administrative decisions and to grant variances, special exceptions, and equitable waivers where particular statutory prerequisites are met. However, the statute does not give a ZBA general equitable jurisdiction. Therefore, the Holderness ZBA did not have the authority to adjudicate an equitable estoppel claim. Furthermore, this was not a question of construction, interpretation, or application of the zoning ordinance or of the compliance officer's refusal to issue the certificate of compliance: there was no dispute that the ordinance prohibited more than one dwelling unit on a lot. Instead, the Dembiecs claimed that even though the compliance officer correctly interpreted the zoning ordinance, it was inequitable for him to decline to issue a certificate of compliance because the Dembiecs reasonably relied upon the building permit issued by the Town. Therefore, their claim was an entirely new claim for relief and one which the ZBA was not empowered to hear. Consequently, the case was sent back to the superior court.

(From [New Hampshire Municipal Association Court Updates](#), August 2015.)

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### **ZBA did not exceed authority by “converting” appeal.**

#### ***Accurate Transport, Inc. v. Town of Derry*, 168 N.H. 108 (2015)**

Accurate Transport sought to operate a Dumpster Depot in the Town's Industrial III zoning district. On June 19, 2013, the planning board voted to accept jurisdiction of the site plan application, although the motion to approve the plan was continued until August 21. Prior to the June 19 hearing, a technical review committee had reviewed the proposed site plan, and the code enforcement officer, a member of the committee, had expressed his opinion at that time that the proposed use of the property was permitted.

On August 21, the application was approved and a written decision was issued on August 28. On September 13, an abutter filed an administrative appeal with the ZBA. The stated purpose of the appeal was to demonstrate that the code enforcement officer's decision that the use was permitted by zoning was in error. On October 31, the ZBA determined that an appeal from the code enforcement officer's decision was untimely. However, the ZBA determined that the substance of the appeal contained questions about the planning board's interpretation of the zoning ordinance – an appeal that would be timely – and therefore “converted” it to an appeal of the planning board's decision. In deciding that appeal on November 7, the ZBA determined that the planning board had erred and, therefore, Accurate Transport could not operate the Dumpster Depot. On appeal to the superior court, the judge ultimately determined that the appeal was meant to challenge the code enforcement officer's determination of June 19, which meant, pursuant to local ordinance, that the abutter was required to appeal within 20 days. Therefore, the judge decided that the appeal was untimely.

On appeal to the New Hampshire Supreme Court, the court first determined that the ZBA did have the power to “convert” the abutter's appeal of the code enforcement officer's decision to an appeal of the planning board's decision. [RSA 674:33](#) gives the ZBA broad authority to hear and decide appeals on subjects within its jurisdiction. Despite the fact that the abutter's stated purpose was to appeal the code enforcement officer's decision, the body of the appeal referenced and challenged the planning board's determinations on June 19 and August 21 as well. Because such an appeal is within the ZBA's jurisdiction, it had the ability to consider it as an appeal of the planning board's decision, including making a determination of whether the proposed use was permitted under any zoning provision, not just the provision referenced in the appeal. It was immaterial that the ZBA does not have the explicit statutory to “convert” an appeal.

Second, the court determined that the abutter's appeal was timely. Because the ZBA determined that the abutter's appeal was actually from the planning board's decision on August 21, the abutter had 20 days, per town ordinance, from the written decision, which was issued on August 28. Relying on [RSA 676:5](#) and the case of *Atwater v. Town of Plainfield*, 160 N.H. 503 (2010), the court determined that the June 19 decision was not an appealable decision of the planning board under RSA 676:5, III because the board did not make a decision interpreting zoning at that hearing. Instead, the June 19 decision was merely a procedural decision to accept jurisdiction. Although there was some discussion about whether the proposed use was allowed, the ultimate discussion and decision was tabled until August 21, at which time the planning board voted to approve the application. Thus, when the August 28 decision was issued, the abutter had 20 days to appeal. Furthermore, the court stated that when the planning board accepted jurisdiction on June 19, it did not also "accept" the code enforcement officer's "decision" that the use was permitted. The code enforcement officer never made an administrative decision; he instead simply gave his opinion, as part of the technical review committee, that the use would comply with zoning.

Finally the court did not review the validity of the ZBA's decision because the petitioners did not properly challenge the merits of the ZBA's decision.

