

ANNUAL SPRING PLANNING & ZONING CONFERENCE

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2007 LAND USE LAW UPDATE

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(RELATIVELY) NEW STATUTES OF INTEREST

STATUTORY VESTING (“GRANDFATHERING”) PROVISIONS ARE EXPANDED

Chapter 285 of the Laws of 2006 amended one of the two statutory vesting statutes, RSA 676:12 (the other important statute is RSA 674:39). Under the prior version of the statute, a proposed development did not gain protection from changes to land use regulations (zoning ordinance, building code, subdivision regulations, and site plan regulations) unless the development application had been formally accepted as complete by the planning board before the first legal notice was given of the proposed change to the land use regulation.

As amended by Chapter 285 (effective August 14, 2006), RSA 676:12, VI now states that proposed changes to the regulations shall not apply to a development proposal that was “the subject of notice” under RSA 676:4, I(d) prior to the first legal notice of the proposed change to the land use regulation. In addition, if “the subject of notice” under RSA 676:4, I(d) was for the design review form of preliminary review under RSA 676:4, II(b), the applicant is thereafter protected from proposed changes to the regulations “provided that a formal application is filed with the planning board within 12 months of the end of the design review process.”

LEGISLATIVE BODY MAY AUTHORIZE PLANNING BOARDS TO REQUIRE PRELIMINARY REVIEW OF SITE PLANS AND SUBDIVISION PLANS

Effective July 9, 2005 RSA 674:43, I was amended by Chapter 33 of the Laws of 2005 to allow the legislative body (town meeting in “traditional” towns) to vote to authorize the planning board to require preliminary review of site plans; companion language was added by inserting a new subparagraph (j) in RSA 674:44, II and by a slight change to RSA 676:4, II and II(c).

This change was the logical next step to the enactment of Chapter 71 of the Laws of 2004 (effective July 6, 2004) which had authorized the legislative body to grant the planning board the power to require preliminary review of subdivision plans. See RSA 674:35, I.

PRACTICE POINTER: Note well that before the planning board may require preliminary review of either site plans or subdivisions, two things must happen:

1. the town meeting (or other form of the local legislative body) must vote to authorize the planning board to require preliminary review for either or both types of plans; and
2. the site plan regulations and/or subdivision regulations (as the case may be) must then be amended by the planning board to require such preliminary review.

PLANNING BOARD MAY REQUIRE INNOVATIVE LAND USE CONTROLS TO BE APPLIED TO PROPOSED SUBDIVISION IF SUPPORTED BY THE MASTER PLAN

Chapter 71 of the Laws of 2004 also provided (in addition to preliminary review of subdivision plans, see above) that the planning board may require subdivision proposals to comply with an innovative land use control that has been adopted in that municipality, “when supported by the master plan.” See RSA 674:21, II and RSA 674:36, II(m).

Under RSA 674:21, “innovative land use controls” include, but are not limited to the following:

(a) Timing incentives; (b) Phased development; (c) Intensity and use incentive; (d) Transfer of density and development rights; (e) Planned unit development; (f) Cluster development; (g) Impact zoning; (h) Performance standards; (i) Flexible and discretionary zoning; (j) Environmental characteristics zoning; (k) Inclusionary zoning; (l) Accessory dwelling unit standards; (m) Impact fees; (n) Village plan alternative subdivision.

PRACTICE POINTER: First, note that the power to require innovative land use controls rests on the following two elements:

1. the subdivision regulations must first be amended by the planning board to allow the board to require that innovative controls be applied in a particular case; and
2. the enabling legislation limits the planning board’s authority to require that an innovative land use control be implemented only where “supported by the master plan.”

I have serious concerns about the legislative catch that the requirement must be supported by the master plan, because I believe that requirement is sufficiently ambiguous that reasonable people could disagree about whether that support is present in a particular case. In the limited number of situations which I have dealt with to date, the planning board has sought to require that a subdivision be designed to comply with the cluster regulations. Clusters have vocal opponents as well as advocates, and each side will tend to see support in master plan for their point of view in the particular case!

METHOD OF COUNTING DAYS TO FILE MOTION FOR REHEARING WITH ZBA IS CHANGED (YET AGAIN)

Effective August 14, 2005 Chapter 105 of the Laws of 2005 corrected an anomaly in RSA 677:2. The prior version of the statute said that in counting the 30 day period within which a motion for rehearing must be filed with the ZBA, the day the ZBA actually voted to adopt their decision would be counted as day 1. This approach was different from how other land use filing deadlines are calculated, so in yet another attempt to bring uniformity to this topic the legislature amended RSA 677:2 to make it clear that to calculate the 30 day period **the day after** the ZBA makes the decision must be counted as day 1.

Chapter 105 also amended the planning board appeal statute, RSA 677:15, I, in the hope of bringing a uniform approach to how various appeal deadlines are calculated.

THAT VEXING ROAD LAW, RSA 674:41, IS AMENDED TO ALLOW LOTS TO BE EXCEPTED FROM THE STATUTE'S REQUIREMENTS

Effective September 3, 2005 RSA 674:41, II-a was amended by Chapter 226 of the Laws of 2005 to allow the legislative body (town meeting in "traditional" towns) to except any lot(s) from the statute's requirements that (as a general matter) buildable lots must be accessed from a publicly maintained street, or from a street that was approved by the planning board if it is not publicly maintained. The amended statute requires that the vote to except any lot must be "pursuant to RSA 675" and the proposal must first be submitted to the planning board for its approval. Although the legislature has given us the usual dose of unclear language that will probably result in litigation at some point, the statute probably means that in towns with a zoning ordinance, the vote to except any lots from the statute must be done as an amendment to the zoning ordinance. In towns that do not have a zoning ordinance in place, it would appear that the proposal must be put to the voters using the same procedures as if a zoning ordinance were being amended.

SOME REAL BITE ADDED TO LAND USE ENFORCEMENT POWERS

By the adoption of HB 713 (Chapter 242 of the Laws of 2004, effective January 1, 2005), the legislature put some real "bite" into the powers municipalities have to enforce land use regulations.

First, under RSA 676:17 (the "generic" enforcement statute that allows the municipality to bring land use enforcement actions in either the superior or district courts), the daily penalty has been doubled from \$275 to \$550 for a **subsequent offense**; the daily fine remains \$275 for a **first offense**.

What a Difference a Word Makes!

Far more important than the increased fine for subsequent offenses, is the change of the word "may" to "shall" in RSA 676:17, II. The prior version of the statute said that in an enforcement action, the municipality "**may**" recover its costs and reasonable attorney's fees in pursuing the enforcement action if the municipality is found to be a prevailing party – in the vast majority of enforcement actions, the court would not award the town its attorney's fees, because the general rule in the United States is that each party bears its own fees, unless the losing party has engaged in egregious behavior that convinces the court that the award of attorney's fees is a justifiable response. However, the amended statute now requires that the municipality "**shall**" recover such costs and attorney's fees if it is a prevailing party. That is a huge shift in the dynamics of land use enforcement, and I think it will have a very powerful, positive effect on the ability of municipalities to achieve "voluntary" compliance with land use regulations once the word gets around that if the violator loses in court he or she **will be** required to pay the town's costs and attorney's fees.

By the way, the town's recoverable costs (in addition to attorney's fees) are defined as "all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses."

Finally, keep in mind that RSA 676:17 has a very broad application, in that it may be used to enforce any of the provisions of state enabling legislation, or any local ordinance, code, or regulation adopted under the state enabling legislation, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of the state's land use laws.

IMPACT FEES, SITE-SPECIFIC EXACTIONS, VESTING OF DEVELOPMENT RIGHTS, AND WAIVER OF SUBDIVISION REGULATIONS

Whew! SB 414 (Chapter 199 of the Laws of 2004, most of which became effective June 7, 2004) was a sort of a "Christmas Tree" piece of legislation that affected several different and important areas of land use law. Let's describe the separate changes, as follows:

1. Legislature Adjusts Relationship Between Impact Fees & Vested Rights Statute

As background, recall that in R. J. Moreau Companies, Inc. v. Town of Litchfield, 149 N.H. 312 (2002) the court ruled that the vested rights statute, RSA 674:39, protected developments from impact fee ordinances, and even increases in fees that were already on the books as part of an impact fee ordinance when the development was approved! In Moreau, the supreme court rejected the town's argument that the protection afforded by the statute should be limited to changes to land use ordinances (or entirely new ordinances) that have the effect of **prohibiting completion** of the development in accordance with the approved plans -- impact fees do not prohibit a project's completion but are merely additional costs imposed on a developer. Instead, the court ruled flatly that "RSA 674:39 plainly encompasses all zoning ordinances, whether or not they will have the effect or purpose of stopping an approved project. If the legislature had wanted to exempt impact fees from the reach of RSA 674:39 (as it did for ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements) **it could have included them in the statutory exceptions.**" (Emphasis added.)

Well, the legislature took up the court's invitation and amended RSA 674:39 by the passage of Chapter 199 (SB 414) in the 2004 session -- the result was originally advertised as reversing the court's decision in Moreau, so that the amended statute expressly subjects developments (subdivision or site plan approvals) to new impact fees, or changes in existing impact fee ordinances, that are enacted after the project is approved by the planning board.

However, when one actually reads the text of the amendment, the way the new statute was originally described **WAS NOT ACCURATE!!**

What the legislature actually did is:

(a) amend the first paragraph of RSA 674:39 to make the statute **AGREE** with the Moreau decision, by stating that every approved and recorded subdivision or site plan **shall be exempt from new impact fee ordinances, or from increases in the amount of impact fees**, for 4 years, provided active and substantial development or building begins on the site within 12 months of the date of approval;

(b) amend the second paragraph of RSA 674:39 to state that once substantial completion of the improvements shown on the subdivision plat or site plan has occurred, the project will lose the protection inserted into the first paragraph and then **BE SUBJECT TO** new impact fee ordinances, or changes to pre-existing impact fees!!

Indeed, it seems to me that the new law turns the common law on its head, in the sense that developments are protected from new or increased impact fees during the period when developments would normally be subject to them at common law, and are made subject to the new or increased impact fees after the developments would, in many cases, have become vested against zoning changes at common law! It therefore seems to me that the amendment to paragraph II of RSA 674:39 might be struck down as unconstitutional, at least as applied in a particular case where enough work has been done to vest the development against changes in land use regulations at common law. Time will tell, perhaps.

2. Amendments Regarding Impact Fees & “Exactions”

Section 2 and 3 of SB 414 make changes to RSA 674:21 regarding impact fees, and “exactions,” as follows:

(a) RSA 674:21, V(d) was rewritten (but the change is not effective until June 1, 2005) to alter the way impact fees are assessed and collected; the changes are:

1. all impact fees are now assessed at the time the planning board approves a subdivision or site plan (prior version: fees are assessed prior to, or as a condition for, the issuance of a building permit “or other appropriate permission to proceed with development”);

2. where no planning board approval is required, or has been granted prior to the adoption or amendment of the impact fee ordinance, impact fees shall be assessed prior to, or as a condition for, the issuance of a building permit “or other appropriate permission to proceed with development” (new provision);

3. impact fees shall be intended to reflect the effect of development upon municipal facilities at the time of the issuance of the building permit (new provision);

PRACTICE POINTER: This provision (No. 3 above) is a sleeper, in the sense that it seems to add to the substance of what an impact fee is, and should have been inserted into the introductory text of paragraph V of RSA 674:21 where the definition of impact fee is found, rather than in subparagraph V(d) which, before the amendment, merely addressed the mechanics of assessment and collection. Time will tell if this new

statement hidden away in V(d) has any practical effect on the definition of impact fees as interpreted by the courts.

4. impact fees shall be collected at the time a certificate of occupancy is issued; if no CO is required in the town, impact fees shall be collected when the development is ready for its intended use (prior version: impact fees shall “normally” be collected as a condition for the issuance of a CO);

5. the municipality and the assessed party may agree on an alternate, mutually acceptable schedule of payment of impact fees in effect at the time of subdivision or site plan approval by the planning board. If such an alternate schedule of payments is established, municipalities may require the developer to post a bond or otherwise provide “suitable measures of security” to guarantee future payment of the impact fees (similar to prior version, but rewritten to be clearer).

(b) Effective June 7, 2004 a new section was inserted into the statute, RSA 674:21, V(j), which declares that the failure to adopt an impact fee ordinance **shall not** preclude a municipality from requiring developers to pay an “exaction” for the cost of off-site improvements determined by the planning board to be necessary for the occupancy of any portion of the development. This new statute reverses (finally!) the court’s decision in Simonsen v. Town of Derry, 145 N.H. 382 (2000), in which the court misunderstood RSA 674:21, V(i) and held that municipalities must first have an impact fee ordinance before requiring an “exaction” for off-site improvements. (In the years since the Simonsen case was wrongly decided, many towns adopted a “stripped down” version of an impact fee ordinance that would comply with the Simonsen mandate for off-site exactions; planning boards in other towns were often able to convince the developer to “voluntarily” pay for off-site improvements, to avoid having the planning board deny the application as scattered or premature.)

“Off-site improvements” are defined as those improvements necessitated by a development which are located outside the boundaries of the subdivision plat or site plan, but limited to “any necessary highway, drainage, and sewer and water upgrades pertinent to that development.”

The new subparagraph goes on to include a statement of the familiar “rational nexus” test fashioned by the courts:

“The amount of any such exaction shall be a proportional share of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction.”

The statute also includes the following points:

1. as an alternative to paying an exaction, the developer may elect to construct the necessary improvements, subject to bonding and timing conditions as may be reasonably required by the planning board;

2. any exaction shall be assessed at the time of planning board approval of the development;

3. if the calculation of the exaction is predicated on some portion of the cost being paid by the town, a refund of any exaction collected from the developer shall be given if the local legislative body (town meeting) to appropriate the town's share of the cost within 6 years from the date of collection.

PRACTICE POINTER: With the insertion of RSA 674:21, V(j) into the law, the legislature has firmly drawn the line between two “flavors” of impact fees that I used to call “generic impact fees” and “site-specific impact fees,” and which are now referred to in statute as “impact fees” and “exactions.”

The first flavor, that I used to call “generic impact fees,” are those fees that are assessed, usually against residential dwelling units, to help defer the costs of the infrastructure needs of the community that are required by residential growth as a general matter, needs such as water and sewage treatment facilities, schools, solid waste disposal, libraries, public recreational facilities, and so forth (as set out in RSA 674:21, V) – these are not fees to pay for public infrastructure specifically made necessary by a particular development. To adopt and administer an impact fee ordinance requires a major effort on the part of those involved in local land use matters. A difficult task is to set the amount of the impact fee in a manner that reflects new developments' fair share of the cost of anticipated (or already constructed) public infrastructure – a significant amount of work by both citizens and professional consultants is necessary to craft an impact fee ordinance and associated fee structure that will survive a legal challenge.

The other flavor of development fees, which the legislature has now called “exactions,” are fees for the cost of off-site improvements that are, at least to some degree, specifically made necessary by, and which will specially benefit, a particular development application that is under consideration by the planning board. It is a much simpler task, although not without some complications, to determine what off-site improvements are required, and how much of the burden should be laid on the specific developer.

3. Planning Boards May Waive Subdivision Requirements, Finally (If the Subdivision Regulations Say So)!

Section 4 of SB 414 inserts a new subparagraph (m) in RSA 674:36, II which allows, but does not require, the planning board to insert a waiver provision in its subdivision regulations – effective June 7, 2004 the subdivision regulations may provide

“for waiver of any portion of the regulations in such cases where, in the opinion of the planning board, strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations.”

For some strange reason, the statute that controls the content of the planning board's site plan regulations, RSA 674:44, has for many years **required** that the board's

regulations contain the waiver language that the planning board is now **allowed** to insert in the subdivision regulations – see RSA 674:44, III (e). H-mmmmmm.

PRACTICE POINTERS: Three things. First, some planning boards did place waiver language in their subdivision regulations before the recent statutory amendment specifically allowed for it. Every planning board that already has waiver language should review it to be sure it is compliant with the new law, and amend it if the old waiver language differs in any substantial way from the new law.

Second, be aware that although the legislature has used the phrase “unnecessary hardship” as the standard to determine when the grant of a waiver may be appropriate, both in the site plan, and now the subdivision, enabling legislation, we have no reason to think that this is the same “unnecessary hardship” test that applies to the grant of a variance. Instead, this type of “unnecessary hardship” is probably more like “practical difficulty,” meaning that there must be a really good reason why the part of the regulations that are waived will pose a difficult obstacle to the project with little, if any, public benefit (so that a waiver will not violate the spirit and intent of the regulations).

Third, there are probably planning boards that occasionally granted a waiver from subdivision regulations even without having any language to allow that in their regulations. Especially with the enactment of the new RSA 674:36, II (m) it is quite important that the waiver enabling language be inserted into the subdivision regulations (see RSA 675:6 for the simple procedures which must be followed to adopt or amend subdivision or site plan regulations). If the waiver language is not inserted into the regulations, the court may well conclude that the planning board had no power to grant any such waiver.

NEW HAMPSHIRE SUPREME COURT OPINIONS

APPEAL FROM PLANNING BOARD'S DECISION ON EXCAVATION PERMIT MUST START WITH A MOTION FOR REHEARING!

K & B Rock Crushing, LLC v. Town of Auburn
153 N.H. 566 (2006)

K & B applied to the Auburn Planning Board for a permit to excavate 5.5 acres pursuant to RSA 155-E over a twelve year period, with "Phase I" involving about 1.6 acres. The planning board ruled that the application was complete only for a 1.6 acre excavation, and K & B appealed to the superior court without filing a motion for rehearing with the planning board. The town moved to dismiss the case, arguing that the superior court lacked jurisdiction to hear the appeal because K & B had not first filed a motion for rehearing with the planning board under RSA 155-E:9. The superior court denied the town's motion to dismiss, but on appeal the NH Supreme Court agreed with the town that under the statute K & B had a mandatory obligation to file a motion for rehearing with the planning board before it could appeal to the superior court.

The court reasoned as follows:

RSA 155-E:9, which is entitled "Appeal" and which governs the procedure for appeals from decisions on excavation permits, provides as follows:

If the regulator disapproves or approves an application for an excavation permit or an application for an amended permit, any interested person affected by such decision may appeal to the regulator for a rehearing on such decision or any matter determined thereby . . . Any person affected by the regulator's decision on a motion for rehearing to the regulator may appeal in conformity with the procedures specified in RSA 677:4-15.

"Regulator" is defined in relevant part in RSA 155-E:1, III as:

(a) The planning board of a city or town, or if a town at an annual or special meeting duly warned for the purpose so provides, the selectmen of the town or the board of adjustment; or

(b) If there is no planning board, the selectmen of the town or the legislative body of the city. . . .

RSA 155-E:9 clearly sets forth the procedure to appeal an excavation permit decision. The statute states that if an interested person affected by the regulator's decision wishes to appeal the regulator's decision, he may do so by moving for a rehearing. If that person then wishes to appeal the regulator's rehearing decision, he may appeal in conformity with RSA 677:4-:15, which generally govern appeals to the superior court. See 15 P. LOUGHLIN, NEW HAMPSHIRE PRACTICE, LAND USE PLANNING AND ZONING § 36.17, at 522-23 (2000) (stating that, under RSA 155-E:9, the "aggrieved party must file for a rehearing before going to Superior court"). Nothing in

the statute authorizes an interested person to appeal the regulator's initial decision in conformity with the procedures specified in RSA 677:4-:15, yet that is what the petitioners did in this case.