(From [New Hampshire Municipal Association Court Updates](#), 2015.)

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## **One Bite At the Apple Applies to Planning Board Decisions**

### ***CBDA Development, LLC v. Town of Thornton*, 168 N.H. 715 (2016)**

In 2012, the Thornton Planning Board denied CBDA's site plan application for a recreational campground. In 2013, CBDA submitted another application, and, although the second application addressed some of the board's concerns from the first site plan, not all issues had been resolved. Therefore, the board determined, under the Fisher doctrine, that it could not consider the subsequent application because it did not materially differ in nature and degree from the first application.

The planning board was citing the doctrine set forth in the case of *Fisher v. Dover*, 120 N.H. 187 (1980), where the Court held that a board of adjustment cannot lawfully reach the merits of a subsequent application unless there is a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application. This so-called "one bite at the apple" rule is intended to preserve the finality of zoning board decisions, protect the integrity of the zoning plan, and prevent an undue burden on other property owners.

Here, the Court answered a long-awaited question: whether this doctrine applies to successive site plan applications before planning boards. The Court determined that the policy rationales of *Fisher* applied equally to zoning boards and planning boards. Planning boards, like zoning boards, engage in quasi-judicial decision-making when hearing and deciding on applications; therefore, the need for finality and certainty of the administrative decision is the same. In addition, because planning boards have the ability to attach conditions to site plan approvals, planning board decisions similarly affect the development of municipalities. Thus, the community does rely on the planning board to uphold the integrity of the zoning plan. Furthermore, the fact that planning boards are required by statute to consider "completed" applications does not prohibit application of the Fisher doctrine. RSA 676:4, I(b) imposes a procedural requirement that planning boards to specify by regulation what constitutes a "complete" before it will consider the merits of an application. On the other hand, the question of material change in circumstances or in nature and degree of use is a fact-sensitive inquiry that

As a final matter, the Court upheld the planning board's determination that CBDA's modified application was not materially different than its first. Although CBDA had addressed some of the board's concerns, the subsequent application did not resolve one of the board's principal reasons for denial: the permanency and immobility of the homes in the proposed park. Therefore, the record supported the board's refusal to consider CBDA's second application.

Practice Pointer: This means that before accepting a subsequent application, the planning board, like the zoning board, must determine whether there has been a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application.

(From [New Hampshire Municipal Association Court Updates](#), 2016.)

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## **Denial of Electronic Sign to Church Did Not Infringe on Religious Liberty**

### ***Signs for Jesus v. Town of Pembroke*, 230 F.Supp.3d 49 (2017)**

Hillside Baptist Church and Signs for Jesus were denied a permit to install an electronic sign on the Church's property in Pembroke and they brought an action against the Town alleging violations of the United States Constitution, the New Hampshire Constitution, and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The US District Court in Concord concluded that (1) the Town's decision to deny the Church's request for an electronic sign had nothing to do with either religion or the content of the Church's speech, (2) the decision served the Town's important governmental interests in aesthetics and traffic safety in a manner that was narrowly tailored to serve those interests, (3) the decision does not unreasonably burden the Church's right to practice its religious beliefs, to practice free speech, or to use its property and finally, that the Town has not treated the Church differently from any other similarly situated landowner.

In reaching these legal conclusions the Court said the Town's regulation of electronic signs did not substantially burden more speech than necessary, especially because the Church could communicate its religious messages using a manually changeable sign.

Considering these conclusions, the court found that the Church's contention that it should be free from the effect of the Town's electronic sign ordinance amounts to a demand, not for a level playing field, but instead for a right to be treated differently from all other private landowners. Neither the state and federal constitutions nor RLUIPA requires this result.

(From [New Hampshire Municipal Association Court Updates](#), 2017.)

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## **Non-conforming Use Limited to Uses Maintained When the Non-conformity was Established**

### ***Dartmouth Corp. of Alpha Delta v. Town of Hanover*, New Hampshire Supreme Court No. 2016-0304 (April 11, 2017)**

A non-conforming use has the burden to prove it was being operated in a manner inconsistent with a subsequently adopted zoning ordinance. The burden of proving the non-conforming manner of operation is on the party claiming the non-conforming status. Thus, once the Alpha Delta fraternity was decertified by Dartmouth College the burden was on Alpha Delta to prove it was a pre-existing

student housing use that was never operated in conjunction with an institutional use such as Dartmouth College.

The Alpha Delta fraternity had been continuously operated as a fraternity/student housing use in conjunction with Dartmouth College from 1846 to the present. The fraternity's manner of non-conforming operation was always in conjunction with another institutional use. So even though the fraternity did not have to get a special exception based upon the 1976 zoning ordinance, it did have to maintain the use consistent with its non-conforming manner of operation and therefore remain in conjunction with another institutional use.

When Dartmouth College decertified the Alpha Delta fraternity as an approved student organization in April of 2015 this set the stage for purging the fraternity house as permissible student housing under the Town of Hanover Zoning Ordinance.

After Dartmouth revoked Alpha Delta's recognition of the fraternity as a student organization, the College notified the Town of Hanover that Alpha Delta was no longer affiliated with Dartmouth College. Thereafter, the Town's zoning administrator notified Alpha Delta that because the College had derecognized Alpha Delta, Alpha Delta's use of the property violated the zoning ordinance. On appeal the Hanover ZBA ruled that Alpha Delta failed to present any evidence that the fraternity ever operated in a manner which was not in conjunction with Dartmouth College prior to the adoption of that zoning requirement and therefore Alpha Delta did not sustain its burden of showing that its property is lawfully nonconforming.

The New Hampshire Superior and Supreme Courts both agreed that in order to prove that it was grandfathered from the 'in conjunction with' requirement, Alpha Delta needed to show that it operated its property in a manner that was not 'in conjunction with another institutional use' at the time the 'in conjunction with' requirement was adopted, in 1976.

Practice Pointer: In determining whether a use of land is grandfathered from a subsequently adopted zoning regulation a municipality must undertake a careful review of how the use was operated before the conflicting zoning restriction went into effect. The burden is on the party claiming the non-conforming, grandfathered status to prove the manner of operation was in conflict with a subsequently adopted zoning regulation.

(From [New Hampshire Municipal Association Court Updates](#), 2018.)

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## Variance Denial Based in Part on “Cumulative Effect” Upheld

### *Perreault v. New Hampton*, 171 N.H. 183 (2018).

The plaintiffs, the Perreaults, were denied a variance to build a permanent shed within the twenty-foot side setback of their property. The ZBA found that the slope of the property was “not . . . egregious” compared to other lots in the same area, and that it was therefore possible to build the permanent shed in a location that conformed to the setbacks. The ZBA also considered the cumulative effect of allowing such variances and found that “[t]he spirit of the ordinance, in terms of wanting to control overbuilding, is important because allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.”

The ZBA granted the plaintiffs' motion for rehearing but once again denied the variance, finding that the plaintiffs had failed to establish four out of five the criteria. Even though the plaintiffs demonstrated that other properties on the same street had received variances for storage structures

that violated the setback requirement, the ZBA found that those properties were distinguishable from the plaintiffs' property. The ZBA also determined that "[g]ranteeing the variance would be contrary to the public interest because the essential character of the neighborhood and the cumulative impact of granting this and similar variances to others in the neighborhood jeopardizes the goals of the setback requirements in the zoning ordinance," which the ZBA identified as "preventing safety issues and, in this case, overbuilding on lots." They also found that the plaintiffs had failed to meet the substantial justice and unnecessary hardship criteria. On appeal, the superior court upheld the ZBA's findings on public interest, spirit of the ordinance, and substantial justice; the judge did not address unnecessary hardship.

In part, the superior court judge determined that the ZBA had reasonably considered the cumulative effect that these types of variances would have on the area. The New Hampshire Supreme Court said that although the "cumulative effect" standard was mentioned in the case of *Bacon v. Town of Enfield* in 2004, it has never been officially adopted by the Court. However, because the plaintiffs did not object to the superior court judge's reliance on the *Bacon* case or consideration of "cumulative effect," the Court determined, without deciding, that it was a proper consideration.

Given that determination, the Court agreed that the ZBA's decision was not unreasonable or unlawful. Preventing overcrowding is a legitimate zoning purpose, as is preventing safety issues that come from overcrowding. Furthermore, the Court agreed that the aesthetic environment and the appearance of overcrowded lots are proper factors to be considered; these considerations were, in fact, underlying reasons for the setback requirement from which the plaintiffs were requesting a variance. Finally, the Court agreed that evidence that other properties had similar outbuildings did not require the ZBA to grant the variance. In fact, the ZBA had specifically found that the other outbuildings either were granted before the variance criteria were, were on lots distinguishable from the plaintiffs' lot, or were not actually within the setback.