PRACTICE QUESTION (NOT REALLY A POINTER!): Although I have no quarrel with the analysis employed by the court in this case, it seems that we always find something to worry about. My concern is that it is not unusual for planning boards to deal with applications for excavation approvals by using their site plan review authority. After reading this otherwise clear decision I am left to wonder if an aggrieved party must file a motion for rehearing with the planning board to challenge the board's decision on what seems like a site plan application, or whether such an application will be looked at by the court as fundamentally an application for an excavation permit that requires a motion for rehearing under RSA 155-E:9? My sense is that court would rule that even if the process can be called "site plan review," it is in essence an application for an excavation permit, and thus subject to the requirement of a motion for rehearing. We shall find out in due course, no doubt.

CITIZEN HAS NO STANDING TO SEEK COURT ENFORCEMENT OF ZONING ORDINANCE

Goldstein v. Town of Bedford,
(November 22, 2006)

Mr. Goldstein was upset (and probably still is) 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.

PLANNING BOARD MAY REVOKE CONDITIONAL SUBDIVISION APPROVAL FOR GOOD CAUSE

Simpson Development Corporation v. City of Lebanon,
153 N.H. 506 (2006)

In 1999, the Lebanon Planning Board granted Simpson a fifty-seven lot cluster subdivision containing fifty-three single-family homes. The approval was conditioned upon the creation of an open space area that included all the land not immediately adjacent to the homes within the developed portion of the property.

In 2003, Simpson came back to the planning board to amend the cluster subdivision approval to add nine lots sited in the area that had been designated as open space in the 1999 approval. In June, 2003 the planning board approved the amendment with conditions. The city attorney then informed the planning board that under both State law (RSA 674:21-a) and a provision in the Lebanon Zoning Ordinance the planning board had no authority to allow the development of the area that had been previously designated as open space. As a result of this advice, in October, 2003 the board voted to revoke its conditional approval of the amendment.

Simpson then appealed the revocation to the superior court, which upheld the decision of the planning board; on appeal, the NH Supreme Court agreed with the superior court.

The case turned on the fact that three of the conditions that the board attached to its June, 2003 approval of the amendment are conditions precedent which had to be met before the approval became final. The court found that the approval had not become final at the time the planning board revoked it in October, 2003 because one of the conditions precedent (that the applicant had to submit for review and approval the amended declarations of covenants and restrictions that will govern the homeowner's association) had not been completed.

The court concluded that because the June, 2003 approval was not final, the planning board was not barred from reviewing the decision, as it did in October, 2003, and voting to void the June, 2003 approval.

PRACTICE POINTER: It is VERY important to understand that this case should NOT be interpreted to mean that planning boards have the routine authority to change their collective judgment about conditional approvals, and vote to revoke or amend such approvals any time they get thinking that maybe they made a bad judgment the first time through. Instead, any subsequent action by a planning board to reconsider a conditional approval where, as in Simpson, one or more conditions precedent to final approval have not yet been fulfilled, should only be taken with great caution, and after thorough review by the planning board's attorney.

NO ESTOPPEL AGAINST TOWN FOR INCORRECT STATEMENTS OF OFFICIALS

Thomas v. Town of Hooksett, 153, N.H. 717 (2006)

This case involves the same proposed development as the court's earlier decision in Hooksett Conservation Commission v. Hooksett ZBA, 149 N.H. 63 (2003) reported further on in these materials in the section on Appeals / Motions for Rehearing. In the earlier case, the supreme court concluded that the Hooksett Conservation Commission did not have standing to appeal to superior court the ZBA's decision on an administrative appeal that the proposed convenience store and gas station was permitted under the zoning ordinance.

While the first case was winding its way through the courts, Hooksett amended its zoning ordinance to create a Groundwater Conservation District that prohibits new gas stations within the District, or within 1000 feet of an existing gas station. You guessed it! – Boisvert's property is located both within the conservation district and within 1000 feet of a gas station owned by the petitioners, Joseph and Cindy Thomas. It appears, however, that at some point before the first legal notice of the new zoning restrictions was given, the planning board approved the site plan for the new gas station and convenience store. Thus, after the supreme court decided the Hooksett Conservation Commission case on January 23, 2003, Mr. Boisvert met with the Hooksett CEO and a planning board member to discuss the status of the site plan approval.

At that meeting, both town officials told Mr. Boisvert that if he obtained a building permit within 1 year of the date of court's decision **and** if he began construction within 6 months after that, the site plan approval would stand. Boisvert got his building permit within 1 year (it was issued on January 5, 2004), and contracted with Cumberland Farms to start construction of the gas station and convenience store by June 30, 2004.

However, by letter dated May 27, 2004 the Hooksett CEO revoked the building permit. The letter stated in part that under RSA 674:39 Mr. Boisvert had only 1 year from the supreme court's decision on January 23, 2003 to begin "active and substantial development" and since no such construction had been undertaken during that year, Mr. Boisvert's site plan approval was no longer valid and he could not proceed.

Mr. Boisvert appealed to the ZBA, claiming that he had relied upon the assurances of the CEO and the planning board member that his project would be protected if he got a building permit with 1 year and began construction with 6 months after that. The ZBA overturned the revocation of the building permit based upon the claim of municipal estoppel, and granted two variances. The Thomases appealed to superior court, which reversed the ZBA's decisions on both the municipal estoppel argument, and the grant of the variances. Mr. Boisvert appealed to the supreme court, which upheld the superior court's ruling that the doctrine of municipal estoppel would not protect Mr. Boisvert, but sent the case back to the ZBA because it was not clear why the ZBA granted the variances. The supreme court's reasoning is as follows.

Municipal Estoppel

The court noted that the doctrine of municipal estoppel has been applied to prevent unjust enrichment and to accord fairness to those who deal with town officials. The elements of estoppel are:

first, a false representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

However, implicit in the elements of estoppel is also the notion that the person's reliance on the representation made by the municipal official must be **reasonable**. The supreme court ruled that Mr. Boisvert's reliance on what he had been told by the CEO was unreasonable, because "at the time of [Mr. Boisvert's] reliance or at the time of the representation or concealment, [Mr. Boisvert] knew or should have known that the conduct or representation was improper, materially incorrect or misleading."

Why should Mr. Boisvert have known that what he was told was incorrect? The court explained it this way:

Although Ken Andrews and Charles Watson informed Boisvert and Cumberland Farms that the permit would be valid as long as construction began within six months following issuance of the permit on January 5, 2004, **both Boisvert and Cumberland Farms should have been aware that those representations were**

incorrect. Pursuant to RSA 674:39, Boisvert had one year from the date of the issuance of our opinion in Hooksett Conservation Commission to begin "active and substantial" development of the property in order to secure protection from the zoning changes. The trial court correctly noted that "**[s]ince a statute squarely addressed the issue about which Boisvert was concerned, he was on notice that any representations by town officials to the contrary were materially incorrect, and therefore his reliance was not reasonable.**" (Emphasis added.)

Bases for Grant of Variances Not Clear

The record showed that after it found that the town was estopped based on the statements that had been made to Mr. Boisvert by the CEO and planning board member, the ZBA only briefly discussed the variances and voted unanimously in favor of granting them. Because the ZBA gave only cursory consideration to the variance issue, and because it was unclear how the ZBA would have ruled on the variances had it correctly denied Mr. Boisvert's municipal estoppel claim, the supreme court vacated the grant of the variances and remanded the case directly to the ZBA for further proceedings.

PRACTICE POINTER: The failure of the ZBA to make specific findings to support the grant of the variances resulted in sending this case back to the board. Moreover, when a ZBA **denies** an application, RSA 676:3 requires that a written decision be issued by the board that includes "written reasons for the disapproval." While the law seems to be a little more forgiving as to applications that are **granted**, the Thomas case should be a warning to both ZBAs and planning boards that where an applicant has to show compliance with specific criteria (as in the grant of variances and special exceptions by the ZBA, and special use permits or conditional use permits by the planning board), it is part of the board's job to make findings documenting that those criteria have been met.

BUILDING PERMITS MAY BE ISSUED ON A CASE BY CASE BASIS ON CLASS VI ROADS

Blagbrough Family Realty Trust v. A & T Forest Products, Inc. & Town of Wilton
(February 28, 2007)

This decision closes yet another chapter in the ongoing battle between neighboring landowners in the Town of Wilton. (An earlier case brought by the Blagbrough family unsuccessfully challenged a subdivision approval granted by the planning board based on an alleged violation of State wetland laws – that 2006 decision is reported in these materials along with other cases involving possible State preemption of local land use regulations.)

There were many legal and factual issues raised by the Blagbroughs in this new case, but only one is of interest to us. Seeking to build a single family home on its 12.8 acre parcel on Old Peterborough Road (which was determined to be a Class VI town road) A & T Forest Products, Inc. went through the process set out in RSA 674:41, I(c). Pursuant to that statute, the Wilton Board of Selectmen voted to authorize the issuance of a building permit to A & T, after review and comment by the planning board (and by

town counsel). Blagbrough appealed this decision to the ZBA, which agreed with the selectmen's decision to authorize the building permit. Blagbrough then appealed to the superior court, which also upheld the selectmen's decision.

On appeal to the NH Supreme Court, Blagbrough argued that the ZBA and the superior court had misinterpreted the text of RSA 674:41, I(c), and that the statute does not authorize the selectmen to issue building permits to individual landowners on a case by case basis. Rather, Blagbrough argued that the statute should be interpreted to allow selectmen, after review and comment by the planning board, to authorize the issuance of building permits generally on all Class VI roads in town, or at least on certain Class VI roads – if an individual landowner seeks a building permit on a Class VI road that has not been “opened up” to building permits as a general matter by the selectmen, that individual must seek a building permit directly from the ZBA under the provisions of RSA 674:41, II. The supreme court agreed with the superior court that there is

no merit in Blagbrough's suggestion that RSA 674:41, I(c) does not permit the [board of selectmen] to grant building permits on an individual, case by case basis, for properties that fall within the purview of the statute. The mere fact that the statute uses the plural terms “permits” and “buildings” does not compel the conclusion that the selectmen must grant such approval en gross, i.e., either on a road-wide or municipality-wide basis. On the contrary, the statute specifically indicates that approvals can be granted “for said class VI highway or a portion thereof.” (Emphasis added.) These terms support the view that the statute contemplates a case by case determination by the selectmen as to whether to grant approval for building on a particular lot or lots.

Finally, the supreme court held that it sees no conflict between RSA 674:41, I(c) and the appeal provisions found in RSA 674:41, II. The court held that the latter provision provides an appeal mechanism for an applicant suffering from practical difficulty or unnecessary hardship to appeal a denial of the a local administrative officer. On the other hand, RSA 674:41, I(c) “simply sets forth the procedure to be followed by those applicants who cannot, choose not, or need not, demonstrate a practical difficulty or unnecessary hardship.”

PLANNING BOARD HAS AUTHORITY TO ADJUST THE AMOUNT OF IMPACT FEES, MAYBE

Caparco v. Town of Danville and Drowne v. Town of Sandown,
152 N.H. 722 (2005)

These two cases were joined together and decided on November 15, 2005. The plaintiffs challenged impact fee ordinances that had been adopted by the towns that granted authority to the local planning boards to adjust the amount of the impact fees charged. The Rockingham County Superior Court upheld the ordinances, and so did the NH Supreme Court.

Both towns are part of the Timberlane Regional School District, which commissioned a planning consultant, Bruce C. Mayberry, to prepare a methodology to

calculate impact fee schedules for public schools within the district. Mayberry issued a report providing a methodology that contained numerous factors for calculating an impact fee to ensure that it represents "a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by [new] development, and to the benefits accruing to the development from the capital improvements financed by the fee" as required under RSA 674:21, V(a). Based on the Mayberry report, in 1998 both towns adopted impact fee ordinances which imposed fees on new development to reflect the costs that would be incurred by the towns in building or improving public facilities, such as schools, to accommodate the proposed development. For example, under the Danville ordinance, a public school facility impact fee of \$2,900 is imposed for each new single family detached residence constructed. Both ordinances also authorized the planning board to periodically adjust the amount of the impact fee.

The plaintiffs argued that such a grant of authority violates the innovative land use control statute, RSA 674:21, because the statute contains no language that allows the planning board to adjust the amount of the fees. The court analyzed the language of the statute as follows:

The innovative land use controls statute expressly provides that an impact fee ordinance "may provide for administration . . . by the planning board." RSA 674:21, II. Such an ordinance, however, must "contain within it the standards which shall guide the person or board which administers the ordinance." Id. The terms "administration" and "administers" are not defined in the statute. We look, therefore, to their common usage, using dictionary definitions for guidance, to determine whether the statute allows a town to delegate to a planning board the authority to adjust the amount of an impact fee charge. See In re Juvenile 2003-187, 151 N.H. 14, 16 (2004). Common definitions of the term "administration" include: a furnishing or tendering according to a prescribed rite or formula . . . a meting out . . . the total activity of a state in the exercise of its political powers including the action of the legislative, judicial and executive departments . . . the management of public affairs as distinguished from the executive or political function of policy making . . . the principles, practices, and rationalized techniques employed in achieving the objectives or aims of an organization. Webster's Third New International Dictionary 28 (unabridged ed. 2002). Under another source, "administration" includes: 1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies. Black's Law Dictionary 46 (8th ed. 2004). Further, the term "administer" includes "to manage the affairs of . . . to direct or superintend the execution, use, or conduct of . . . to mete out: DISPENSE." Webster's Third New International Dictionary, supra at 27. Notably, these common definitions do not restrict "administer" and "administration" to purely ministerial acts, but incorporate the exercise of some circumscribed discretion or judgment to effectuate identified goals. Contextual language within RSA 674:21, II itself implies that the authority of an entity charged with the administration of an innovative land use controls ordinance, like a planning board, extends beyond purely ministerial acts such as inputting numbers into a mathematical formula. In particular, the statute commands that an ordinance "contain within it the standards which shall guide the person or board which

administers the ordinance." RSA 674:21, II (emphasis added). The term "guide" includes "to regulate and manage . . . direct or supervise [especially] toward some desirable end, course, way, or development. . . ." Webster's Third New International Dictionary, *supra* at 1009. Therefore, the statute's requirement that an ordinance provide standards to guide its administration includes an expectation that the administering entity will exercise some measure of sound judgment and discretion to implement the terms of the ordinance within circumscribed parameters.

Based on that analysis, the court held that the two impact fee ordinances in question provided the planning board with sufficient standards to guide its periodic adjustment of impact fees. Because there were sufficient standards set out in the impact fee ordinances to guide the planning board in calculating future changes to the impact fees, the planning board's exercise of some discretionary authority in executing that task did not violate RSA 674:21.

The plaintiffs also argued that the adjustment of the amount of impact fees by the planning boards violates Part I, Article 28 of the NH Constitution (which requires generally that taxes may not be imposed without the consent of the people, or their representatives in the legislature). The court disposed of this argument by pointing out that the legislature authorized towns to delegate some discretion to planning boards, under proper standards, to adjust the level of impact fees as part of a planning board's administration of the ordinance. Moreover, the town meetings in both towns voted to adopt the method for adjusting the impact fees contained in the proposed ordinances, which included the authority of the local planning board to implement changes to the fees. Thus, even if impact fees are subject to Part I, Article 28 of the Constitution the method of adjusting those fees does not violate that article.

PRACTICE POINTER: The court ruled against the plaintiffs challenge in these two cases by finding that the delegation to the planning board of the power to "administer" the impact fee ordinance carries with it the notion that the planning board is authorized to exercise some limited discretion or judgment. What follows from this, however, is the clear statement by the court that such power may only be lawfully exercised if the ordinance also limits the planning board's discretion by providing sufficiently detailed standards to guide the planning board's adjustment of the amount of the impact fees. If the impact fee ordinances did not provide adequately detailed standards to limit the exercise of the planning board's discretion, these two ordinances would surely have been declared invalid.

PROXIMITY REGULATION OF VEHICLE DEALERSHIPS IS CONSTITUTIONAL

Taylor v. Town of Plaistow, 152 N.H. 142 (2005)

In 1997 the Town of Plaistow amended its zoning ordinance to provide that no lot used for a vehicular, trailer or recreational vehicle dealership in Commercial I District may be located closer than one thousand (1,000) feet to any other lot used for such a dealership. Mr. Taylor bought a lot that he wished to use for a dealership, but which was within the 1,000 foot proximity restriction to another dealer. He eventually received a variance to allow him to use the property for the dealership, but he challenged the

restriction on constitutional grounds, seeking money damages for the time that he owned the property but was prevented from using it for vehicular sales. Mr. Taylor argued that the restriction violated both his right to substantive due process and to equal protection of the laws. The superior court upheld the zoning restriction as constitutional and the supreme court agreed.

Substantive Due Process

A substantive due process challenge to a zoning ordinance is based on the allegation that the restriction in question is fundamentally unfair, because it is not rationally related to the town's legitimate zoning goals. The supreme court began its analysis of this question as follows:

The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community. Asselin v. Town of Conway, 137 N.H. 368, 371 (1993); see RSA 674:16, I (1996). In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved. Furthermore, a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare. Asselin, 137 N.H. at 371-72.

The trial had court found that the town primarily focused on aesthetics, safety and planning concerns when drafting and enacting the 1,000-foot buffer between vehicular dealerships. In particular, the planning board considered that vehicle dealers display their goods outdoors, often in a disorderly manner, and that the positioning of the vehicles creates potential traffic and fire access problems. The supreme court ruled that these are legitimate reasons for which a town may exercise its zoning power. In a very significant statement that bodes well for the exercise of local discretion, the supreme court then held that **it would defer to the planning board's judgment as to the necessity and efficacy of adopting the proximity regulation to meet the aesthetic, safety and planning concerns described above**; in addition, the court pointed out that some other States have upheld such proximity regulations that are reasonably related to public health, safety or welfare as valid exercises of a municipality's police power. Thus, the court concluded that Plaistow's proximity regulation is rationally related to legitimate town goals and does not violate Mr. Taylor's constitutional right to due process.

Equal Protection

Because the proximity regulation applies only to vehicular dealerships and not other businesses, Mr. Taylor also claimed that his right to equal protection of the laws had been violated. An equal protection challenge is an assertion that the government impermissibly established classifications and a result, has treated similarly situated individuals in a different manner. In New Hampshire, the court applies a test that is more difficult for the town to pass when a zoning ordinance is challenged on equal protection, rather than due process, grounds. To survive an equal protection challenge, the restriction that is being challenged "must be reasonable, not arbitrary, and must rest

upon some ground of difference having a fair and substantial relation to the object of the [restriction].”

The trial court found that vehicular dealerships impair the town's aesthetics more than other types of businesses because they display their goods outdoors in full view to the general public, while other businesses operate indoors and the outside areas are reserved for employee and customer parking. Furthermore, the court found that vehicular dealerships have a greater impact on traffic safety than other businesses because motorists are likely to look at the inventory displayed outside the dealership as they drive by. Thus, the trial court concluded that the ordinance's distinction between vehicular dealerships and other businesses bears a fair and substantial relation to the Town's goals sufficient to warrant disparate treatment with respect to the 1,000 foot proximity restriction. The supreme court agreed with the trial court that the classification created by the ordinance bears a fair and substantial relationship to the town's goals of preserving aesthetics and ensuring traffic safety.

CASES ON NONCONFORMING (“GRANDFATHERED”) USES

“USE IT OR LOSE IT” CLAUSE IN ZONING ORDINANCE UPHELD, SORT OF

McKenzie v. Town of Eaton ZBA,
(January 31, 2007)

In 1981 the town issued a building permit to Nancy Burns that allowed her to construct a storage shed some 59 feet from the shore of a lake. In 1989, the zoning ordinance was amended to require a setback of 125 feet from the lake, thus rendering the shed nonconforming. Also in 1989, a one-year nonconforming use “lapse” clause, or “use it or lose it” clause, was inserted in the ordinance as Article VI, section 2, which states as follows:

Any structure damaged by fire, deterioration, or other casualty to the extent of seventy-five (75) per cent or more of the floor area in square feet and is not reconstructed within one (1) year shall constitute discontinuance and abandonment under Article VI, 1.a. above and shall not be reconstructed or used except in conformity with this ordinance. The Board of Selectmen may permit the reconstruction or use of such building or structure substantially as it was prior to destruction upon finding that the same will not be detrimental or injurious to the neighborhood. If, for any reason, this permit is not granted such damaged structure shall be removed to clear ground level and put into safe condition within one (1) year following the date of damage. Any time after the expiration of said one (1) year, the Board of Selectmen may cause such removal to be done at the expense of the owner.

The “lapse” clause was still in effect on June 2, 2002 when a windstorm blew over some trees onto the shed and damaged it in excess of 75% of its floor area. Nine months later, in March, 2003, Burns met with the selectmen and stated that she wanted to rebuild the shed. The selectmen agreed it could be rebuilt on the same footprint because of the protection afforded to nonconforming structures under the zoning ordinance.

However, by the anniversary of the damage, June 2, 2003, Burns had not rebuilt her shed or removed the debris left by the storm. On June 4, 2003 the angry abutter, Mr. McKenzie, wrote to the selectmen requesting that Burns remove the remnants of the shed and the debris on the property as required under Article VI, section 2. The selectmen notified Burns on August 19, 2003 of her duties under the ordinance. Burns promptly applied for a building permit to rebuild the shed, which the selectmen equally promptly granted on August 26, 2003.

McKenzie appealed the issuance of the building permit to the ZBA, which reversed the issuance of the permit because it was not issued within the one-year period required by the ordinance. Burns filed for rehearing, which the ZBA granted. After rehearing, the ZBA reversed its initial decision and affirmed the selectmen's issuance of the building permit. (**Note:** At the rehearing, I represented the selectmen, an associate in Attorney Fay Melendy's office represented Nancy Burns, Attorney Bernie Waugh represented the ZBA (although I do not recall that he was asked to attend the hearing itself), and Mr. McKenzie was pro se (represented himself). I argued to the ZBA, as did Nancy Burns's attorney, that under Lawlor v. Town of Salem, 116 N.H. 61 (1976), the one-year "lapse clause" could not be automatically and rigorously applied – rather, the Lawlor court was clear that when considering whether a nonconforming use or structure had been abandoned, the landowner's subjective intent, as revealed by the actions the landowner took or failed to take, would determine the question. If the landowner's actions revealed an intent to reestablish the nonconforming use, there was no abandonment of the nonconforming use and the municipality had a constitutional obligation to recognize the continued vitality of that use (i.e., the right to reestablish the use). The Eaton ZBA was persuaded by these arguments to reverse its original decision and uphold the issuance of the building permit beyond the one-year deadline in the ordinance because the record showed that Ms. Burns expressed her intent to rebuild the shed to the selectmen before the one year period expired.)

Mr. McKenzie, who was not at all happy with the ZBA's final decision, hired an attorney and appealed to superior court, arguing that the ordinance provision was clear and unambiguous and that the ZBA failed to properly apply it. The superior court agreed with Mr. McKenzie, ruling that while the ZBA's consideration of Burns's intent under the Lawlor case may have been appropriate if there were no controlling provision in the zoning ordinance, the terms of Article VI, section 2 allowed the ZBA no discretion in determining abandonment. Because Burns failed to reconstruct her shed within one year of its destruction, the superior court found the ZBA's decision to uphold the building permit unreasonable.

The ZBA and Ms. Burns appealed to the NH Supreme Court which upheld the superior court's ruling. The court agreed with the interpretation that the zoning ordinance provision "precludes a consideration of a property owner's subjective intent when determining whether the owner has abandoned a nonconforming use or structure. As to the holding in the Lawlor case that the landowner's intentions must be taken into account, the court ruled that the Lawlor test is applicable only "in the absence of an applicable ordinance defining abandonment."

Burns and the ZBA also argued that the application of the one-year provision is a constitutional violation of substantive due process. The court disagreed, reasoning as follows:

The appellants argue that the ordinance provision is unconstitutional as applied to Burns' shed. Accordingly, we address whether the provision is rationally related to a legitimate governmental interest under the particular facts of this case. The part of the provision upon which the ZBA and Burns focus is the first sentence, which states that any nonconforming structure that is destroyed to the extent of seventy-five percent or more and is not rebuilt within one year "shall constitute discontinuance and abandonment" and "shall not be reconstructed or used except in conformity with this ordinance." The plain language of this provision evinces a purpose to discourage the continuation of nonconforming uses. The provision works to reduce nonconforming uses by establishing a time limit on their reconstruction. Those nonconforming uses not reestablished within a year are lost. Thus, the provision reduces the chance that a nonconforming use will be rebuilt. It is well established both in this state and in others that a legitimate purpose of zoning is the reduction and elimination of nonconforming uses. See, e.g., Hurley v. Hollis, 143 N.H. 567, 571 (1999) (stating, "the well established policy of zoning law is to carefully limit the enlargement and extension of nonconforming uses, and, ultimately, to reduce them to conformity as completely and rapidly as possible" (quotations omitted)); 4 Zeigler, Rathkopf's The Law of Zoning and Planning § 74:11, at 74-38 (stating, "the spirit of zoning is to restrict, rather than increase, nonconforming uses and to eliminate such uses as speedily as possible"). Accordingly, the ordinance's purpose of reducing nonconforming uses is a legitimate governmental interest. The remaining question is whether the provision, as applied to Burns' shed, bears a rational relationship to the legitimate goal. By imposing a time limit on Burns' ability to rebuild her nonconforming shed, the provision reduced the possibility that Burns would reconstruct her nonconforming shed and increased the possibility that the shed, if rebuilt, would be rebuilt in compliance with the zoning ordinance. As Burns did not rebuild her shed within a year, the efficacy of the time limitation is evident. Accordingly, as applied to Burns' property, the ordinance provision bears a rational relationship to the legitimate goal of reducing nonconforming uses. Based upon the above reasoning, we conclude that the ordinance provision at issue does not violate substantive due process as applied to Burns' nonconforming shed. Although there may be ways in which the provision could further the goal of reducing nonconforming uses while being less restrictive of Burns' property rights, we have not considered such alternatives, pursuant to our holding in Boulders, 153 N.H. at 638 (stating, "We will not second-guess the town's choice of means to accomplish its legitimate goals, so long as the means chosen is rationally related to those goals").

However, there is even MORE to be gleaned from this case. Justice Duggan wrote a concurring opinion that I believe is intended as a not so subtle hint about where the court will ultimately end up in dealing with "use it or lose it clauses." The long and the short of it is that Justice Duggan believes this case might have been decided differently if Burns and the ZBA had argued that the application of the provision in the zoning ordinance to the destroyed shed resulted in a "taking" of Burns's property. He based his reasoning on the long line of New Hampshire decisions that have referred to

the ownership, use, and enjoyment of property as a “fundamental” right under our State Constitution, which is a code word for the notion that such property rights are deserving of significant protection from government regulations that unduly interfere with those rights. Justice Duggan went on to opine that:

a strict one-year ‘use-it-or-lose-it’ ordinance provision is unduly rigid. A nonconforming use may not be repaired for over a year for any number of reasons, none of which suggest that it should be deemed abandoned. For example, a soldier may be deployed overseas for over a year and have no way of knowing that there has been property damage or that repairs need to be made; a family business may have difficulty in obtaining financing to rebuild; or some type of natural disaster or catastrophe could make rebuilding within a year impractical. To the extent an ordinance is read to contain a strict one-year ‘use-it-or-lose-it’ provision, it would fail to account for such reasonable contingencies. Moreover, under our precedents, the ordinance likely would result in a taking. (Emphasis added.)

Justice Duggan then favorably considered a decision of the North Dakota Supreme Court, City of Minot v. Fisher, 212 N.W.2d 837 (N.D. 1973) in which that court adopted an approach to this question which “presumes abandonment after the designated period of nonuse [as set forth in an ordinance] has passed, but avoids a due process challenge by not applying the presumption of abandonment in situations where the cessation of use was beyond the control of the property owner.” (Emphasis added.) Justice Duggan concluded his important concurring opinion with the following remarks:

If the [City of Minot] approach were applied in the present case, Article VI, Section 2 of the Town of Eaton Zoning Ordinance would have created a presumption that Burns’ (sic) nonuse of her shed rendered it an abandoned nonconforming use. Then, the ZBA would have been required to permit Burns to attempt to overcome that presumption by offering facts or argument that demonstrated that the cessation of use was beyond her control. I concur in the result reached by the majority because I do not read its opinion as foreclosing the adoption of such an approach under more compelling facts where the takings issue is squarely raised.

PRACTICE POINTER: Where are we left after all this? We may actually be left almost where we started, because Justice Duggan has strongly signaled that the court is not going to allow “lapse” clauses to be relentlessly applied to strip landowners of their rights to a nonconforming use or structure regardless of the surrounding circumstances (in other words, I believe that the old Lawlor abandonment test does have continuing vitality, even to situations governed by a “use-it-or-lose-it” clause in the zoning ordinance, notwithstanding the actual result in this McKenzie case). You can be reasonably certain, I believe, that the “lapse” clause that survives a future constitutional challenge will be one that expressly states (or is interpreted to mean) that a landowner is allowed to overcome the presumption of abandonment by demonstrating that the failure to comply with the one-year deadline (or whatever the time limit is in the ordinance) was the result of circumstances beyond the landowner’s control.

HOW MUCH INVESTMENT DOES IT TAKE TO BECOME VESTED?

AWL Power, Inc. v. City of Rochester, 148 N.H. 603 (2002)

In August, 1987, the Rochester Planning Board approved a development plan for about 24 acres that would create 18 single family homes and a 59-unit condominium. The approval was subject to the condition that the developer construct a number of public improvements on the property, including a sidewalk, a sewer line extension, a fence and a road.

About a year after the planning board's approval, the zoning ordinance was amended, which rendered the proposed condominium and many of the unbuilt single-family houses nonconforming. The city, however, allowed the developer to continue the development according to the 1987 approved plan. During the 3 years that followed the approval, the developer built 6 of the 18 houses, and spent slightly over \$200,000 on the public improvements, finishing the sidewalk and sewer line construction; it also paid the city a \$50,000 impact fee for off-site improvements.

The parties in this case did not dispute that the original developer met the requirements of RSA 674:39 which grants a four-year exemption from subsequently enacted zoning restrictions, running from the date of recording of an approval, provided the builder begins "active or substantial development" on the property within 12 months of the approval. The parties thus agreed that the city could not have blocked the developer's proposed construction under the amended zoning ordinance until at least August, 1991 (4 years from the original approval).

In 1990, all construction ceased on the site because of the downturn in the real estate market, and the developer did not seek to resume construction for 10 years. In April, 2000 the developer notified the city of its intention to finish the project. In response, the city reviewed the project and determined that the developer had completed 43.2 percent of the required public improvements, and 10.7 percent of all the combined public and private improvements. Based on this study, and following a public hearing, the planning board found that the developer's right to complete the project had not vested, and that the changes in the zoning ordinance, no longer stayed by the statutory four-year exemption, barred the completion of the project. Based on this finding, the planning board revoked the 1987 project approval.

The developer appealed to the superior court, arguing that the right to complete the project had vested and could not be revoked. The superior court compared the \$200,000 that had been spent on the public improvements to the projected cost of the entire development which was almost \$6,500,000. Without taking into account the completion of the 6 houses, the court concluded that the developer had completed only about 3% of the project, and agreed with the planning board that this small percentage was insufficient to constitute the "substantial construction" necessary to vest the right to complete the project under the common law standard articulated in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970).

Test to Determine "Substantial Construction" is Absolute, Not Relative (Sometimes)

On appeal, the supreme court ruled that the trial court had used the wrong approach in considering what percentage of the overall project had been completed before the zoning ordinance was amended. The court outlined the following three bases for its rejection of the "percentage of completion approach" to vesting:

1. Prior cases do not support the "percentage of completion approach"

The court looked at some of the earlier cases about vesting and pointed out that "we have never held that completion of a certain percentage of construction is the exclusive method by which the rights of a developer may vest," and that in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970) the court had gone out of its way to declare that "each case presents a question of fact peculiar to its own set of circumstances."

2. The "percentage of completion approach" conflicts with the common law rationale for vesting

The court said that common law vesting rights stem from the developer's good faith reliance upon the absence of land use regulations that prohibit the project, and for that reason courts should be liberal about how and when such "good faith" vested rights are created. Against this liberal approach, the supreme court clearly felt that the superior court had simply set the vesting bar too high by using the "percentage of completion approach."

3. The "percentage of completion approach" would lead to anomalous results

Finally, the supreme court said that the "percentage of completion approach" would unfairly burden developers with large or complex plans compared to smaller projects. The court noted that:

"In fact, the city's application of this standard has already led to disparate results. At about the same time it considered this case, the city determined that another developer, who had spent no more than \$143,000 on his approved plan, had acquired a permanent, vested right to complete his project. The rationale for this decision was that the total cost of the other developer's project was only several hundred thousand dollars, and that the construction completed by the developer thus constituted a substantial percentage of the total. While consistent with the reasoning used by the city and trial court in this case, the trial court's standard places as much emphasis on the size of the overall project as it does on the actual reliance of the developer. We thus hold that the superior court erred as a matter of law in interpreting the "substantial construction" standard."

Thus, the supreme court concluded that the correct standard to determine whether "substantial construction" has occurred will take into account not only construction measured against the entire plan, but also whether the amount of completed construction is per se substantial in amount, value, or worth. The court agreed with the developer that its expenditure of over \$200,000 on public improvements and

construction of six houses was enough to meet the "substantial construction" standard in this case.

The court also clearly left the door open to apply the "percentage of completion approach" to the vesting of smaller projects where good faith expenditures might not seem *per se* substantial. However, the main point is that "in cases where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost of the project."

Vesting Will Not Always Depend Only on Public Improvements

The supreme court rejected the developer's argument that vested rights should depend only on whether the developer has made "significant expenditures" on the public improvements to the land. The court said that while it is possible that a developer may acquire vested rights solely by the construction of public improvements, that will happen only if the construction was "substantial" and not merely because it constituted a certain percentage of the total public improvements.

What Good is The Vesting Statute, RSA 674:39?

Last, the developer had argued that the four-year vesting statute, RSA 674:39, establishes a standard for the acquisition of vested rights that is easier to meet than the standard developed over the years as the court has decided cases such as Piper v. Meredith (the common law). The court disagreed with this, confirming its earlier ruling in Morgenstern v. Town of Rye, 147 N.H. 558, 563 (2002) that the test for vesting under the statute and at common law is the same.

Indeed, the court pointed out that the principal benefit of the vesting statute for developers is that it provides a developer with additional time (four years) to meet the common law vesting standard of having completed "substantial construction" of the project -- the statutory four years becomes available to the developer if she begins "active or substantial" construction within one year of the approval of the project. The statutory protection is significant; recall that at common law even an approved project could be stopped dead in its tracks if a subsequent land use amendment prohibiting the project was enacted before common law vesting had occurred.

FORMER ACCESSORY USE NOT ALLOWED TO BECOME THE PRINCIPAL NONCONFORMING USE (OR, DON'T GIVE UP THE PIGS!!)

Town of Salem v. Wickson, 146 N.H. 328 (2001)

Richard Wickson owns a 4.1 acre vacant lot in Salem that had been used as a working farm, including pigs, since the 1950's; the farming use became nonconforming when the town's first zoning ordinance was adopted in 1961.

As part of the farming activities, horse, chicken and pig manure were stockpiled, and sand and other materials were brought onto the site to be mixed with the manure; this material was then trucked off the property to market. In 1988, Wickson voluntarily removed the animals and buildings and ceased the farming operation with the intention

of establishing a nursery for which he had received site plan approval, but the nursery was never built. It does not seem to have been disputed that Wickson voluntarily abandoned the principal, nonconforming use of farming; see Lawlor v. Town of Salem, 116 N.H. 61 (1976) for a discussion of how to evaluate whether a nonconforming use has been abandoned.

Instead, Wickson continued to use the lot to stockpile earth materials, involving the delivery of some twenty-five eighteen-wheel truckloads per week. In 1990 the town notified him that the stockpiling was not a permitted use, and eventually filed a petition in the superior court seeking an injunction against the use. After a two day trial, the superior court judge dismissed the town's petition, ruling that the use of the property for stockpiling had been continuous and essentially unchanged since the 1950's and was therefore a lawful, nonconforming use.

On appeal, the town argued that when Wickson abandoned the nonconforming farming use of the property, he also abandoned all nonconforming uses incidental to pig farming, including his right to stockpile earth materials; therefore, the continued stockpiling constitutes a substantial change in use. Wickson argued that to determine whether a substantial change in the nonconforming use had taken place, the superior court correctly focused on the consistency of the stockpiling activity, and not whether that activity was incidental to the farming operation that had been abandoned; that is, Wickson argued that no change had occurred because the stockpiling activity still consisted of manure being mixed with earth products for commercial sale just as when the farm existed.

Tests to Evaluate Whether Change to Nonconforming Use is Allowed

In its analysis, the supreme court first repeated the approach set out in earlier cases that to determine whether there has been a substantial change in the nature or purpose of the pre-existing nonconforming use, which is not allowed (unless the local zoning ordinance says otherwise) the court will consider:

- (1) the extent the challenged use reflects the nature and purpose of the prevailing nonconforming use;
- (2) whether the challenged use is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and
- (3) whether the challenged use will have a substantially different effect on the neighborhood.

So, the first task is to determine the nature and purpose of the use that was in place when the zoning ordinance went into effect (always the "magic moment" in this part of the analysis). The court concluded that "the nature and purpose of the nonconforming use in 1961 was for pig farming and that the stockpiling activity was incidental and subordinate to the farming activity." (As shorthand, this finding is the equivalent of a finding that the stockpiling was an "accessory" use in support of the principal use of farming.) The court noted that the courts in some other States have adopted a firm rule that a nonconforming use that is accessory to a principal use can

never be converted to a principal nonconforming use, but declined to consider adopting that hard and fast rule on the technicality that the town had not argued that the rule should be adopted when the case was before the superior court.