Practice Pointer: It's important to note that The Supreme Court has not formerly adopted the "cumulative effect" standard. However, because the plaintiffs did not object to the ZBA or superior court judge considering cumulative effect, the Court also used that standard in holding that the ZBA's denial was not unreasonable or unlawful. In addition, this case gives helpful reminders about the factors that may be considered when assessing the variance criteria.

(From [New Hampshire Municipal Association Court Updates](#), 2018.)

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## **Written Findings of Fact to Support a Variance Not Required if not Requested, Provided There is Adequate Evidence in the ZBA Record**

### **Allegations of Bias Must be Raised at the Earliest Opportunity**

#### ***Rochester City Council v. Rochester Zoning Board of Adjustment*, New Hampshire Supreme Court Case No. 2017-0501 (September 7, 2018).**

The Rochester City Council objected to a use variance that was approved by the Rochester Zoning Board of Adjustment permitting the expansion of an existing manufactured housing park. In 2014 the City Council had adopted a zoning amendment that eliminated manufactured housing parks as permitted uses in the City. After that amendment went into effect, an existing manufactured housing park, Addison Estates, applied for a variance to be allowed to expand the park onto adjacent property.

In 2016 the ZBA granted that variance request, but in its written decision the Board did not explicitly address the unnecessary hardship requirement of RSA 674:33, I (b). The City Council filed a motion

for rehearing arguing it was illegal and unreasonable for the ZBA to approve a variance without clearly finding hardship. That motion for rehearing was rejected by the ZBA. On appeal to the Superior Court the City sought to expand the ZBA certified record to support an allegation of bias and conflict of interest by the ZBA Chair. The City also principally argued that the ZBA's decision was erroneous because it neither seriously considered the hardship question, nor made written findings of fact on the hardship issue.

The Superior Court ruled the ZBA record could not be expanded to address issues of bias because that question was not timely raised before the ZBA depriving the Board of the opportunity to correct any error in its proceedings. On the question of written findings on the hardship issue the Court ruled that since no request for a hardship finding was made before the ZBA, the Court's duty on appeal was to examine the record and determine whether the evidence supports the ZBA's decision. On that score the Superior Court was satisfied the ZBA could have reasonably concluded that since the subject parcel that was adjacent to the Addison Estates manufactured housing park, in light of the removal of manufacture housing parks from the list of permitted uses under the Rochester Zoning Ordinance, that this constituted a special condition making the property unique for the purposes of the variance.

On appeal the Supreme Court ruled in favor of the ZBA finding that even though the ZBA did not explicitly address unnecessary hardship in its written decision, unnecessary hardship was addressed in the variance application, and the ZBA discussed whether the applicant demonstrated unnecessary hardship. The Court also ruled that when the Superior Court reviews a ZBA decision that it finds to be unclear the court could conduct its review based upon the decision and record before it, take additional evidence, or remand the case to the ZBA for clarification. Although the trial court here could have taken additional evidence or remanded to the ZBA for clarification if it found the decision to be unclear, the Supreme Court was satisfied that it was within the discretion of the Superior Court to conduct its review based on the ZBA decision and record before it.

On the issue of taking additional evidence on the alleged bias of the ZBA Chair, the Supreme Court agreed with the trial court that the question of bias or conflict of interest was not raised in a timely fashion by the City.

Practice Pointer: When acting on a variance application a ZBA should attempt to address each of the five variance criteria found in RSA 674:33, I (b). Unless a party to the proceedings explicitly requests a ruling on each of the variance criteria, the ZBA is not required to provide a ruling on each of those requirements, provided, there is evidence in the minutes, application documents or other materials that demonstrates those issues were addressed by the ZBA. When a party has evidence of bias or conflict of interest by a ZBA member requiring disqualification that question must be promptly raised with the ZBA at the earliest possible opportunity.

(From [New Hampshire Municipal Association Court Updates](#), 2018.)