Because it refused to adopt the hard and fast rule (but did it, really?? -- see below!), the court went on to consider whether Mr. Wickson's revised stockpiling activity constitutes a use different in character, nature and kind. The court ruled that it does, observing that at the time the zoning ordinance was adopted in 1961 earth materials were brought onto the lot and stockpiled to assist in removing a by-product of the principal pig-farming activity -- the character and nature of the stockpiling after the farming was abandoned is wholly unrelated to pig farming, and all materials are brought in from off-site. Therefore, the supreme court rejected the superior court's finding that the use had remained essentially unchanged since before zoning was adopted.

The heart of the case lies in the court's disagreement with Mr. Wickson's argument that any use that is "similar" to the nonconforming use for stockpiling is a natural expansion of that nonconforming use, since the argument "misconstrues the purpose of the right to continue a pre-existing lawful use." The court explained that:

The right to continue a pre-existing lawful use vests in the property because a substantial reliance has been placed on that use . . . at the time the ordinance creating the nonconforming use was enacted. Accordingly, nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use. Here, any claim that substantial reliance had been placed upon the use of the lot for stockpiling was directly related to the nonconforming use of the property as a pig farm. The fact that the stockpiling activity of mixing manure with earthen materials has continued without interruption is irrelevant, because the right that vested with the property was to continue pig farming. Therefore, unless the stockpiling is closely related to the pig farming, it is not the expansion of a natural activity closely related to the nonconforming use. (Emphasis added.)

The court also went on to find that the stockpiling also flunked the third part of the test, since the use does have a substantially different effect on the neighborhood ("it is inconceivable that sixty-five pigs could create enough waste to require anywhere near the twenty-five eighteen-wheel truckloads per week involved in the new stockpiling operation"). However, that finding was not critical to its decision, and is an anticlimax.

When Is a Firm Rule Not a Firm Rule??

Although the court said it would not adopt a "firm rule" that an accessory use can never be converted to a principal nonconforming use as the town had requested, the practical effect of its decision may amount to the same thing. The court was unequivocal that "the right that vested with the property was to continue pig farming," which was the principal use of the property that became nonconforming the moment the zoning ordinance was adopted in 1961. Since the principal use was later abandoned, the new stockpiling activity could not be "the expansion of a natural activity closely related to" pig farming because there is no more pig farming. Therefore, how could a

use that was accessory to a former nonconforming use that was then discontinued ever be allowed as a substitute, principal nonconforming use of the property?? It seems logically impossible, because the former accessory use will never be able to claim that it is still closely related to the former principal use. Sure seems like a firm rule to me!

PLAINTIFF MUST PROVE THAT DISCRIMINATORY ENFORCEMENT OF ZONING ORDINANCE WAS CONSCIOUS AND INTENTIONAL; SOME INTENSIFICATIONS OF NONCONFORMING USES ARE ALLOWED AS A MATTER OF RIGHT

Pope v. Little Boar's Head District, 145 N.H. 531 (2000)

The plaintiff owns a small ice cream stand, the Beach Plum, in the Little Boar's Head District of the Town of North Hampton. Established before the area was zoned residential in 1937, the operation was closed during World War II, and re-established under a conditional variance in 1946. The conditional variance restricted items sold from the stand to principally products of the owner's dairy, and only for the retail sale of his ice cream, cream, milk, buttermilk, frappes, and other dairy products, hot dogs, tonics, candy, popcorn, potato chips, peanuts, cigarettes, cigars, and chewing gum.

Interestingly, there is a small restaurant located just a few hundred yards from the Beach Plum, called Andrews-by-the Sea; in 1992 the District Board of Commissioners, after an "informal" meeting (!!!), granted Andrews-by-the Sea a one-year permit for a take-out window. Then, in a 1993 letter, the building inspector and commissioner, without conducting a hearing (!!!), gave Andrews-by-the Sea permission to operate the take-out window permanently.

In 1996, Mr. Pope, the latest owner of the Beach Plum, applied for a special exception under the zoning ordinance to expand his menu items to include coffee, tea, hot chocolate, hamburgers, cheeseburgers, muffins, doughnuts, pastries, and cold sandwiches. He did not seek to make any physical alteration to the building, but claimed that he was seeking to intensify his nonconforming use. The special exception was denied, which was particularly unsettling to Mr. Pope in light of the easy time his competition had at Andrews-by-the Sea.

Mr. Pope appealed the denial of the special exception to superior court, alleging that (1) it is unlawful for the District to not have a provision in its zoning ordinance so that a property owner can receive permission to intensify, as opposed to expand physically, a nonconforming use; and (2) the District applied the zoning ordinance in a discriminatory manner because of the way it allowed his competitor, Andrews-by-the Sea, to install a take-out window. The superior court judge was so upset about what seemed to him to be blatant discrimination that he never ruled on the first argument. Instead, the judge found that the District had enforced the zoning ordinance in a discriminatory manner, and ordered it to either allow the expanded sales requested by Mr. Pope, or enforce its ordinance against all businesses similarly situated and in direct competition with Mr. Pope. The District appealed to the supreme court.

On appeal, the supreme court stated flatly that a finding that a municipality selectively enforced its zoning ordinance in a discriminatory manner requires evidence that any discrimination was conscious and intentional. Although that is an incredibly

hard thing to prove, it seems an appropriate burden to avoid a situation where good faith, but uneven or negligent, enforcement decisions could allow similarly situated property owners to simply ignore the ordinance. Certainly such a result would not be in the public interest and it is for that reason that the court has justifiably set the bar in a very high place when a plaintiff claims discrimination. Because the superior court did not consider whether any discrimination was conscious and intentional, the supreme court remanded the case (sent it back down to the superior court) for further proceedings.

Nonconforming Use v. Use Allowed by Variance

The poor old much-maligned supreme court had its eyes wide open on this one! It went on to point out that although everybody was arguing about the Beach Plum being a pre-existing nonconforming use, it seemed to the court that it really is a use established (or at least re-established) after zoning was adopted by virtue of the conditional variance that was granted in 1946. As such, perhaps Mr. Pope should have sought a modification of the conditions placed on his variance, rather than seeking a special exception under the ordinance. In this regard, the supreme court recognized the authority of the ZBA “to modify conditions previously imposed with respect to the grant of a variance.”

Intensification of Nonconforming Use as a Matter of Right

The supreme court also pointed out that if Andrews-by-the Sea is a nonconforming use, the addition of the take-out window that seems so improper because permission for it was granted without any public proceedings may have been permissible as a matter of right. That is so because it is the law that a property owner who seeks to expand or “intensify” a nonconforming use internally may do so as a matter of right if the intensification will not result in a substantial change to the effect of the use on the neighborhood. See Ray’s Stateline Market, Inc. v. Town of Pelham, 140 N.H. 139 (1995). Thus, on remand the superior court should also consider whether the uproar about the different treatment afforded Andrews-by-the Sea was merely a tempest in a teapot.

TEST FOR EXPANSION OF A NONCONFORMING USE IS MORE RESTRICTIVE THAN THE TEST FOR "CHANGE OF USE" FOR SITE PLAN REVIEW

Town of Seabrook v. Vachon Management, Inc., 144 N.H. 662 (2000)

In 1990, the defendants opened a business known as "Leather and Lace" in unit one of a six unit building on Route 1 in Seabrook - the business sold adult books, magazines, videotapes, and paraphernalia and later installed coin-operated video booths. The adjacent unit, unit two, was occupied by a third party who used it for retail computer equipment sales. For some time, Leather and Lace also presented live entertainment in unit one, including mud and oil wrestling, but that activity stopped in unit one after the town's building inspector informed the owner that the addition of live entertainment would require site plan approval from the planning board since it constituted a change of use from retail sales.

In fact, as soon as the computer sales operation moved out of unit two in 1992, Leather and Lace expanded into it without notice to the town, and began offering mud wrestling and bachelor parties. Eventually, part of the wall separating the two units was removed, and live nude dancing was substituted for the mud wrestling and bachelor parties in unit two.

In 1994 the Town of Seabrook amended its zoning ordinance to regulate sexually oriented businesses; the regulations prohibit any such business from operating within 1,000 feet of a place of worship, 300 feet of a residence, or 500 feet of the town boundaries. Leather and Lace violated the new restrictions by virtue of its proximity to the town border, a residence and a church.

In 1997 the town discovered that unit two was being used for live nude dancing and sought an injunction in superior court to stop it. Following a trial, the superior court denied the injunction, finding that mud wrestling was a preexisting nonconforming use that was unaffected by the 1994 zoning amendment, and implicitly concluding that live nude dancing was a lawful expansion of mud wrestling.

The supreme court reversed, agreeing with the town that live nude dancing in unit two is not exempt from the 1994 ordinance as a grandfathered use. The key to the decision is that only lawful preexisting uses are protected from later enacted zoning restrictions, so that they may continue as nonconforming uses. When unit two was changed from computer sales to mud wrestling in 1992, it was a change of use from "retail" to "commercial entertainment" under the ordinance at the time. In order to be lawful, the owner was required to seek and receive site plan approval for the change from the planning board. Since the owner never applied for site plan approval, mud wrestling was never lawfully established and therefore neither it nor the later addition of live nude dancing were protected from the restrictions imposed by the 1994 sexually oriented business amendment.

The court went on to provide clarification as to when a change of use is sufficient to trigger the need for site plan review. The defendants argued that in order to require site plan approval, the change in use must be substantial, a test similar to that used to determine if an expansion of a lawful nonconforming use is permitted. The court disagreed, ruling that:

the purpose of requiring site plan approval is to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety or prosperity of abutting property owners or the general public. If a town is not permitted to review site plans for all changes in use, it will be unable to measure the impact of such changes on the existing infrastructure and site conditions to protect the public health, safety, and welfare.

PRACTICE POINTER: Do not confuse the court's ruling that all changes of use are subject to site plan review (assuming, of course, that the new use is either multi-family or nonresidential as provided under RSA 674:43, I) with the incorrect idea that any change to an existing use is subject to site plan review. The court's ruling does not address expansion of an existing use, such as adding a table or two to an existing restaurant. It merely states that when a restaurant changes to, say, retail sales, site

plan review is required even if the owner argues that the changed use is not substantially different from the existing use, or that the impact on the surrounding properties, traffic patterns and the like, will not change.

GROWTH CONTROL ORDINANCES

INTERIM GROWTH MANAGEMENT ORDINANCE UPHELD

Weare Land Use Association v. Town of Weare,
153 N.H. 510 (2006)

At the town meeting on March 9, 2004 the Weare town meeting adopted a one-year interim growth control ordinance pursuant to RSA 674:23 which prohibited the planning board and the ZBA from formally accepting or acting upon "any site plan applications for single family housing, multi-family housing, mobile home parks or condominiums proposed . . . or any other major subdivision applications creating a total of more than 3 lots." The ordinance applied to applications formally accepted after March 9, 2004 but not to those there were formally accepted prior to that date. The ordinance also limited to 60 the number of building permits that the town could issue for new dwellings during the one-year period.

In response to the adoption of the ordinance, the Association filed suit, advancing a number of constitutional and statutory challenges. After some maneuvering in court, the case boiled down to the claim that the ordinance was invalid "because RSA 674:23 does not authorize the town to suspend the legal protection and effect of RSA 676:4 [planning board's procedures on plats] and RSA 676:12 [building permits] nor deny access to the Board of Adjustment." In essence, the Association argued that the interim growth control ordinance interfered with the statutory authority (and obligation) of the planning board to accept and review plats and applications, the authority of the town to issue building permits, and the rights of persons to seek relief from the ZBA.

In rejecting the Association's argument, the superior court stated:

The purpose of the interim growth management ordinance, RSA 674:23, as previously codified at RSA 31:62-b, is to provide "a town [with] reasonable time to develop [or alter] a master or comprehensive plan and to provide for phasing in growth." Conway v. Town of Stratham, 120 N.H. 257, 258-59 (1980); RSA 674:23, I. This purpose would likely be defeated if RSA 676:4, I(c)(1), and RSA 676:12, VI — both of which concern plats or applications that have been formally accepted by the Planning Board — were interpreted in the manner suggested by the Association. Moreover, interpreting RSA 676:4, I(c)(1), and RSA 676:12, VI, in that fashion would have the effect of rendering RSA 674:23 rather meaningless. The Court "will not interpret the statute to produce such an illogical result." Appeal of Soucy, 139 N.H. 110, 116 (1994).

The Association appealed, but the NH Supreme Court agreed completely with the superior court's common sense ruling. Case closed.

ONLY AN UNCONSTITUTIONAL LAND USE ORDINANCE WILL LEAD TO AN AWARD OF MONEY DAMAGES FOR A TAKING

Torromeo v. Town of Fremont and MDR Corp. v. Town of Fremont,
148 N.H. 640 (2002)

These two cases eventually became joined at the hip, but started out life as separate challenges to the Town of Fremont's growth control ordinance. Torromeo is the developer of a twenty-seven lot residential subdivision know as Mason's Corner. After all but five lots were sold, the town stopped issuing building permits under its newly enacted growth control ordinance. Torromeo and a prospective purchaser of lots sued the town, seeking to require it to issue a building permit to the buyer. The trial court ruled that the subdivision was exempt from the growth control ordinance under the "grandfathering" provisions of RSA 674:39 and ordered the town to issue the building permit.

MDR is the developer of a fourteen lot subdivision and was originally issued five building permits, but was later informed that under the growth control ordinance no more permits could be issued for quite some time. MDR also sued the town, arguing that the growth control ordinance was invalid because the town had never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance under RSA 674:22. The trial court agreed that the town had never validly adopted the growth control ordinance, and the supreme court had upheld that ruling in an earlier case.

Following their successful attacks on the town's growth control ordinance, Torromeo and MDR filed separate lawsuits against the town seeking money damages caused by the "temporary taking" of their property from the time building permits had been denied under the invalid growth control ordinance until the permits were finally issued. The town argued that money damages for a temporary taking could only be awarded if the plaintiffs had shown that the growth control ordinance was unconstitutional, not merely unenforceable. After some confusing legal maneuvers, the superior court agreed with the plaintiffs and awarded them a substantial amount of money damages.

The town appealed to the supreme court, which reversed the award of money damages. The court clarified some language in an earlier case by ruling that money damages are only available to a plaintiff where the ordinance at issue is found to be unconstitutional and constitutes a taking (temporary or permanent) of the plaintiff's property. If the ordinance is merely invalid for some reason other than unconstitutionality, and thus unenforceable, as was Fremont's growth control ordinance, the only remedy the successful landowner is entitled to is an order forcing the town to issue the building permits that were erroneously denied.

TOWN MAY APPLY GROWTH CONTROL ORDINANCE UNLESS IMPACT FEES ALREADY PAID OR ASSESSED

Monahan-Fortin Properties, LLC v. Town of Hudson,
148 N.H. 769 (2002)

This case involves the court's interpretation of RSA 674:21, V(h) which states:

"The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development." (Emphasis added.)

The developer/plaintiff sought approval to construct a 101-unit elderly housing condominium known as Riverwalk along the Merrimack River in Hudson. When the developer filed its site plan application the town already had an impact fee ordinance in place, but there was a dispute about whether the application would be exempt from a newly proposed growth management ordinance. Although the developer and the town battled about whether the site plan should have been (or was in fact) formally accepted by the planning board as complete before the first public notice of the growth management ordinance was published, the superior court ruled that the development was exempt from the growth control ordinance under the above quoted statute because impact fees "would inevitably be assessed or had, in fact, been assessed against the plaintiff." This point was the only issue appealed to the supreme court, and based on the plain language of the statute it disagreed with the lower court.

The record was clear that the developer had not actually paid an impact fee, so it couldn't fit into that part of the statute. However, in its site plan application the developer stated the specific amount of the impact fees it would have to pay under the town's ordinance, and the town acknowledged that it had preliminarily calculated the amount of the impact fees that were to be charged to the project. The superior court held that the statute was satisfied because it seemed "inevitable" that the developer would end up having to pay the impact fee, and therefore concluded that an impact fee had been "assessed." As a result, it ruled that the town could not also apply its growth control ordinance to the project.

The supreme court disagreed, although it declined to precisely define the meaning of "assessed" in this context. Instead, the court said that it was sufficient to state that

"a preliminary estimate of an impact fee by a municipality does not constitute an assessment within the meaning of the statute, and that a municipality does not assess fees implicitly by merely receiving an application wherein fees are represented."

Instead, the supreme court said the plain language of the statute should have been followed by the superior court: since an impact fee had not already been paid or assessed (past tense) when the growth control ordinance came along, the town could apply both impact fees and growth control restrictions to the development.

SITE PLAN REVIEW; ASSISTANCE TO APPLICANTS

PLANNING BOARD NOT LIMITED TO SPECIFIC LIMITATIONS IN LOCAL ORDINANCES WHEN REVIEWING SITE PLAN APPLICATION

Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75 (2004)

The plaintiff is a commercial business engaged in heavy equipment sales and service at a location about ½ mile west of the intersection of Route 93 and Route 3 in Tilton. The plaintiff wished to install a ninety-foot flagpole to fly a 960 square-foot American flag, and filed an application with the planning board to amend its site plan. The board’s site plan regulations set forth the purposes served by site plan review as follows:

- a. To provide for the safe and attractive development . . . of the site and to guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of:

. . .

- (3) Undesirable and preventable elements of pollution such as noise

. . .

- b. To provide for the harmonious and aesthetically pleasing development of the municipality and its environs; [and]

. . .

- h. To include such provisions as will tend to create conditions favorable for health, safety, convenience and prosperity.

Based on these regulations, the board noted the following concerns with the plaintiff's site plan: (1) the required lighting of the flag at night; (2) a ninety-foot flagpole would exceed the zoning ordinance's height limitations on buildings; (3) the noise associated with the flag in windy conditions; (4) the safety concerns from ice falling or the pole itself falling; and (5) improper use of the flag for advertising.

The board directed several questions to the plaintiff's representatives, Chris Rice and Jason Kahn. Mr. Rice was unable to answer the board's questions about the size of the pole, the effect on the neighborhood of the required lighting and the potential noise. In answering why a ninety-foot flagpole was required, Mr. Kahn first stated the purpose was to draw awareness to the flag. The board's minutes also reflect that "Mr. Kahn stated [the plaintiff] was trying to develop a brand presence. [The plaintiff] was trying to develop this brand as one identity and a 90 foot flag was one of his identities." In addressing the safety and noise concerns, Mr. Kahn stated that the manufacturer could provide information about the noise generated by flags flying in the wind and that the flagpole would be "fully engineered." He also stated that ice would not adhere to the flag and that the pole was tapered. The board approved the proposal conditioned on a

height restriction of fifty feet, the same height restriction in the town's zoning ordinance for buildings. The board imposed the height restriction based upon concerns about safety, noise and aesthetics.

The applicant appealed to the superior court, which ruled that the planning board had reasonably determined that the applicant had failed to address the board's concerns about safety, noise, and the effect on the area aesthetics of lighting the flag and flagpole.

On appeal to the supreme court, the applicant argued that the planning board's denial was unlawful because there is no local ordinance in Tilton that prohibits the installation of a ninety-foot flagpole; pointing to the specific height limitation on buildings contained in the zoning ordinance, the applicant argued that the lack of such a limitation for flagpoles prevented the planning board from denying the application.

The supreme court disagreed with this argument. The court stated that site plan review is designed to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public. Moreover, the planning board has authority under site plan review to impose requirements and conditions that are reasonably related to land use goals that are within its purview. Most importantly, in upholding the exercise of discretion by the planning board, the court wrote that

Where the role of site plan review is to ensure that uses permitted by the zoning ordinance are appropriately designed and developed, restricting the board's authority to the specific limitations imposed by ordinances and statutes would render the site plan review process a mechanical exercise. The planning board properly exercised its authority to impose conditions that are reasonably related to the purposes set forth in the site plan regulations; namely, the "safe and attractive development" of the site. Therefore, the superior court did not err in upholding the board's decision.

Finally, one justice dissented from the opinion, stating that he believed the planning board did not give the applicant a sufficient opportunity to address its concerns. Perhaps the reason that this concern was not shared by a majority of the court is that there was no evidence in the record to show that the applicant requested additional time to address the issues raised at the public hearing. If the applicant had requested such additional time, but been denied that opportunity to come back to a continued hearing with additional evidence, I strongly suspect that the outcome of this case would have been different.

PLANNING BOARD WAS REASONABLE IN REQUIRING ADDITIONAL BUFFERING TO PROTECT ABUTTING RESIDENTIAL USE

Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167 (2003)

Bayson sought site plan approval for the construction of a 56,000 square foot Hannaford grocery store on its property, along with a parking lot to accommodate 302 cars. Over the course of several months, the planning board held seven public hearings

on the application and conducted an official site visit; most of the public hearings exceeded three hours in length. Finally, by a four to three vote, site plan approval was denied for failure to comply with landscaping and traffic provisions in the site plan regulations. Bayson and Hannaford appealed to the superior court, and the court upheld the denial. The supreme court agreed that the board's denial was supported by the evidence and not legally erroneous. The major issues are described as follows.

Bias of Planning Board Chairman

The acting chair of the planning board had participated in an earlier effort to rezone the property so that it could not be used for commercial purposes, but the city council had declined to change the zoning. At the first public hearing, the chair did exactly the right thing: she disclosed that she had been in favor of the rezoning, but had no problem with chairing the board's review of the site plan in a fair and impartial manner. She also asked any planning board member who could not act fairly and impartially to step down, but no member did so. The chair then asked if the applicant or any member of the public believed that any member of the board was prejudiced with respect to the site plan application they should please offer their objection, stating which board member should step down and why — no objections were raised.

Three months later the applicant's attorney made a vague reference at a public hearing about his feeling "that there are people on the Board who do not appear to like the fact that it is a commercial zone and the proposed use is an allowed use."

On appeal, the supreme court restated the rule that an objection to the impartiality of a member of a land use board member must be raised "at the earliest possible time" so that the matter can be addressed and corrected if necessary. Because the chairman raised the matter of her involvement in the rezoning effort at the beginning of the first public hearing, the applicant lost its right to later complain because it did not challenge her impartiality at that time.

Additional Buffering Required

The applicant sited the grocery store on that portion of the lot that most closely abuts those lots on which residential or low-intensity office uses were already situated. Moreover, the most intensive activities, the site driveway and loading dock, was proposed to be placed less than fifty feet from a Genesis Elder Care Facility on an adjacent parcel! The planning board determined that to adequately protect the residential uses of the surrounding sites, a twenty-five foot landscape buffer and additional buffering would be required "to remediate negative sight, noise and pollution impacts attendant to the proposed development, with respect to the abutting Genesis Elder Care Lot." On appeal, the applicant argued that the twenty-five foot buffering would have provided adequate noise protection for abutting residences, and that no additional buffering was necessary. The court upheld the planning board's judgment, based at least in part of the difficulty of enforcing some voluntary restrictions which the applicant proposed, as follows:

The plaintiffs expect truck deliveries to the site of from two to four tractor-trailers per day, two to three days per week, and up to forty smaller vendor trucks per day.

The plaintiffs offered to limit truck delivery hours to the site from 5 a.m. through 9 p.m. to alleviate noise generated from idling trucks, braking, back-up warning beeping, truck doors opening and closing and dock loading and to build a twenty-five-foot tall wall. The board found, however, that such voluntary provisions were "unrealistic" and "unenforceable" because: (1) "it is unclear to what extent the applicant can enforce the proposed restrictions on private vendor trucks"; (2) "testimony . . . indicate[d] that turning diesel truck engines on and off may be harmful to the longevity of such engines and that refrigeration compressors on some trucks would likely not be turned off during deliveries"; (3) the "difficulties inherent in enforcing the proposed restrictions . . . due to lack of city enforcement staff and the intermittent nature of potential noise and activity violations"; and (4) "the fact that many residents of the Genesis Elder Care facility sleep during the times in which the applicant anticipates the most intensive loading/unloading activities would take place."

The trial court found that "in light of these problems with the plaintiffs' voluntary restrictions, any one of which would be enough to support a finding of reasonableness on the Board's part, . . . the Board's finding, that the restrictions would not fully remediate potential noise concerns, thus justifying the imposition of additional buffers, was reasonable."

PRACTICE POINTER: Perhaps the most interesting aspect of this decision is the fact that the planning board was allowed to reject the efficacy of the applicant's voluntary restrictions based on the difficulty of enforcing those restrictions. In other words, a planning board is not required to accept voluntary restrictions proposed by an applicant that attempt to mitigate impacts on surrounding properties – the planning board can still deny the application if it reasonably determines that enforcement of those voluntary restrictions would be difficult, if not impossible. Perhaps this outcome doesn't seem too surprising, but it is surely nice to have the court confirm in plain language the board's authority to reject such restrictions!

Guidance Offered to Applicant

On appeal, the applicant also argued that the planning board held it to such an impossibly high standard that the practical effect was to rezone the property so that no commercial use could be made of it. The court rejected this argument, finding that, to the contrary, "the board provided the plaintiffs with ample input and guidance for bringing the application into compliance with the site plan regulations." Also telling on this point was the fact that the board's denial of the application had been made "without prejudice to the applicant's right to submit a revised application that adequately addresses the Board's concerns." The fact that the plaintiffs were unwilling to reduce the size of the proposed building, relocate the proposed building or substantially change the layout of its site plan to enable it to meet the concerns of the board, does not establish a "rezoning" of the property.

COURT REAFFIRMS PLANNING BOARD'S OBLIGATION TO PROVIDE ASSISTANCE TO APPLICANTS

The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003)

In this case, the supreme court reaffirmed the obligation of municipalities to provide assistance to those seeking land use approvals, and held that the Concord Planning Board had behaved properly in this case. Let's take a look at the details.

Richmond applied to the Concord Planning Board for site plan approval to construct a shopping center, including a supermarket, on a 34 acre parcel off South Main Street in Concord. The proposal called for the demolition of all existing structures on the property and the construction of four retail buildings with a total of approximately 180,000 square feet. Given the location of the property, the applicant was required to satisfy the requirements for development standards and special design criteria in the city ordinances.

Following several public hearings at which testimony and documentary evidence were received, the board voted unanimously to deny Richmond's site plan application because it failed to meet the requirements of city ordinance 28-11-7. Specifically, the board concluded that the Richmond project failed to satisfy criteria of the ordinance in that:

- 1) the project would not generate either a short term or long term expansion of the city's economic base;
- 2) the applicant's economic impact statement did not adequately address the fiscal costs and net fiscal impacts to the city for municipal services;
- 3) the application failed to address certain ancillary employee benefits;
- 4) the project was incompatible with the existing architectural and historic character of the area; and
- 5) the project was not specific to the site and the design did not enhance the scenic and/or recreational uses of the South End Marsh, which is part of the Merrimack River watershed and floodplain.

Richmond appealed to the superior court, which found that the planning board's decision was not supported by the evidence and that the board failed to share any of its concerns regarding Richmond's compliance with the city ordinance, thereby depriving Richmond of the opportunity to address and remedy any problems – thus, the court held, the planning board had failed to engage in a good faith dialogue with Richmond to assist it in satisfying the requirements for site plan approval. The superior court then remanded the case back to the planning board, and both sides appealed to the New Hampshire Supreme Court (Richmond appealed because it didn't want to go back to the planning board, it said the superior court should simply have granted it site plan approval).

On appeal, the supreme court reminded towns “that it is their function to provide assistance to their citizens, and that the measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order.”

Richmond argued that the board failed to provide meaningful assistance because it did not comment on or question the substance of Richmond’s application during the public hearings as it related to the city ordinance. The supreme court disagreed, saying that this was not a case where the board ignored the application or otherwise engaged in dilatory tactics in order to delay the project – indeed, the court ruled that it was appropriate for the board to “maintain a certain level of impartiality” during the public hearing process. Also, the court pointed out that Richmond acknowledged that its site plan project received “rigorous review,” and that it was appreciative of the input from the board, city staff and the public throughout that application process. It further stated that “well prior to the submittal of the Application, the Applicant discussed its plans for the area with City Administration, the City’s Engineering and Planning Departments, City Councilors and numerous others.”

Moreover, throughout the hearings, members of the public commented on whether Richmond’s project complied with the applicable section of the city ordinance. At the close of the hearings the board allowed Richmond to offer rebuttal testimony. Further, Richmond filed a detailed letter with the board on the final day the board accepted evidence, addressing issues raised throughout the hearing, including issues relating to the project’s compliance with the criteria in the city ordinance. The court held that fact that the board did not comment on the suitability of the project in response to Richmond’s inquiries prior to its deliberative session and vote is neither inappropriate nor unusual since the purpose of the board’s deliberative session is to decide the issues.

PRACTICE POINTER: Although the court did say it is appropriate for the planning board to “maintain a certain level of impartiality” during the public hearing process, the point of this case is that it is clearly the planning board’s job to give guidance to the applicant about what may be wrong with its development proposal, both from a technical (there is stuff missing that you need to provide) and from a substantive standpoint (here is where we think your proposal doesn’t comply with our land use regulations). Don’t just lie back watching the show, and then hand out a denial after the public hearing process is closed – have a dialogue with the applicant as you go through the process, giving the applicant an opportunity to adjust the proposal to meet your legitimate concerns and those of the abutters and other interested persons.

APPEALS / MOTION FOR REHEARING

ZBA SHOULD NOT ADD NEW REASONS FOR ORIGINAL DENIAL WHEN 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 Dziama v. City of Portsmouth, 140 N.H. 542 (1995).

APPEAL FROM PLANNING BOARD'S INTERPRETATION OF THE ZONING ORDINANCE MUST FIRST GO TO THE ZBA

Heartz v. City of Concord, 148 N.H. 325 (2002)

The complicated facts of this case are not important to our understanding of the rule that comes out of it. The supreme court interpreted the provisions of RSA 676:5, III, which gives the ZBA authority to review the planning board's interpretation of the zoning ordinance, as being mandatory in order to preserve the right to appeal to court.

In other words, if an applicant or abutter is not happy with the planning board's interpretation of the zoning ordinance in the course of its review of a subdivision or site plan application, that unhappy person MUST first appeal that portion of the planning board's decision to the ZBA in order to preserve their rights to eventually seek court review. If the unhappy person DOES NOT first appeal to the ZBA, she gives up her right to bring the zoning portion of the matter to court.

PRACTICE POINTER: Frequently, the planning board's final decision on a complex subdivision or site plan application will include within it the planning board's determination of how the zoning ordinance applies to the proposal, and how the planning board's subdivision and/or site plan regulations should be interpreted and applied to the project. (See Hoffman v. Town of Gilford, 147 N.H. 85 (2001), a case which foreshadowed the result of Heartz case). Under the state of the law after Heartz, to preserve their rights the unhappy party must first appeal the purely "zoning" questions to the ZBA under RSA 676:5, III while at the same time appealing the "planning" issues (those arising from the application of the subdivision and site plan

regulations) directly to the superior court under RSA 677:15! In such a case, the superior court would no doubt be willing to put a hold on any proceedings in the direct appeal from the planning board until the zoning issues either were resolved once and for all at the ZBA, or also came up on appeal from the ZBA where they could then be consolidated with the direct appeal from the planning board and tried at the same time. Awkward.

This split appeal process is what is classically referred to in law schools as “a trap for the unwary,” and will no doubt be the source of grief in the future. It doesn’t have to be this way. When the legislature amended the statutes to give the ZBA an opportunity to review disputes about the planning board’s interpretation of the zoning ordinance, it could not know that the court would eventually interpret that appeal process to be mandatory. The legislature is free to tinker with the process if it does not approve of the post-Heartz world we are at least temporarily inhabiting!

BOARD OF SELECTMEN IS THE ONLY TOWN BOARD THAT CAN APPEAL A ZBA DECISION TO SUPERIOR COURT

Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment,
149 N.H. 63 (2003)

Well, it finally happened. Many of us were waiting for a case like this to come along to clear up an uncertainty in the statutes about which town boards or officials have authority to pursue an appeal of a ZBA decision to the courts.

In July, 2000 the Hooksett Conservation Commission reviewed an application for site plan approval submitted to the planning board for a convenience store and retail gasoline sales facility. The commission provided a memo to the planning board stating its determination that the zoning ordinance prohibits “automobile service or repair shops” in the proposed location. The planning board sought an interpretation of the zoning ordinance from the town’s code enforcement officer, who then issued a formal zoning interpretation in which he concluded that the proposed use is permitted under the zoning ordinance. The conservation commission appealed the CEO’s formal interpretation to the ZBA under RSA 676:5, and the ZBA upheld the CEO’s ruling that the use is permitted. The conservation commission then filed a request for rehearing with the ZBA under RSA 677:2 which was denied, and then appealed the ZBA’s decision to superior court under RSA 677:4.

The ZBA filed a motion to dismiss the appeal, arguing that the conservation commission had no authority to appeal to the court (had no “standing” to bring the case to the court) under the language of RSA 677:4. The superior court denied the ZBA’s motion to dismiss and then ultimately issued an order agreeing with the conservation commission that the proposed use was prohibited in that location under the zoning ordinance. The ZBA then appealed to the supreme court.

To make a long story short, after a lot of comparison of the history of changes to the three relevant statutes and a consideration of the policy issues involved, the supreme court ruled that the conservation commission could file an appeal with the ZBA in the first instance, but is not allowed to apply for a rehearing to the ZBA if it gets an

answer it doesn't like, and is not allowed to take the issue to the courts. The supreme court ruled that under the statutes, only the selectmen are clearly given the authority to not only appeal to the ZBA in the first place, but then to file for a rehearing with the ZBA if the selectmen are not happy with the ruling and then take an appeal to the courts if the ZBA sticks to its original result.

The supreme court reached this result because although RSA 676:5, I permits "any person aggrieved or . . . any officer department, board or bureau of the municipality affected by any decision of the administrative officer" to appeal the initial zoning determination to the ZBA, the language of RSA 677:2 and RSA 677:4 which govern the process after that is not so clear. Instead, RSA 677:2 says that "the selectmen, any party to the action or proceedings, or any person directly affected thereby" may file for a rehearing with the ZBA, and RSA 677:4 allows "any person aggrieved" (which includes "any party entitled to request a rehearing under RSA 677:2") to appeal to the superior court. The supreme court ruled that the legislature did not intend to include town boards or officials within the definition of who is a "party" under RSA 677:2 with a right to pursue the matter.

The supreme court really had to struggle with this one, because neither the long legislative history of changes to the statutes, nor the current language of the statutes provides a clear answer to the question. To provide that answer, the court considered the policies sought to be advanced by the appeal process, and became "persuaded that the legislature did not intend for all municipal boards to have standing to move for rehearing and to appeal the ZBA's decision to the superior court." In support of that conclusion the court wrote the following (case citations, ellipsis and quotation marks omitted):

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, to 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. Such wrangling among governmental units should be minimized. In light of the above policy considerations, we conclude that the legislature did not intend to grant standing to request a rehearing to all municipal boards that may initiate an appeal under RSA 676:5.

Of course, the legislature is free to amend the appeal statutes in light of this decision, and the supreme court respectfully invited the legislature to do so if it believes the court misinterpreted the legislature's intent.

WHEN LAND USE DECISIONS (OR THE BASES FOR THEM) ARE NOT CLEAR

ZBA WASN'T CLEAR ABOUT WHICH VARIANCE TESTS WERE NOT MET, AND THE SUPERIOR COURT WASN'T CLEAR ABOUT APPEAL REQUIREMENTS!!

Robinson v. Town of Hudson, 149 N.H. 255 (2003)

This most confusing case started out simply enough. Michelle Robinson owns an old subdivision lot on Mark Street in Hudson that was approved in 1970. Because the planned road improvements were never done, Robinson's lot has only 50 feet of road frontage instead of the 150 feet required under the zoning ordinance. Robinson applied for a variance from the frontage requirement, which the ZBA denied. The ZBA's Notice of Disapproval specifically found that she failed to meet two of the five conditions for a variance (#1 - the variance would not be contrary to the public interest, and #2 - substantial justice would not be done) (see RSA 676:3, which requires both the ZBA and the planning board to issue written decisions -- if the decision is a denial, the reasons for the denial have to be spelled out in the written decision).

The superior court denied Robinson's appeal on the grounds that she did not challenge the ZBA's decision on all five of the variance grounds when she filed her motion for rehearing with the ZBA!! The supreme court ruled (correctly) that RSA 677:3 does not place a burden on an applicant to raise in a motion to reconsider variance conditions that were not specifically denied by the ZBA.

The town tried to argue that the ZBA did base its denial on each and every one of the five variance conditions, but based on the evidence the supreme court said:

. . . the evidence presented is insufficient to demonstrate that the ZBA concluded that the petitioner did not meet any of the variance conditions. The worksheet of one member is missing from the record and the remaining worksheets contain votes that are neither unanimous nor clear. The worksheets and minutes are inconclusive as to the findings of the ZBA. As such, the record does not support the trial court's finding that the petitioner failed to meet any of the five conditions for granting a variance.

Because the premise for the superior court's ruling dismissing Robinson's appeal was legally incorrect (the faulty requirement that her motion for rehearing to the ZBA had to include all five variance conditions even if the ZBA's denial was based on less than all five), the supreme court reversed the dismissal and sent the case back down to the superior court.

PRACTICE POINTER: Although the superior court didn't help things, most of the confusion in this case does seem to arise from unclear records of the ZBA's actions. It can't be emphasized too strongly that both the ZBA and the planning board must strive to create a clear record of what was decided, supported by a description of what facts were found by the board to support each decision!

LIMITATION ON AREA SUBJECT TO VARIANCE AND SPECIAL EXCEPTION MUST BE CLEARLY STATED TO BE ENFORCEABLE

(NCES I)

North Country Environmental Services, Inc. v. Town of Bethlehem,
146 N.H. 348 (2001)

This is the first of two cases to reach the supreme court, each of which arose from years of disputes between successive owners of a solid waste landfill in Bethlehem on one hand and the town and concerned citizens on the other. Although the facts and the law involved in the court's decision are complex and peculiar to the situation in Bethlehem, there is one guiding principle that comes out of the decision that offers instruction to all of us who are connected in any way with planning and zoning matters. That principle is: the need to strive for clarity in the use of the English language. Clarity most often results from the expression of simple concepts using simple words. Let's see how failure to follow that principle determined the basic outcome of this case.