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## **Planning Boards Cannot Rely Upon Lay Opinions and Anecdotes Refuted by Uncontroverted Expert Evidence**

### **Planning Boards Cannot Supplant the Specific Regulations and Ordinances that Control the Site Plan Review Process with their Own Personal Feelings**

*Trustees of Dartmouth College v. Town of Hanover*, New Hampshire Supreme Court Case No. 2017-0595 (November 6, 2018).

Dartmouth submitted a site plan application seeking approval for the construction of a 69,860 square foot Indoor Practice Facility (IPF) located in Hanover's Institutional Zoning District (I-District). The Hanover Zoning Administrator determined that the IPF would be fully compliant with the town's zoning ordinances. Hanover's planning board staff prepared a final memorandum recommending the approval of the application with 21 conditions. Nevertheless, the planning board voted to deny the application concluding that the college's site plan application; (1) did not conform with the Hanover Master Plan, (2) negatively impacts the abutters, neighborhood and others, town services and fiscal health, (3) does not relate to the harmonious and aesthetically pleasing development of the town and its environs.

Dartmouth appealed the board's decision to the Superior Court, arguing that the regulations relied upon by the board are vague, ambiguous, and not proper standards by which to review a site plan application. The trial court, nevertheless upheld the board's decision, ruling that the regulations the board relied upon are valid. The trial court also ruled that the board did not err by basing its decision on its concerns about the project's impacts on the abutters and the town.

On appeal the NH Supreme Court focused on Dartmouth's arguments that the planning board: (1) relied upon factual claims and a rationale, not supported by the evidence or the board's deliberations; and (2) engaged in ad hoc decision-making, employing personal feelings, rather than objective or discernible facts.

In support of its decision the IPF would negatively impact abutters the planning board found the structure would block an unreasonable amount of sunlight from reaching abutting homes. Upon close examination of the certified record the Supreme Court ruled that that in rejecting a professional light and shadow casting study submitted by Dartmouth the planning board improperly rejected uncontroverted expert evidence and instead relied upon lay opinions and general information that were insufficient to refute the experts' conclusions. *Continental Paving v. Town of Litchfield*, 158 N.H. 570 (2009). Moreover, the Court also ruled that any conclusion that the IPF is not harmonious with the character and development of the neighborhood, or the town and its environs, is directly contradicted by the finding of the Zoning Administrator the IPF was fully compliant with the town's zoning ordinance.

The planning board certified record included studies submitted by Dartmouth and prepared by a licensed appraiser who determined that the IPF would not impact the property values of the abutting neighborhood. Evidence submitted by the abutters refuting this opinion consisted of anecdotal statements and conclusory estimates, without supporting data, from residents and retired or unidentified real estate agents. Even if the board denied site plan approval based upon the IPF's negative impact on property values, the record failed to include evidence that would reasonably support such a finding.

The Court also ruled that the planning board relied upon personal feelings and engaged in ad-hoc decision making when it concluded that the IPF was out of harmony with the town and its environs. The Court observed that the planning board cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings. and then justify their reasoning through the application of general considerations. Although the Court emphasized that site plan review cannot be reduced to the mechanical process of determining conformity with specific zoning and site plan regulations, in this instance, the Hanover Planning Board's reliance solely upon general considerations to override the IPF site plan's conformity with specific regulations and ordinances, without sufficient evidentiary support for doing so was deemed unreasonable. Consequently, the Supreme Court reversed the trial court order upholding the planning board decision.

The Supreme Court further ruled that Dartmouth was entitled to a Builder's Remedy provided the college complies with each of the 21 conditions identified by Hanover's planning board staff. A builder's remedy rewards a successful plaintiff for his or her efforts in testing the legality of a land use decision. *Community Resources for Justice, Inc. v. City of Manchester*, 157 N.H. 152 (2008).

Practice Pointer: When a land use board is presented with uncontroverted expert evidence in support of an application, opposing views only supported by lay opinions and general information are insufficient to refute the experts' conclusions. Land use boards are entitled to rely in part on their own judgment and experience when acting upon applications. Nonetheless, a board's decision must be based on more than the mere personal opinion of its members. A land use board cannot supersede the specific regulations and ordinances that control the application review process with their own personal feelings and then justify their reasoning through the application of general considerations.

(From [New Hampshire Municipal Association Court Updates](#), 2018.)