Harold Brown owned an 87 acre parcel in Bethlehem. In 1976 he received a variance to operate a landfill, and obtained State approval for the landfill within a four acre footprint on the property. In 1977 the State allowed him to expand the footprint by about an acre; Mr. Brown did not seek any further town approval for that expansion.

In 1983, Mr. Brown received planning board approval for a ten acre subdivision for landfill use, then sold the lot to Sanco, Inc. In 1985, Mr. Brown got approval to subdivide an additional 41 acres for landfill use, and also sold that lot to Sanco. In 1985-1986, Sanco received a special exception to expand the existing landfill onto the 41 acre parcel. Over the next few years, Sanco received permission from the State to expand the landfill in two stages and several phases, and then sold the entire property to North Country Environmental Services, Inc. ("NCES").

In 1999, the town petitioned the superior court to stop the expansion of the landfill under the State permits, alleging among other things that the expansion was an unlawful expansion of a nonconforming use in violation of the 1976 variance; NCES also filed a petition with the court, asking it to declare that it has the right to gradually expand the landfill onto the entire 87 acres.

The town argued that the 1976 variance contained a limit on the area that the landfill could occupy on the 10 acre parcel. The supreme court agreed with the superior court that the variance contained no such limitation, and pointed out that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued (quoting Dahar v. Department of Bldgs., 116 N.H. 122, 123 (1976)). The court found there was simply no language in the variance which expressly limited the area to be used for landfilling, and the ZBA's notice of decision to Mr. Brown simply states that the variance request is "granted and approved, subject to complete state approval and subsequent supervision." Also, although the variance application contained a "crude map" showing the proposed landfill's approximate location, it contained no statement of the landfill's expected dimensions. Although the town argued that a limit on the size of the landfill should be

implied by the reference to the need for future State approval and supervision, the court did not agree that any such implication was strong enough to be enforceable against the landowner.

The town also argued that the 1985-1986 special exception regarding the 41 acre parcel should also be interpreted to contain a limitation on the size of the landfilling that could occur there. As with the variance, there was simply no express limitation contained in the grant of the special exception, and the evidence in support of some implied limitation was just too flimsy.

PRACTICE POINTER: If the ZBA had intended to limit the size of the landfill that could be constructed under the variance, it could have easily done so using simple words, and by requiring the limited area to be shown on a plan that was then clearly incorporated as part of the grant of the variance.

When we sit as land use board members, it is helpful to step back for a minute and try to imagine what questions about the proposed use might come up years in the future, and then try to find clear answers to those questions in the material that is before the board, or being generated by it in the form of minutes, lists of conditions, draft notices of decision and so forth. If there isn't a clear answer to the question in the record, that's a gap that can and should be filled before final approval is granted!

STATE PREEMPTION (OR NOT) OF LAND USE REGULATION

LOCAL JUNK YARD REGULATIONS CONTROL OVER STATE JUNK YARD LAW, EVEN IF THE LOCAL REGULATIONS ARE LESS STRICT

City of Rochester v. Corpening,
153 N.H. 571 (2006)

This is the rare example of an “anti-preemption” case rearing up to bite the municipality in the you-know-where. In 2002, the legislature amended the definition of motor vehicle junk yard found in the state junk yard statute, RSA 236:112, so that 2 or more motor vehicles “no longer intended or in condition for legal use according to their original purpose” constitute such a junk yard, regardless of whether the motor vehicles are registered – before the 2002 amendment, the statute also required that the motor vehicles must be unregistered, so that any registered motor vehicles did not count in the determination of whether there was a junk yard present. After the 2002 change, whether the motor vehicles are registered or not simply doesn't matter.

Also in the junk yard statute is a section, RSA 236:124, that we normally would be quite pleased with, as it recognizes that local ordinances also have a significant role to play in the regulation of junk yards. The statute reads as follows:

236:124 Effect of Local Ordinances. This subdivision is not in derogation of zoning ordinances or ordinances for the control of junk yards now or hereafter established within the proper exercise of the police power granted to municipalities, but rather is in aid thereof. Specific local ordinances shall control when in conflict with this subdivision. (Emphasis added.)

Unfortunately, the City of Rochester did not amend its local General Ordinances relating to the control of junk yards after the legislature changed the definition of what constitutes a motor vehicle junk yard in 2002; thus, the City's regulation, which had previously tracked the State law, still defined a motor vehicle junk yard as having at least 2 motor vehicles that are both unfit to be used for their original purpose and unregistered. Because of the language of RSA 236:124, the superior court ruled that the defendant "can either remove or register the offending vehicles to bring his property into compliance with the motor vehicle junkyard regulations." Over a spirited and well-reasoned dissent by Chief Justice Broderick, the NH Supreme Court affirmed the decision of the superior court, ruling that the State junk yard statutes should not be interpreted as establishing minimum requirements – in other words, the court ruled that municipalities are free to enact stricter, or less strict, junk yard regulations than are found in the State law. If the municipality enacts less strict regulations, it is stuck with them, and cannot successfully charge a landowner with a violation of the State law that is not also a violation of the local regulation.

PRACTICE POINTER: If your city or town has local junk yard regulations, either as part of your zoning ordinance or as a free-standing regulation, be sure it is at least as strict as the State statutes, especially as it relates to the definition of what constitutes a junk yard in the first place! To the extent there is any conflict between the State law and the local ordinance, the local ordinance will control!

TOWNS MAY REGULATE BUFFERS FROM WETLANDS

Blagbrough Family Realty Trust v. Town of Wilton,
153 N.H. 234 (2006)

The Town of Wilton has a zoning provision that requires that no "structure" could be located less than 200 feet from open water and perennial streams or less than 150 feet from intermittent streams, the 100 year floodplain or any wetland. The planning board approved a two-lot subdivision with a shared driveway with two culverts. The angry neighbors appealed to the ZBA, arguing that the culverts are "structures" and because they must be placed within the protected setback from a wetland, the subdivision approval violated the zoning ordinance. The ZBA ruled that the definition of "structure" in the zoning ordinance was not intended to include culverts nor driveways; the ZBA thus upheld the planning board's approval of the subdivision.

The angry neighbors appealed the ZBA's decision to the superior court, but before the case could be heard, the Town of Wilton amended the zoning ordinance to specifically exclude driveways and culverts from the definition of "structure." After some legal maneuvering, the plaintiffs argued that the amendments to the zoning ordinance were preempted by State law, because the town's definition of "structure" is less protective of wetlands than the definition of "structure" contained in RSA Chapter 482-A.

The supreme court agreed with the superior court and found no conflict between the two definitions of "structure," concluding that the town's ordinance and the State statute may be applied without conflict **because they regulate two different areas**. As the superior court stated, RSA Chapter 482-A regulates the construction of a structure in a wetlands area while the town ordinance regulates the construction of a structure

within a setback from such wetlands. These two definitions may be applied harmoniously. A person would be permitted to construct a culvert within a setback from state waters, but would not be permitted to build a culvert in a wetland. In addition, the superior court found that the ordinance, which regulates the construction of a structure within a setback, does not conflict with RSA chapter 482-A, which regulates the construction of a structure within a wetland. The court found "no indication that RSA 482-A is to be exclusive. There is no language in the statute to this effect and the state scheme is not so pervasive or comprehensive that it would preclude municipal regulation." Finally, the court stated that the ordinance does not frustrate the purpose of RSA chapter 482-A to protect and preserve submerged lands and wetlands from despoliation and unregulated alteration, see RSA 482-A:1, because "[t]he ordinance's definition of 'structure' does not interfere with the regulation of submerged lands or wetlands, but is only applicable to a setback from a wetland."

TOWNS HAVE SOME AUTHORITY TO REGULATE SOLID WASTE DISPOSAL FACILITIES

(NCES II)

North Country Environmental Services, Inc. v. Town of Bethlehem,
150 N.H. 606 (2004)

In the first supreme court battle between these parties, reported above, NCES had urged the court to declare that the Solid Waste Management Act, RSA Chapter 149-M, preempted two zoning provisions adopted by the town in 1987 and 1992, as follows:

1987: no private solid waste disposal facility is allowed in any district;

1992: no solid waste disposal facility may be located in any district, and no existing landfill may be expanded, unless the town itself owns the facility.

In the first case, the supreme court did not have to reach the question of whether these zoning provisions were preempted, but the issues that had to be decided in this second case put question of preemption squarely before the court. The zoning question had to be decided because the town challenged the legality of a State permit issued to NCES to develop Stage IV of the landfill, nearly all of which was outside of the fifty-one acres that the landfill could occupy under the decision in NCES I.

Tests for State Preemption of Municipal Regulation

The supreme court first discussed the general contours of the doctrine of preemption, which asks whether local authority to regulate a particular use of land under the zoning enabling legislation is preempted by state law or policy. The court said the following questions must be answered to determine whether the state has preempted a particular field such as the siting of solid waste disposal facilities:

- does the local ordinance conflict with state law
- is the state law, expressly or impliedly, intended to be exclusive

- does the subject matter reflect a need for uniformity
- is the state scheme so pervasive or comprehensive that it precludes the existence of municipal regulation
- does the local ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

The court next reviewed the details of the statute itself, RSA 149-M, and the administrative rules adopted by the Department of Environmental Services to implement the statutory scheme of state regulation. Not surprisingly, the court concluded that “RSA Chapter 149-M constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it.”

Legislature Leaves Some Room for Municipal Regulation

Although the court found the state scheme to be comprehensive and detailed, that finding did not decide the outcome of the dispute because in RSA 149-M:9, VII the legislature has authorized some level of municipal regulation. That section provides:

The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of a facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

NCES urged the court to interpret this language to mean that a private solid waste facility may be subject only to local regulation of the location of the facility. The supreme court rejected that interpretation, which would have required the court to ignore the word “all” (referring to local ordinances, codes, and regulations) in the first sentence of the provision. However, the court did point out that, “were it not for this provision, we would agree with NCES that RSA Chapter 149-M completely preempts the field of solid waste management regulation.” Moreover, the comprehensiveness and detail of the State scheme requires that the section allowing some local regulation be interpreted “narrowly.” Thus, “when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located.” (Emphasis added.)

1992 Zoning Amendment Is Allowed Under RSA Chapter 149-M

The court went on to rule that RSA Chapter 149-M does not, on its face, preempt Bethlehem’s 1992 zoning amendment, because the amendment does not prohibit that

which RSA Chapter 149-M permits or vice versa.¹ Thus although NCES had acquired the right as a result of the first supreme court decision to completely use the 51 acre site for its solid waste facility, RSA Chapter 149-M does not on its face invalidate the town's 1992 zoning amendment that has the effect of prohibiting NCES from using the other 36 acres of its land for expansion of the landfill. As the court explained

The town currently complies with RSA chapter 149-M by granting its residents access to NCES' landfill. See RSA 149-M:17, I; see also RSA 149-M:23-:25. Under these circumstances, it does not violate RSA chapter 149-M for the town to prohibit development of the portion of [the landfill] that falls outside of the fifty-one acres. We agree with the trial court that, with the 1992 amendment, the town has not exempted itself from its obligation to partake in the State plan of integrated solid waste management. The amendment indicates that, in the future, presumably when there is no additional capacity in NCES' landfill on the fifty-one acres, the town will either provide its own facility or assure its residents access to another approved facility. See RSA 149-M:17, I; see also RSA 149-M:23-:25.

But, the 1992 Zoning Amendment Might Be an Unlawful Exercise of the Zoning Power!

Although the 1992 amendment is not preempted by RSA Chapter 149-M, NCES also argued that it is an unlawful exercise of the zoning authority for two reasons: (1) the zoning amendment distinguishes between users of land, not uses of land, contrary to the ruling in Vlahos Realty Co. v. Little Boar's Head District, 101 N.H. 460, 463-64 (1958); and (2) it contravenes the general welfare of the region it affects, contrary to the teaching of Britton v. Town of Chester, 134 N.H. 434, 441 (1991).

The supreme court did not decide this question, wisely taking the view that because "the trial court did not address these arguments and as resolving them might require additional factual findings, we remand them to the trial court for resolution in the first instance." The result of all this is that, as of this writing (March 29, 2004), we do not yet finally know whether Bethlehem will be able to stop the expansion of the landfill across the boundary of the 51 acres that it originally permitted.

Some of the Town's Site Plan Regulations May be Applicable to the Area Beyond the 51 Acres

In other cases where the State has enacted a detailed and comprehensive regulatory scheme such as RSA Chapter 149-M, the court has allowed towns to apply site plan review regulations to the regulated project if it does so "in good faith and without exclusionary effect." In other words, the site plan regulations cannot be applied to prohibit a project that receives State approval under the comprehensive State scheme. Some local activists thus argue that the power to apply some local site plan regulations to such projects is the municipal equivalent of being allowed to rearrange the deck chairs on the Titanic. In any event, the court confirmed that the town would be

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The supreme court's opinion does not decide the legality of the 1987 zoning amendment; the superior court ruled that the amendment is invalid because it is inconsistent with RSA Chapter 149-M.

able to apply such non-exclusionary site plan regulations to the area beyond the 51 acres, but that ruling may be moot if the town is ultimately able to prohibit the expansion of the landfill into the remaining acreage under its 1992 zoning amendment.

WETLANDS PERMIT FROM NHDES MAY NOT SATISFY LOCAL REGULATIONS

Cherry v. Town of Hampton Falls, 150 N.H. 720 (2004)

Mr. & Mrs. Cherry submitted an application to subdivide some 84 acres of land into 19 lots. The proposal included the construction of a paved road which would require the filling of about 10,500 square feet of wetlands. As required under the Hampton Falls Zoning Ordinance, the applicants applied to the planning board for a special use permit to fill the wetlands - the "Wetlands Conservation District" in the ordinance applied to wetlands, and to land within 100 feet of the District (the wetlands buffer area).

The zoning ordinance requires that to secure a special use permit for the paved road the applicants had the burden to show that "No alternative route which does not cross a wetland or has less detrimental impact on the wetland is feasible."

At the planning board's public hearing, the engineer for the applicants testified that a safe road could not be designed that could both avoid wetlands impact and serve the needs of the proposed subdivision. The engineer went on to propose an alternative road design that did reduce the impact on the wetlands, but the applicants' environmental expert stated that this alternative design caused increased safety concerns.

The chair of the conservation commission testified that the applicants could design an alternate road with reduced impact on the wetlands and the wetlands buffer, although it would result in fewer than the proposed 19 house lots. A member of the planning board agreed that a road with reduced wetlands impact appeared to be a possibility and that the applicants needed to address that issue. When asked by the planning board vice-chairman if there was a safe alternative that would have a reduced impact on the wetlands and the wetlands buffer, the applicants' environmental expert stated that he had only analyzed direct wetlands impact and had not had an opportunity to analyze other designs.

At the end of the hearing, **the planning board requested that the plaintiffs submit a road design that addressed the impact upon the wetlands buffer and options to minimize the adverse impact.** The applicants declined the planning board's request because they believed that the plan they presented represented the most viable option. The planning board then voted to deny the application for the special use permit because it failed to address the extent of impact in the wetlands buffer areas, and because the applicants failed to show that there was no feasible alternative as required under the ordinance. The applicants appealed to the superior court, which ruled that based on the evidence that was before it, the planning board's denial was unlawful because although the applicants' plan had to be reasonable, there was "no requirement under the law that it be perfect." The court based its decision, in part, on a permit issued by NHDES Wetlands Board, which the court found was further evidence that the applicants' overall subdivision plan was reasonable.

On appeal, the supreme court noted the familiar rule that the trial court is not allowed to substitute its judgment for that of the local land use board, and that if any of the board's reasons for the denial of an application support its decision, the decision must be upheld by the court. Based on the record, the supreme court ruled that the applicants failed to make the showing required by the ordinance that the proposed road would minimize impact on the wetlands buffer and that no feasible alternative design would have a less detrimental impact. The applicants failed to make this showing because their expert conceded that he had not analyzed the impact of the proposed road on the wetlands buffer.

Finally, the supreme court ruled that the issuance of the wetlands permit by NHDES did not settle the question of whether the applicants had satisfied the requirements of the zoning ordinance, noting that the trial court was correct in stating that municipalities are allowed to adopt more restrictive regulations for wetlands that those required under State law.

PRACTICE POINTER: One of the places that I think the planning board could have gone wrong, but instead did exactly the right thing, is in its reaction to the expert's admission that he had only analyzed direct wetlands impact and had not had an opportunity to analyze other designs. At that point, any planning board might be tempted to say "Fine. Application denied!" However, as we see in the cases reported earlier in these materials under the heading "Site Plan Review; Assistance to Applicants," local land use boards do have an obligation to assist applicants, not merely seize on imperfections or mistakes in applications as a way to deny them. In this Cherry case, the Hampton Falls Planning Board did exactly the right thing: it requested that the applicants submit a revised road design that would address the impact on the wetlands buffer and options to minimize adverse impact. Once the applicants chose to decline that invitation, the planning board was well within its rights, and indeed had no choice, but to deny the application.

TOWNS MAY REGULATE THE USE OF SLUDGE UNDER FEDERAL & STATE LAW

Thayer v. Town of Tilton, 151 N.H. 483 (2004)

In a nutshell, the town adopted an ordinance regulating the use of sludge in the town, limiting the use to Class A sludge. The plaintiff had a contract with a division of Wheelabrator Clean Water Systems to stockpile and spread Class B municipal sewage waste biosolids (sludge) on his property, and was notified by DES that a site permit from the State was not needed for the project, although there were some issues that needed to be addressed before the project could move forward. Mr. Thayer subsequently sued the town to have the restriction to Class A sludge declared unlawful, claiming, in part, that the regulation of sludge was preempted under Federal and State laws.

The question of Federal and State preemption was not addressed by the superior court, which denied the plaintiff's challenge on other grounds. However, on appeal, the NH Supreme Court did address the question of preemption, and declared that neither Federal nor State laws prevent towns from adopting their own regulations governing sludge, at least to the extent that such regulations do not conflict with the DES sludge management rules. The court found that there is no "direct conflict" between Tilton's

and the State's regulations, and that the Tilton regulations do not "run counter to the legislative intent underlying the statutory scheme." Therefore, Tilton's sludge regulations are not preempted by State or Federal laws or regulations.

MISCELLANEOUS

PLANNING BOARD NOT REQUIRED TO HOLD PUBLIC HEARING ON QUESTION OF WHETHER APPLICATION IS COMPLETE

DHB, Inc. v. Town of Pembroke, 152 N.H. 314 (2005)

The plaintiffs filed subdivision plans and related documents with the Pembroke Planning Board for its 128-acre parcel. As the initial phase of staff review and comment progressed, the plans were modified. Eventually, a third set of plans were submitted for 120 single-family lots, 48 units of housing for the elderly, the consolidation of two parcels with abutting property, and four parcels left for future development. It became of critical importance to the applicant that the planning board vote to accept the application as complete, in spite of a host of checklist items that had not been completed, because it was known that notice of the planning board's public hearing on a Growth Management Ordinance was about to be posted. The GMO would probably make the development plan unfeasible, so the fate of the project depended on the planning board voting to accept the application before the notice of the GMO was posted. See RSA 676:12, VI.

Of course, we wouldn't be talking about all this if the planning board had voted to accept the application as complete, so you will not be surprised to learn that the planning board voted 6-0 not to accept the plaintiff's application for review because the materials submitted did not meet the checklist requirements established in the board's rules.

The decision not to accept the application as complete was challenged in the superior court, which upheld the planning board's rejection of the application. The plaintiff appealed to the NH Supreme Court, which also upheld the planning board's decision. There were several issues raised by the plaintiff, but most do not lend themselves to the extraction of principles that provide guideposts to all planning boards in all municipalities. However, the plaintiff requested the opportunity to address the alleged deficiencies at the meeting when the planning board voted not to accept the application, but the planning board refused to allow the plaintiff to speak. On appeal, the plaintiff argued that the planning board had violated RSA 676:4, I which it claimed gave it the right to be heard when the planning board determines whether the plaintiff's application is complete and ready for submission. The supreme court rejected the plaintiff's argument, and in so doing gave us a helpful review of the distinction between a public meeting and a public hearing, as follows (I have edited the text somewhat for purposes of clarity):

A board considers whether to approve or deny an application only after the board has voted to accept that application as complete. RSA 676:4, I(c)(1). As set out under RSA 676:4, I(e), a "public hearing" is required when a board is considering an application on the merits; i.e., when a board is determining whether to deny or

approve an already accepted application. With regard to the process required when a board determines whether an application is complete, RSA 676:4, I(b) merely provides that such determination shall be made at a "public meeting." The plaintiff argues that although the legislature used the term "public meeting," an applicant still has a right to be heard when the Board is considering whether an application is complete and ready for submission. We disagree. RSA 676:4, I, does not define the terms "public hearing" or "public meeting." When statutory terms are undefined, we ascribe to them their plain and ordinary meanings. In the Matter of Blanchflower & Blanchflower, 150 N.H. 226, 227 (2003). The definition of "meeting" is "an act or process of coming together," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1404 (unabridged ed. 2002), whereas the definition of "hearing" is an "opportunity to be heard, or to present one's side of a case," id. at 1044. The plain meaning of meeting, unlike the plain meaning of hearing, does not include an opportunity to be heard. Nowhere in RSA 676:4 does the legislature indicate that an applicant has a right to be heard at a public meeting regarding the completeness of that applicant's application. Nor do the Board's rules of procedure support the plaintiff; under the section dealing with public hearings, the rules merely require that public hearings be held in accordance with RSA 676:4. PEMBROKE PLANNING BOARD RULES OF PROCEDURE § VI(A)(6). We conclude that the trial court correctly found that the Board did not err in denying the plaintiff the opportunity to speak at the October 28, 2003 meeting.

PRACTICE POINTER: Most planning boards do allow the applicant to speak at the meeting at which the board will vote on whether to accept the application as complete, and I do not recommend otherwise. However, it is helpful to keep in mind the distinction between a public meeting and a public hearing, and to know when a public hearing is required as a matter of law and when it is not.

ZBA CANNOT GRANT A SPECIAL EXCEPTION IN THE HOPE THAT THE PLANNING BOARD WILL CLEAN UP THE MESS!

Tidd v. Town of Alton, 148 N.H. 424 (2002)

The Holts own a forty-four acre tract of land located in a rural zoning district along County Road in Alton. After denying two previous applications, the ZBA approved a third application for a special exception to allow the Holts to develop a campground on the property with 100 campsites, and the angry abutters appealed. The superior court reversed the ZBA's approval and the supreme court agreed with that result.

In order to grant a special exception under the Alton Zoning Ordinance, the ZBA was required to find that the applicant meets several conditions including the following two:

1. There is no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of access ways and off-street parking.
2. The proposed use or structure is consistent with the spirit of this ordinance and the intent of the Master Plan.

The supreme court repeated the rule that in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth in the zoning ordinance – also, there must be sufficient evidence before the ZBA to support favorable findings on all of those requirements.

In this case, the record showed that the ZBA received testimony that the proposed campground would create serious traffic hazards that could only be resolved if the planning board and/or the NHDOT acted by taking land, redesigning the intersection and pruning some trees and brush. Because of these unresolved traffic hazards, the superior court also concluded that the plan would not promote the public health, safety and general welfare as required by the zoning ordinance, and thus would not be consistent with the spirit of the ordinance.

The supreme court agreed, holding that "by granting the special exception in the face of serious traffic hazards, the ZBA unlawfully waived or varied the conditions [for special exception] of the zoning ordinance."

DO NOT FORGET TO CERTIFY SUBDIVISION AMENDMENTS AND FILE THEM WITH THE TOWN CLERK!! -- IN THIS CASE, THE APPLICATION SHOULD HAVE BEEN ACCEPTED BY PLANNING BOARD, EVEN THOUGH THE APPLICATION DIDN'T COMPLY WITH THE NEW SUBDIVISION RULE

Rallis v. Town of Hampton Planning Board, 146 N.H. 18 (2001)

Mr. Rallis proposed a six-lot subdivision that included a road which abutted two lots in an adjoining subdivision that already had frontage on an existing road. The proposed design therefore created two "double-fronted" lots, i.e., lots abutted by roads at the front and rear property lines. After several contacts with the planning board and the town's circuit rider planner about the content of his subdivision application, Mr. Rallis submitted the application and filing fee to the planning board on **September 16, 1997**.

Earlier, on **September 4**, the planning board had posted notice of a public hearing for a proposed amendment to the subdivision regulations that prohibited subdivision roads that created double-fronted lots like the two in Mr. Rallis's application. The same notice of public hearing was published in the newspaper on **September 5**.

At the public hearing on **September 17** the planning board voted to approve the amendment, but it did not certify the amendment until **October 1** and did not file the required certification with the town clerk (see RSA 675:6, III) until **October 2**.

At its hearing on **October 1**, the planning board voted not to accept jurisdiction of the subdivision application because it:

- (1) did not include written waiver requests for the double-fronted lots; and
- (2) presented too many design issues "which ultimately could be reconfigured and submitted at a later date."

Mr. Rallis appealed to superior court, which ruled that the planning board should have accepted the application. The town appealed, and the supreme court agreed with the superior court.

Subdivision Amendment Not Effective Until it Is Certified And Filed With Town Clerk

On appeal, the town first argued that the subdivision amendment became effective on **September 4** or **September 5**, the date of the first published notice, under the provisions of RSA 676:12, I, V. Because the application submitted on **September 16** contained plans for double-fronted lots in violation of the amendment, the planning board argued that it properly declined to accept jurisdiction. The supreme court disagreed, pointing out that under RSA 675:6, III the amendment did not legally become effective until it was certified by the planning board and filed with the town clerk. Thus, the supreme court drew a distinction between the effect of the two statutes, and a corresponding distinction “between a planning board taking jurisdiction over an application, which is at issue here, and formal consideration of an application after accepting jurisdiction.” (Emphasis added.)

In other words, the supreme court agreed that Mr. Rallis’s application was subject to the new amendment, because the application was not formally accepted by the planning board prior to the first legal notice of the amendment. However, the court said that RSA 676:12, V cannot be relied upon by the planning board to deny jurisdiction over the application, since the application had not taken legal effect when the board voted to decline jurisdiction.

PRACTICE POINTER: I think the most important issue to be highlighted in this case is the fact that neither the subdivision regulations themselves nor any amendment to them are legally effective until a copy has been certified by a majority of the planning board and filed with the town clerk as required under RSA 675:6, III. (Note: The same statute also applies to site plan regulations, so the same rules apply to the site plan process!)

That is not a mere request, it is a fundamental requirement that might well determine the outcome of litigation over the denial of a subdivision application and leave a town, at least temporarily, without any enforceable subdivision regulations at all!! It is worth checking with your town clerk to see if the regulations and any amendments have been properly certified and filed. If the town clerk can’t find them, you best assume it hasn’t been done and touch base with your town counsel about what action to take!!

Offer to Revise Subdivision Plan Does Not Make it Incomplete

The town also argued that the applicant’s offer to revise or redesign the plan to satisfy various planning board concerns, after submitting the application, rendered the application “incomplete.” The supreme court disagreed.

Under RSA 676:4, I(b) a “completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision.” The court pointed out that the plaintiff’s application included

detailed subdivision plans and the other items required by the subdivision regulations. Thus, the court ruled, the application was sufficiently complete for the board to exercise jurisdiction over it; the fact that the plan might be revised as it went through public hearing and planning board review does not render it “incomplete” at the time it is submitted for formal acceptance.

PRACTICE POINTER: Understandably, planning boards sometimes get frustrated with the changes that must be made to a subdivision plan to get it to the point where the legitimate planning concerns are addressed; we sometimes hear comments like: “We’re not here to design your project for you!!” I think this case stands for the notion that within very broad limits, it is the job of the planning board to work with applicants to make the changes that are needed to eliminate planning concerns. The fact that the proposal is not perfect when it comes in the door is not grounds to refuse to accept it, or refuse to work the plan through the process.

CASES ON THE EVOLVING LAW OF VARIANCES

THE “AREA” VARIANCE HARDSHIP TEST

On May 25, 2004 the New Hampshire Supreme Court released its decision in the case of Boccia v. City of Portsmouth, 151 N.H. 85. The court announced that ZBAs must now apply a different set of criteria to decide whether “unnecessary hardship” is present when an applicant seeks an “area” variance, in contrast to the Simplex standards which apply when a “use” variance is sought.

Sadly, the court’s decision that we must have a different hardship standard for area variances is an act of pure social engineering that should have been left to the legislature. That is, the existence of a different test for area variances is not required by any constitutional principles that would have justified the court’s meddling; rather, the court was quite frank in stating in Boccia that the justification for the new standard is simply that “we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met.” Ha! Thanks for all your help!

1. What is an “Area” or “Nonuse” Variance?

The court describes it this way:

A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to the required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed “area variances.”

2. Factors of the New “Unnecessary Hardship” Test for Area Variances

The court announced the following two general factors that must be used to evaluate whether “unnecessary hardship” exists that will enable a ZBA to grant an area variance:

- First Factor: Whether the variance is necessary to enable the applicant’s proposed use given the special conditions of the property.
- Second Factor: 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.

Let’s look at each factor in more detail.

First Factor

Under the first factor, the landowner need not show that without the variance, the land will be without value.

In other words, assuming that special conditions of the property make it difficult or impossible to comply with applicable setbacks or other restrictions, then an area variance might be necessary from a practical perspective to implement the proposed plan. Clearly, this factor is much more relaxed than the pre-Simplex hardship standard which required an applicant to prove that without the variance, the restrictions contained in the zoning ordinance prevented all reasonable use of the property. It is also much more relaxed than even the easier hardship standards announced in the Simplex case, which still apply to “use” variances.

Under this first factor, the court incorporates the requirement that was part of the hardship test before the Simplex case changed the rules for all variances in January, 2001. That is, the applicant for an area variance must show that the hardship is the result of special conditions of the property that are not generally shared by lots in the area. Theoretically, this means that an applicant whose property shares dimensional challenges common to other lots in the area will not be able to meet the hardship test, because the conditions that are causing the problem are not “special” to the applicant’s lot. However, the court had no problem ignoring this issue under the pre-Simplex cases when it suited the court to do so, and I suspect that this will be true of cases decided under the new area variance test.

Second Factor

This factor examines whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for the variance. If the answer is “no,” then the applicant has met the second part of the new test.

Note: There is no language in the Boccia case to suggest that the applicant has any obligation to scale back the proposed use so that an area variance might not be required at all, or so that a lesser violation of the area requirements of the

zoning ordinance would result. This seems hard to believe, but until the court says otherwise, applicants will surely argue that the ZBA must deal with the merits of the proposal as advanced by the applicant. The applicant will insist that the ZBA is not allowed to say: “Hey, you could put an 60-unit hotel on your property without any area variances, so you’re not entitled to a variance to cram a 100-unit hotel onto the same space!” (See the report of the case of Vigeant v. Town of Hudson, below, in which our worst fears on this point appear to have materialized.)

The court said that under this second factor, the ZBA must also consider whether the area variance is required to avoid an undue financial burden on the landowner. However, the landowner need not show that without the variance the land will be rendered valueless or incapable of producing a reasonable return. Instead, the ZBA must examine the financial burden on the landowner, including the relative expense of available alternatives. We have no guidance from the court as to when the financial burden is heavy enough to tip the scales in favor of the applicant.

The court referred to the recent case of Bacon v. Town of Enfield, 150 N.H. 468 (2004) as an example of where the applicant would not be able to meet this second factor. In Bacon, the applicant sought a variance to attach a shed on the exterior of her home for a propane furnace. The shed would violate the shorefront setback requirement in the zoning ordinance. Because the evidence showed that the applicant could have located the furnace inside the existing garage or attic at reasonable expense, she would not have been able to meet the second factor of the new area variance hardship test, because there were reasonably feasible method or methods of effectuating the proposed use without the need for the variance.

3. Do the Other Four Elements of the Variance Criteria Apply?

Absolutely. If there is one thing that is clear, it is that the new test applies only to the question of whether there is “unnecessary hardship” present to allow an area variance to be granted. The applicant must still meet the other four variance criteria, which remain the same for both “use” and “area” variances, as follows:

- the variance will not be contrary to the public interest
- the variance is consistent with the spirit of the ordinance
- granting the variance will do substantial justice
- granting the variance will not diminish the value of surrounding properties

JUST WHEN YOU THINK IT CAN’T GET ANY WORSE, IT DOES!

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

In this important follow-on case to Boccia v. City of Portsmouth, the decision which established the separate test for unnecessary hardship for area variances, the court seems to have virtually slammed the door on the municipality’s ability to enforce density

requirements, or other dimensional features important to the overall zoning scheme. Here are the facts:

In October 2002, the plaintiff filed an application with the ZBA for an area variance for a five-unit multifamily dwelling, with the individual units connected either by a garage or a screened porch. The property is zoned as a Business District. Multifamily dwellings, defined in the town's zoning ordinance as three or more attached dwelling units, are a permitted use in a Business District. The parcel of land is a long, narrow, mostly rectangular lot approximately 770 feet long by 129 feet wide at its widest end, constituting about 1.6 acres. The land is bounded along its southerly boundary by Route 111 and along its northerly and easterly boundaries by Windham Road. The zoning ordinance requires a fifty-foot setback from Windham Road and a fifteen-foot setback from Route 111. However, an area of wetlands is present along the southerly boundary, which was created by drainage from Route 111 and failure to maintain the drainage ditch. Because the zoning ordinance requires a fifty-foot setback from wetlands, the setback from Route 111 is actually fifty feet instead of fifteen feet. The plaintiff applied for a variance from the fifty-foot setback to allow construction to extend to within thirty feet of Windham Road and for a special exception to permit a temporary encroachment of ten feet into the wetlands buffer zone during construction. On February 13, 2003, a public hearing was held on the plaintiff's application. The ZBA voted unanimously to deny the request for a variance on grounds that the application was not consistent with the spirit of the ordinance, that there was no evidence of hardship, that there would be a diminution of surrounding property values and that it would be contrary to the public interest. The ZBA also voted unanimously to deny the request for a wetlands special exception. The ZBA denied the motion for rehearing and the plaintiff appealed to superior court.

The superior court reversed the ZBA's denial of the variance, applying the unnecessary hardship test under Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001) (because the Boccia v. City of Portsmouth case had not yet been decided.) The superior court found that the lot is unique, not just in its setting, but in its very character and description. In finding that the landowner had satisfied the unnecessary hardship standard as announced in Simplex, the court stated: "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 also superior court went on to rule that there was no evidence in the record to support the ZBA's denial of the variance on any of the other non-hardship elements of the 5-part test.

On appeal to the NH Supreme Court, both parties requested guidance in applying the Boccia unnecessary hardship factors to the area variance in question. In a nutshell, the guidance the court gave (sometimes it is better not to ask!) is as follows: If the use is permitted under the ordinance, it is presumed to be reasonable; then, if an area variance is needed to enable the permitted use to be established, it must be granted. Here's the detail of the guidance the court gave Hudson, and every other municipality:

First Boccia Factor

As to the first factor, whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property, the town questioned whether the reasonableness of the proposed use is to be taken into account.

The court held that it is implicit under the first factor of the Boccia test that the proposed use must be reasonable. However, 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. Under the Hudson zoning ordinance, it is permissible for the plaintiff to build five units of multifamily housing on his property. Other permissible uses in a Business District under the zoning ordinance include, for example, an automotive service and repair station, a laundromat, a retail establishment, a funeral home or a warehouse. The plaintiff determined, however, that multifamily housing was, of the permitted uses, the most appropriate for the neighborhood. If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property. Given that the proposed use in this case is permitted and thus presumptively reasonable, 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.

Second Boccia Factor - the Bomb is Dropped

As to the second factor, whether the benefit sought by the applicant can be achieved by some method reasonably feasible for the applicant to pursue, other than an area variance, the plaintiff questioned whether the ZBA can require an applicant to agree to a different variance or accept an alternative use for the property, such as building fewer units of multifamily housing than what the applicant is proposing.

In reply, the court said that under the second factor of the Boccia test, 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 Hudson ZBA focused upon whether an alternative use of fewer dwelling units was 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.**

Well, there it is!! To those of us who were wondering after Boccia whether an applicant for an area variance had any obligation to scale back the intensity of the proposed use, to eliminate the need for the area variance, or so that not so great a departure from the dimensional rules would be required, the court has firmly replied: "Not on your life!"

It is really hard to accept the way the court has set up the rules for "unnecessary hardship" for area variances. It seems that, at least so long as the use is permitted under the zoning ordinance, under the supreme court's formulation the applicant will almost always be able to qualify for whatever area variances are necessary to shoehorn

the use onto the particular lot, with no requirement that the intensity of the proposed use be scaled back so that the dimensional requirements can be met, or more nearly met. Thus, at this stage of the development of the law, it is feared that the dimensional requirements of zoning ordinances, including density, may have been rendered meaningless by the court.

LATER EDITORIAL NOTE: In the case of Malachy Glen Associates, Inc. v. Town of Chichester (March 20, 2007) (reported below in these materials), the court stated that under the second Boccia factor the ZBA may consider the feasibility of a scaled down version of the proposed use, but cautioned that if it does, the ZBA “must be sure to also consider whether the scaled down version would impose a financial burden on the landowner.” Being the skeptic that I am, it is hard for me to imagine a scaled down version of a project of any significance that would not impose a financial burden on the developer that would make it unlawful for the ZBA to insist on the scaled down version, but we will have to see how much “bite” the supreme court invests in this issue as future cases are decided.

Will We Be Saved by the Legislature?!

Probably not. In the 2005 session of the legislature, HB 359 eliminated the new distinction between use and area variances, and truly simplified the standard for “unnecessary hardship,” which the court has said was one of its goals. The bill passed the house, but was killed in the Senate where the special interests and their lobbyists usually have a much easier time managing the outcome of legislation than they do in the House!