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### **Equitable Waiver of Dimension Requirement can be Based on a Mistaken Code Interpretation**

***David F. Dietz et al. v. Town of Tuftonboro*, New Hampshire Supreme Court Case No. 2017-0536 (January 9, 2019)**

Resolving a dispute over the proper interpretation of the equitable waiver of dimensional requirement statute, RSA 674:33-a, the NH Supreme Court upholds the decisions of the Tuftonboro ZBA and Superior Court.

Sawyer Point Realty LLC (Sawyer Point) owns a house on Lake Winnepesaukee within Tuftonboro's Lakefront Residential District. The ordinance requires a 50-foot setback from the lake for all buildings. In 1999 Sawyer Point sought a building permit to construct a second story over a portion of the house that was located within the setback. The town's building inspector granted the building permit, noting the addition would cause "no change in footprint." Sawyer Point built further additions in 2008 – 2009 that also intruded on the setback, after seeking and being awarded a setback variance by the ZBA for those additions.

In 2014 Sawyer Point surveyed its property and determined that the 2008 addition to the home was intruding on the setback more than it had realized. The neighboring property owners, the Dietzes sought a court order under RSA 676:15 to remove the unlawful construction. In reply, Sawyer Point sought an equitable waiver under RSA 674:33-a for the portion of the 1999 Addition within the setback, and the approximately fifty square-foot portion of the 2008 Addition that is within the setback but is not within the scope of the 2008 variance. The ZBA granted the equitable waivers and the Dietzes appealed to the Superior Court which upheld the ZBA's decision.

On appeal the Dietzes' argued that the trial court erred because RSA 674:33-a requires that the ZBA make written factual findings as to each element of the statute, something the Tuftonboro ZBA did not do. The NH Supreme Court disagreed concluding that the language of the statute only requires that the ZBA make findings, not that it must set forth those findings in writing. Moreover, the Court observed, the minutes of the ZBA meeting reflect the board discussed and analyzed the four equitable waiver requirements.

The Dietzes next argued that under RSA 674:33-a, I (d) that Sawyer Point was not ignorant of the facts constituting the setback violation at the time of the 1999 addition. The Court decided that if an applicant for a dimensional waiver must always be ignorant of the underlying facts — then there would never be a situation in which an applicant would be eligible for a waiver based on an error made by a municipal official without the applicant also having erred in measurement or calculation as provided in paragraph RSA 674:33-a, I (b). Neither Sawyer Point nor the Town interpreted the zoning ordinance such that building a second floor on the existing footprint would run afoul of the setback requirement.

Court also rejected the Dietzes' argument that the balancing test under RSA 674:33-a, I(d), where the cost of correcting the violation is balanced against the public interest, required direct evidence by Sawyer Point on the cost of correction. Even though such direct evidence was not presented by the Sawyer Point at the ZBA hearing, the representations of Sawyer Point's counsel that the cost would be substantial, coupled with the ability of the ZBA members to use their personal knowledge that the cost of tearing down the 1999 and 2008 additions outweighed the public benefit, was adequate support for the ZBA's decision. The Court also rejected the Dietzes' argument that RSA 674:33-a, I (d) required an applicant to first apply for and be denied a variance before being allowed to seek an equitable waiver. The Court stated that had the legislature intended to make applying for a variance — and having the request denied — a prerequisite for securing an equitable waiver, it could easily have said so, which it had not. The Court likewise rejected arguments by the Dietzes' it was erroneous for the ZBA not to consider the cumulative effect of building within the lakefront setback, and that the improvements to the Sawyer Point property violated Tuftonboro's lot coverage requirements.

(From [New Hampshire Municipal Association Court Updates](#), 2019.)

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## **Wetland Regulation May be Included in Natural Resource Protection Rules; Local Wetland Protection Rules not Preempted; Board Procedures not Subject to Strict Scrutiny**

***Denis Girard v. Town of Plymouth*, New Hampshire Supreme Court No. 2018-0495 (August 30, 2019)**

This decision of the NH Supreme Court concerns a subdivision intended to implement a court ordered partition of land owned in common by 5 different owners. In part, the subdivision application relied upon the construction of an access road proposed to be built over wetlands. During review of the plan the Planning Board received input from a wetland scientist, and relying on that evidence, and a subdivision regulation designed to protect natural resources, the Board declined to approve the proposed access road that would impact wetlands. Instead the Board proposed that the co-owners use an existing woods road or adjust boundary lines to accommodate the relocation of the access way away from the wetlands or construct a right of way that accomplishes comparable road access.