PRACTICE POINTER: With the state of the new variance law (for both use and area variances) so unsettled (and likely to remain so for years unless the Legislature comes to the rescue!) it is more important than ever for ZBAs to rely on more than just whichever of the two “unnecessary hardship” tests applies to the particular case when denying a variance application. This is true because if the court agrees that the applicant has failed to meet any one of the five elements, the ZBA’s denial will be upheld. You may well have a case where an applicant who wishes to shoehorn a proposed use onto a lot in violation of area requirements will not be able to meet one or more of the other four variance tests, even if it seems that the applicant does meet the relaxed test for “unnecessary hardship.” If you deny the application based only on the hardship test, and the court finds that the applicant meets that test, the court may well order the variance to be issued even though the applicant might have failed one or more of the other tests if the ZBA had bothered to address them!

COURT ADDRESSES “PUBLIC INTEREST”, “SPIRIT OF THE ORDINANCE”, “UNNECESSARY HARDSHIP”, AND “SUBSTANTIAL JUSTICE”

Malachy Glen Associates, Inc. v. Town of Chichester
(March 20, 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 themselves. The superior court reversed the denial of the second variance, and the NH 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 & 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 NH 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);
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.

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 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 NH 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."

THE "USE" VARIANCE HARDSHIP TEST

INTRODUCTION

In the case of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) the New Hampshire Supreme Court threw out several decades of case law that had defined the circumstances that must be present for an applicant to meet the "unnecessary hardship" test for a variance. Convinced that the test for "unnecessary hardship" had become so restrictive that almost no applicant could meet it, the court articulated a new, more relaxed standard.

Simplex was followed a couple of years later by the case of Rancourt v. City of Manchester, 149 N.H. 51 (2003). In Rancourt, a unanimous court seems to have applied the new test in a fairly straightforward manner, upholding the grant of a variance which allowed the landowners to stable two horses on their property in a zoning district where such livestock is prohibited.

But then, early in 2004 the court decided the case of Bacon v. Town of Enfield, 150 N.H. 468, and it appeared that the Simplex train jumped the tracks! The Chief Justice wrote the majority opinion, ruling that granting the particular variance would be contrary to the spirit of the Enfield Zoning Ordinance (one of the other four variance tests that must be met in addition to the hardship test), and that is the basis upon which the case was ultimately decided (although the two justices who concurred did not share the Chief's reasoning!). More importantly, four of the justices (two on each side) got into a quarrel about how the first prong of the Simplex hardship test is defined and how it should be applied to variance cases. With two justices on each side of the quarrel, this critical issue could not be resolved by the court, being left for decision in a future case. As we now know, that future case was Boccia v. City of Portsmouth, 151 N.H. 85 (2004), which gave us the new, separate definition of "unnecessary hardship" for area variances, as described at the beginning of the case law section of these materials.

The following sections attempt to shed some light on the current state of the law regarding "unnecessary hardship" as it applies to use variances.

TESTS TO DETERMINE WHETHER “UNNECESSARY HARDSHIP” EXISTS TO JUSTIFY GRANT OF A “USE” VARIANCE

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

In this case, the supreme court radically changed the legal definition of what constitutes the “unnecessary hardship” that must be found to allow the Zoning Board of Adjustment to grant a “use” variance from a zoning ordinance. The other four variance criteria remain nominally unaffected by the decision, although some elements of each of those other criteria seem to be inherently part of the analysis ZBAs will have to undergo as they apply the new hardship tests.

For decades, for unnecessary hardship to exist, the applicant for a variance in New Hampshire had to show that unless the variance were granted, there would be no reasonable use of the property allowed under the zoning ordinance. Now, the supreme court has decided to substitute a more relaxed test, effective immediately.

The new test for “unnecessary hardship” as applied to a “use” variance consists of 3 elements, and the applicant must meet each one. For “unnecessary hardship” to exist, the applicant must show:

- (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;
- (2) that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- (3) that the variance would not injure the public or private rights of others.

Let’s look at each of these elements.

I. REASONABLE USE

- (1) the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment

In the later case of Harrington v. Town of Warner, 152 N.H. 74 (2005), the court wrote that this “first prong” of the Simplex hardship standard is the “critical inquiry” for determining whether unnecessary hardship has been established, and set out the following three general factors that the ZBA must take into account to evaluate whether the first prong of the hardship test is met by the applicant:

First, the question of whether the zoning restriction as applied to the property interferes with the landowner’s reasonable use of the property involves a consideration of the owner’s ability to receive a reasonable return on their investment – this factor does not require the landowner to show that without the variance he or she has been deprived of all beneficial use of the land, but the zoning restriction at issue must result in

more than “mere inconvenience” to the economic fortunes of the landowner. The consideration of this factor by the ZBA will often require “actual proof . . . in the form of dollars and cents evidence” and might take into account evidence of original cost of the land, current market value and decline in value.

Second, Simplex requires a determination of whether the hardship is the result of the unique setting of the property. This factor requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property; however, this factor does not require that the property for which the variance is sought be the only such property burdened by the zoning restriction. Moreover, the burden must arise from the property and not from the individual plight of the landowner; the landowner must show that the hardship is a result of the specific conditions of the property and not the area in general.

Third, the ZBA must consider the surrounding environment, which includes an evaluation of whether the applicant’s proposed use would “alter the essential character of the neighborhood, “ because “the impact on the character of the neighborhood is central to the analysis of a use variance.” Put another way, whether the proposed use of the property is reasonable will depend to a large degree on the setting that surrounds the property. For example, if an applicant is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering the unique setting of the property in its environment. In such a case, the ZBA would therefore find that the zoning restriction (that prohibits pig farms in the zone) does not interfere with the reasonable use of the property, considering the unique setting of the property in its environment.

II. FAIR AND SUBSTANTIAL RELATIONSHIP

- (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

This element requires the ZBA to identify, in the abstract, the general purpose(s) of the zoning restriction for which the variance is sought. Why does the restriction exist in the first place? What purpose is it intended to achieve? The plain language of this test requires the ZBA to identify the general purposes of the entire zoning ordinance and then judge whether those purposes are advanced by the specific restriction in the ordinance that is causing the problem. However, I think this test may be more flexible than the language suggests. I would argue that a proper application of this test would also allow the ZBA to first identify the general purposes sought to be achieved by the specific restriction (not by the ordinance as a whole, which, of course, will have a host of general purposes, some of which may have little relationship to the specific restriction for which the landowner is seeking the variance).

Next, the ZBA should look at whether those general, abstract purposes are advanced when the zoning restriction is applied to the particular piece of property for which the variance is sought -- this “as applied” inquiry must also take into account the unique setting of the property in its environment, just like the first element of the hardship test.

Continuing the pig farm example, the general purpose of restricting a zone to residential use is to separate residential areas from non-residential uses that are deemed incompatible, and then to preserve the residential character of the zone once it is established. In most cases, it would be very difficult for an applicant who sought a variance to allow the pig farm to show that there is no fair and substantial relationship between the general purpose of allowing only residential uses in that zone, and the impact of that restriction on the applicant's specific property. That is so because in the "typical" case the restriction has exactly its intended effect when it is applied to the applicant's property: it preserves the integrity of an existing residential zone from the impact of incompatible, non-residential uses.

However, one can imagine a situation where there are a number of other farming uses in the neighborhood that are either "grandfathered," or were established as a result of earlier variances that were issued, so that there is already a strong presence of similar agricultural uses in the area where the applicant wishes to establish the pig farm. In such a case, the applicant may be able to show that there is no "fair and substantial" relationship between the general purpose of the zoning restriction that allows only residential uses, and the impact that restriction has on the applicant's property.

III. NO INJURY TO PUBLIC OR PRIVATE RIGHTS OF OTHERS

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

This third and final element of the new hardship test requires the applicant to show that the proposal would not injure the public or private rights of others. This encompasses part of one of the four other parts of the variance test that requires the applicant to show that no diminution of surrounding property values will result from the grant of the variance. However, the new third element of "unnecessary hardship" is broader than just property values. Indeed, the specific reference to the "private rights of others" raises the (scary!) possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, or because the boundary of the property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute as within the issues that the ZBA must resolve, but only time will tell as new variance cases are decided.

In the meantime, and as a general matter, the ZBA should not be overly concerned about this third element of "unnecessary hardship" unless there is convincing evidence that there will be a significant decrease in surrounding property values, or some clear harm to public health, safety or welfare if the variance is granted. Also see the write up of Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005) (which is located further on in these materials) for a more exhaustive explanation of what constitutes the "public interest" and "the public rights of others."

IV. WHAT ABOUT THE OTHER FOUR PARTS OF THE VARIANCE TEST?

The applicant must still demonstrate that he or she meets the other four parts of the traditional variance analysis, although there are overlaps between each of those four parts and the new "unnecessary hardship" test. That is, the applicant must show:

- (1) that no diminution in the value of surrounding properties would occur (we've seen that this overlaps to some degree with the third element of the new "unnecessary hardship" test);
- (2) that the proposed use would not be contrary to the spirit of the ordinance (overlaps with the second element of the new "unnecessary hardship" test);
- (3) that granting the variance would not be contrary to the public interest (overlaps with the third element of the new "unnecessary hardship" test); and
- (4) that granting the variance would do substantial justice (overlaps with the first element of the new "unnecessary hardship" test).

V. IS THE OLD "UNNECESSARY HARDSHIP" TEST GONE FOREVER?

As Bernie Waugh pointed out, probably not. It is possible to imagine a situation where, for example, the applicant could not meet the second element of the new test (because there is a fair and substantial relationship between the general purpose of the restriction and the effect that the restriction has on the applicant's property), but where because of special circumstances the zoning restriction leaves the applicant with no reasonable use of the land.

In such a case, the applicant is still entitled to the variance because without it the applicant's property would be effectively "taken" by the zoning restriction. It does not appear that the supreme court recognized this aspect of its Simplex decision!

SUPREME COURT WASN'T JOSHING WHEN IT RELAXED THE UNNECESSARY HARDSHIP STANDARD TO OBTAIN A ZONING VARIANCE!!

Rancourt v. City of Manchester, 149 N.H. 51 (2003)

And you thought the court was kidding when it decided Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)? The Rancourt case was the first time the supreme court has dealt squarely with the unnecessary hardship test since it announced the new standard in Simplex, and there is no doubt that the new "unnecessary hardship" test is very different from the old.

The plaintiffs are abutters to residential property in Manchester owned by Joseph and Meredith Gately. The Gatelys contracted to have a single-family home built on their 3-acre lot. The Gatelys also wished to build a barn to stable two horses on 1½ acres located in the rear part of the lot, but livestock, including horses, are prohibited in that district under the zoning ordinance. The Gatelys applied for a variance to allow the horses, which was granted by the ZBA. The angry abutters first appealed to the superior court, which affirmed the grant of the variance, and then to the supreme court, which also affirmed.

The supreme court first noted that in Simplex "we departed from our traditionally restrictive approach to [unnecessary hardship] . . . We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her

property." The court went on to restate the Simplex unnecessary hardship test as follows:

Under Simplex, to establish "unnecessary hardship," an applicant for a variance must show that:

- (1) a zoning restriction applied to the property 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 summed up the new test by stating that applicants for a variance no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment.

The court noted that the statutory basis for variances, RSA 674:33, I(b) requires that "special conditions" must be present, and pointed out that before Simplex, unnecessary hardship "existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned." After Simplex, "hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." Thus, in the first prong of the Simplex test, "special conditions" are referred to as the property's "unique setting . . . in its environment." I think the court means by this that there are always "special conditions" present, being each property's unique setting in its environment. The first prong of the new hardship test thus looks at whether the proposed use is "reasonable" given that unique setting.

The facts in this case showed that the Gately's lot was located in a country setting, that it was larger than most of the surrounding lots, was uniquely configured in that the rear portion of the lot was considerably larger than the front, and that there was a thick, wooded buffer around the proposed paddock area. In short, the supreme court agreed that both the ZBA and the trial court could logically have concluded that these "special conditions" made the proposed stabling of two horses on the property "reasonable."

SUPREME COURT PUTS SOME TEETH BACK INTO THE "UNIQUENESS" ASPECT OF THE UNNECESSARY HARDSHIP TEST (Two Decisions)

Garrison v. Town of Henniker
(August 2, 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 NH 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:

- (1) 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 Rancourt 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 is 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, but 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.”

Community Resources For Justice, Inc. v. City of Manchester
(January 24, 2007)

In this case, as in the Garrison case reported above, the NH 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 NH 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. Harrington 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 Rancourt 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."

SELF-CREATED HARDSHIP IS MERELY ONE FACTOR TO CONSIDER UNDER THE VARIANCE TEST FOR UNNECESSARY HARDSHIP

Hill v. Town of Chester, 146 N.H. 291 (2001)

In 1997 the Hills bought a 1.3 acre parcel from family members for \$40.00 (yes Virginia, that's "forty dollars"); the lot was part of a larger parcel owned by the family trust, and title would go back to the trust if the Hills didn't build a house on it within five years.

The lot lacked the minimum lot size and frontage now required under the zoning ordinance (although the lot had been taxed by the town as a buildable lot), and the ZBA denied a variance, partly on the grounds that there was no unnecessary hardship because the trust could have adjusted the size and frontage of the lot to comply with the ordinance -- the hardship was thus not "unnecessary," but "self-created." The superior court reversed the ZBA, ruling that because the lot was taxed as buildable (until the variance was denied!!) the plaintiffs had no actual or constructive knowledge that the land was nonbuildable at the time they purchased it, and that the hardship was not self-created. The supreme court ruled in favor of the town, sort of.

Taxable Status; Knowledge of Zoning Restrictions

The supreme court breezed through these two issues (the superior court was wrong on both) by repeating the rule that the method by which a town taxes land is not dispositive in determining zoning questions (although it is one factor that can be considered, and might determine the outcome of a close case on bad facts); see Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991). Also, landowners are deemed to have constructive notice of the zoning restrictions that are applicable to their property

(which means the law will assume the landowner has read the zoning ordinance even if she hasn't); Trottier v. City of Lebanon, 117 N.H. 148 (1977).

Self-Created Hardship and the New Simplex Hardship Tests

The court then clarified its holding in Ryan v. City of Manchester, 123 N.H. 170 (1983), by ruling that it is "implicit" in Ryan that a self-created hardship does not automatically disqualify the person from receiving a variance, rather, "it is just one factor to consider."

Moreover, the court expressly declared that the self-created hardship factor should be considered under the first prong of the hardship test set forth in the Simplex case.

That first prong requires the applicant for a variance to show that the "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." Thus, if the zoning restriction that interferes with the proposed use comes into play because of self-created circumstances, that fact will certainly have an influence on whether the ZBA considers the proposed use to be "reasonable." This factor comes into play not only where the landowner has made some physical change to the property which creates the need for the variance, but also where a landowner purchases property with a perfectly obvious limitation that makes it unsuitable for the intended use under the zoning ordinance.

DISTINCTIONS BETWEEN "USE" AND "AREA" VARIANCE

Harrington v. Town of Warner, 152 N.H. 74 (2005)

In the Harrington case (referenced above in the discussion about the first prong of the Simplex hardship standard), the court gave us some guidance about how to analyze the question of whether a particular application is for a "use" variance, or for an "area" variance. The case involved a manufactured housing park located on a 46 acre parcel in Warner; the park utilized only 26 acres of the tract and consists of 33 manufactured homes and 54 campground sites. The owner, Mr. Wyman, wanted to add 26 manufactured homes on the unused 20 acres of the property.

The Warner zoning ordinance contains a provision that manufactured housing parks must have a minimum of 10 acres and that the maximum number of sites shall not exceed 25. The ZBA members were themselves not sure whether the provision allowed 25 sites per 10 acres of land, or whether the provision was an absolute maximum regardless of the number of acres in the tract in which case Mr. Wyman would need a variance to implement his expansion plan. Mr. Wyman applied for a variance and after two public hearings and a site visit, the ZBA granted the variance, but limited the expansion to 25 additional sites to be added at the rate of 5 per year. The abutting landowners appealed to superior court, which upheld the ZBA's grant of the variance. The abutters then appealed to the NH Supreme Court, which also upheld the variance.

The supreme court first concluded that the provisions of the Warner Zoning Ordinance are not ambiguous, and that the size of a manufactured housing subdivision is limited to 25 units, regardless of the amount of underlying acreage. The next question was whether the variance needed to exceed this limit of 25 units is an “area” or a “use” variance. The court explained the various factors that distinguish the two types of variances, as follows:

- A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits
- Use variances pose a greater threat to the integrity of a zoning scheme because the fundamental premise of zoning laws is the segregation of land according to uses
- An 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 ordinance
- 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. Accordingly, to resolve this question, we must interpret the town's zoning ordinance to determine the purpose of the zoning restriction.

In interpreting the Warner Zoning Ordinance with the above principles in mind, the court concluded that the variance requested was a use variance. The court was persuaded to adopt this result because

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. Rather, the restriction limits the intensity of the use in order to preserve the character of the area. Moreover, Warner's overall zoning scheme segregates land by intensity of use. For instance, there are three residential districts: village, medium density and low density. Within these districts, a two-family dwelling is a permitted use in the village and medium density residential districts. A two-family

dwelling, however, is only allowed in the low density district by special exception. The zoning ordinance is more restrictive with regard to two-family dwellings in the low density district, thereby preserving the character of the neighborhood by restricting a more intensive use of land. Thus, the overall zoning scheme reveals an intent to segregate land by both the types of uses and the intensity of the use. Accordingly, given the language and purpose of the zoning ordinance, we conclude that the provision limiting the number of sites to twenty-five is a use restriction.

In upholding the ZBA's grant of the variance, the court was especially influenced by the fact that manufactured housing parks are a permitted use in the zone: Thus, under the unnecessary hardship prong of the use variance criteria, "this fact is entitled to considerable weight when evaluating the reasonable use of the property." In addition, the court noted that if Mr. Wyman had adequate road frontage to subdivide his property, he would have sufficient acreage for another manufactured housing park on the new lot and would have no need for a variance. On the question of whether unnecessary hardship had been shown to allow the ZBA to grant the use variance, the court wrote that

the evidence supporting the conclusion that the hardship is a result of unique conditions of his property includes: (1) Wyman is unable to subdivide because he has insufficient road frontage; (2) constructing a road that would provide adequate frontage is "almost impossible" because of the current location of the campground, the existing mobile home park and the presence of swamp lands; and (3) the improvements to the private road that services the park would not remedy the inadequacy in road frontage. Finally, the ZBA considered the impact such a large expansion would have on the character of the area, including the impact on the schools, increased traffic, the availability of affordable housing, and the potential of reviving an undesirable area of town. The ZBA also conducted a site walk. In granting the variance, the ZBA implicitly found that the expansion of the park would not adversely affect the character of the area. Notably, the ZBA limited the expansion to five new lots per year in order to lessen the impact on the schools. Moreover, no evidence to the contrary was introduced.

Based on the foregoing factors, the supreme court agreed with the superior court in concluding that the ZBA acted reasonably in finding that Wyman met his burden of proving unnecessary hardship.

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 about how "public interest" is defined.

As 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 NH 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 5-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 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.”