The co-owners rejected the Planning Board's revised access proposals, and this resulted in a unanimous denial of the application by the Board. The co-owners appealed the Superior Court decision upholding the Planning Board decision arguing that the Board relied upon an overly broad subdivision regulation that did not specifically authorize wetland regulation, resulting in ad hoc decision making. The Supreme Court disagreed saying that even though the local regulation only referred to the protection of natural resources, which expressly included brooks, streams and other water bodies, this was a sufficient designation of natural features to be protected so as to impliedly include wetlands.

The Supreme Court also rejected the co-owner's argument the Plymouth natural resource regulation was preempted. The Court concluded the local regulation supported and did not impede the State regulatory scheme for wetland protection. Finally, the co-owners argued the trial court's reliance on a wetland scientist report in the certified record that even the Planning Board did not expressly rely upon in its deliberations and decision was erroneous. The Supreme Court concluded that it was not unreasonable for the trial court to rely upon this evidence to conclude that the evidence supported the board's decision.

Finally, the co-owners argued that because the Planning Board discussed the application at a meeting without the notice to the applicants this warranted reversal of the decision. The Planning Board had engaged in an informal discussion relating to the access way alternatives, and board members briefly expressed their opinions on the matter, but the board did not request or hear any comment from members of the public and did not render a decision on the application. Relying up RSA 676:4, IV, the Court ruled that judicial review of the planning board's procedures shall not be subjected to strict scrutiny for technical compliance.

(From [New Hampshire Municipal Association Court Updates](#), 2019.)

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### **Short Term Rental Use of Property Zoned Residential is Prohibited by a Zoning Ordinance Definition that Such Use is a Prohibited Transient Occupancy**

***Working Stiff Partners v. Portsmouth*, New Hampshire Supreme Court Case No. 2018-0491 (September 27, 2019)**

Working Stiff Partners, LLC (plaintiff) appealed a decision of the Portsmouth ZBA that prohibited the use of a single-family home for short-term rentals. Plaintiff owns adjacent properties in Portsmouth's General A Residence District; one property is an owner-occupied home, the other is a four-bedroom home that plaintiff had renovated and began renting through Airbnb. Plaintiff's Airbnb listing offered the four-bedroom home for daily rental, and for family parties, wedding parties and corporate stays. City Code Enforcement Officials issued a cease and desist order that the home could not be used for short term rentals. Both the Code Enforcement Officials and the Superior Court interpreted the Portsmouth Zoning Ordinance as prohibiting the use of the home for daily rentals as that constituted a transient occupancy that was expressly excluded as a permitted use in the General A Residence District.

On appeal to the NH Supreme Court, plaintiff argued that it was an error to interpret the Portsmouth Zoning Ordinance as not permitting short-term rental of the property as a principal use. After reviewing the relevant definitions in the zoning ordinance, the Court concluded that plaintiff's use of the property for daily rentals to paying guests constitutes a transient occupancy like a hotel, motel, rooming house, or boarding house. Because the ordinance expressly excludes such transient occupancies from the definition of a dwelling unit the Court ruled that providing short-term rentals to paying guests on a daily basis, is not a permitted use affirming the decision of the Superior Court. The Court also ruled that the definitions found in the Portsmouth Zoning Ordinance were not unconstitutionally vague and gave plaintiff fair notice that a short term rental use of the property was not permitted. Left unresolved by the Court's decision is whether a short-term rental use could be considered a permitted, accessory use of the property.

(From [New Hampshire Municipal Association Court Updates](#), 2019.)

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## Objective Testimony from Residents, Combined with Personal Knowledge of Observable Facts by Board Members Can Refute Expert Opinions

### *Three Ponds Resort, LLC v. Town of Milton*, New Hampshire Supreme Court Case No. 2019-0278 (June 3, 2020) (unpublished opinion)

The New Hampshire Supreme Court upheld a decision of the Milton Zoning Board of Adjustment that a proposed campground expansion would be an undue nuisance or serious hazard to pedestrian or vehicular traffic notwithstanding contrary expert traffic engineering evidence. Three Ponds Resort sought a special exception to substantially expand its seasonal campground. A central feature of the hearings before the ZBA was whether the road providing access to the campground could reasonably support the additional traffic that the increased number of campsites would generate.

A traffic study provided by Three Ponds, along with an independent technical review of the submitted traffic study, both concluded that the additional campground traffic was not expected to have an undue or inordinate impact on traffic safety. Due to the apparent uncontradicted content of these traffic studies, Three Ponds argued that *Condos East Corp. v. Town of Conway*, 132 N.H. 431 (1989), and *Continental Paving v. Town of Litchfield*, 158 N.H. 570 (2009) precluded the ZBA from reaching a contrary result.

The Supreme Court distinguished *Condos East* and *Continental Paving* ruling that the ZBA was entitled to question and reject the conclusions of the expert's traffic assessment by relying on objective facts provided through the testimony of town residents and the personal knowledge of board members. The Court observed that the methodology of the traffic study did not consider pedestrian traffic on the impacted town road. Furthermore, these were not personal opinions, but rather descriptions of the actual experience of using the road. The ZBA also relied upon New Hampshire Department of Transportation Minimum Geometric & Structural Guides for Local Roads and Streets (Guidelines) that contradicted the traffic study's statement that Townhouse Road had "ample width." The ZBA also had an objective basis to conclude that the traffic study did not accurately represent peak traffic on the affected town road.

The Supreme Court concluded that the ZBA could have reasonably concluded the traffic study did not fully reflect the current conditions the affected town road; that the road was not wide enough to accommodate existing traffic comfortably, and that increasing the number of wide vehicles using the narrow road — with no shoulders or sidewalk — would endanger people walking, cycling, or running on the road.

Practice Pointer: Critical examination of the methodology of an expert traffic report, combined with direct evidence of objective evidence provided by abutters, residents and board members can support a land use board's decision to reject the conclusions of expert testimony and reports.

(From [New Hampshire Municipal Association Court Updates](#), 2020.)

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## **New Hampshire Supreme Court Affirms Discontinuance of a Road by a Town Pursuant to RSA 231:43**

**[Bellevue Properties v. Town of Conway](#), New Hampshire Supreme Court Case No. 2019-0302 (August 25, 2020)**

The New Hampshire Supreme Court affirmed the discontinuance of a road by the Town of Conway pursuant to RSA 231:43.

The Plaintiff owned a hotel abutting a retail development known as Settler's Green in the Town of Conway. One of the three routes to access the hotel was McMillan Lane, a Class V highway.

Settler's Green proposed a retail development that would require the discontinuance of McMillan Lane, as the development would span the road. Settler's Green proposed an alternate, private means of access.

A warrant article to conditionally discontinue the road was drafted by the Town, providing that Settler's Green continue to keep McMillan Road open until a suitable replacement road was constructed. The replacement road, although private, would continue to be open to the public. After an amendment at Deliberative Session, the article was adopted by Town Meeting.

The Plaintiff, reasoning that the discontinuance would cause harm to the hotel's business, sued. On appeal, the Plaintiff made two claims: (1) the Superior Court did not correctly apply the balancing test formulated in *Town of Hinsdale v. Town of Chesterfield*, 153 N.H. 70 (2005), and (2) the Superior Court erroneously concluded that the Town's interests in discontinuing the road outweighed the interests of the plaintiff and the public in the road's continuance.

The New Hampshire Supreme Court affirmed the Superior Court's application of the balancing test in *Hinsdale*, although *Hinsdale* formulated its test in relation to the interests of one town as compared to another town, rather than a private individual compared to a town. Here, the New Hampshire Supreme Court held that "when the town's decision to discontinue a highway is based upon other interests, in addition to the interest in alleviating the burden of maintenance, the trial court may consider those interests in reviewing the town's decision."

Regarding the balancing test itself, the Court found that the multiple other entries to the hotel, the uncontested testimony of Settler's Green's principal that it would be willing to give an easement to the hotel over the new road, and the continued actions of Settler's Green to hold open access to the hotel evidenced that the Superior Court correctly applied the balancing test. Thus, the Court affirmed the Superior Court decision.

Practice Pointer: In light of these two recent decisions where the Court looked to the motivations of the town in discontinuing a highway, a town seeking to discontinue a highway should have town officials carefully explain why the discontinuance would be of a benefit to the town during deliberative session or town meeting, and ensure that such explanation is captured in the minutes of that public meeting.

(From [New Hampshire Municipal Association Court Updates](#), 2020.)