

APPENDIX A

REQUIREMENTS FOR VARIANCE APPLICATIONS

by

Christopher L. Boldt, Esq.
Donahue, Tucker & Ciandella, PLLC
Exeter, Portsmouth and Meredith, NH
603-279-4158
cboldt@dtclawyers.com

1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

As before, the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005) and its progeny continues to control this issue after January 1, 2010 – namely that the criteria of whether the variance is “contrary to the public interest” should be construed together with whether the variance “is consistent with the spirit of the ordinance”. Id., at 580; see also, Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance “must unduly, and in a marked degree” conflict with the basic zoning objectives of the ordinance. Chester Rod & Gun Club, at 581; and Harborside at 514. “Mere conflict with the terms of the ordinance is insufficient.” Harborside at 514. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

2. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

See, Criteria 1, above.

3. SUBSTANTIAL JUSTICE IS DONE.

As before, the Supreme Court reference in Malachy Glen, 155 N.H. at 109 to the Peter J. Loughlin, Esq., treatise will continue to apply. See, Loughlin, Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 4th ed., and its reference to the Office of State Planning Handbook, which indicates as follows:

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

granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.” *Id.* at § 24.11.

See also, *Farrar v. City of Keene*, 158 N.H. 684, 692 (2009); and, *Harborside* at 515.

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

This variance criterion has not been the focus of any extensive Supreme Court analysis to date. That said, in considering whether an application will diminish surrounding property values, it is appropriate for ZBAs to consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. See, *Malachy Glen*, 155 N.H. at 107.

5. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

(A) FOR PURPOSES OF THIS SUBPARAGRAPH, “UNNECESSARY HARDSHIP” MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

- (i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY; AND
- (ii) THE PROPOSED USE IS A REASONABLE ONE.

(B) IF THE CRITERIA IN SUBPARAGRAPH (A) ARE NOT ESTABLISHED, AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

THE DEFINITION OF “UNNECESSARY HARDSHIP” SET FORTH IN SUBPARAGRAPH (5) SHALL APPLY WHETHER THE PROVISION OF THE ORDINANCE FROM WHICH A VARIANCE IS SOUGHT IS A RESTRICTION ON USE, A DIMENSIONAL OR OTHER LIMITATION ON A PERMITTED USE, OR ANY OTHER REQUIREMENT OF THE ORDINANCE.

This is the crux of the legislative change wrought by SB 147 effective January 1, 2010. This removes the “use” vs. “area” distinction created by the *Boccia* decision but

ostensibly leaves in place the post-Simplex court interpretations of the various criteria. Also, as listed in the statement of intent attached to the statute, Criteria 5(B) is meant to clarify that the pre-Simplex standard for unnecessary hardship remains as an alternative; however, the Supreme Court has noted that the language used “is similar, but not identical, to” the definitions the Court provided in Simplex and Governor’s Island cases. See, Harborside at 513.

The dual references of the property being “distinguished from other properties in the area” solidifies the repeated Court statements that the “special conditions” are to be found in the property itself and not in the individual plight of the applicant. See, e.g., Harrington v. Town of Warner, 152 N.H. 74, 81 (2005); and Garrison v. Town of Henniker, 154 N.H. 26, 30 (2006). Depending upon the variance being sought, those “special conditions” can include the “as built” environment. See, Harborside at 518 (special conditions include the mass of the building and its use as a hotel in case for sign variances).

This statutory revision does contain a fair amount of uncertainty – most particularly with the issue of who is the fact finder (ZBA or applicant) of what is reasonable under either (A) or (B), above. The Court’s prior opinions containing the phrases that a use is “presumed reasonable” if it is allowed in the district and that the ZBA’s desires for an alternate use are “not material” were all in the context of “area” variances and made with respect to the “public interest” and “spirit of the ordinance” criteria, above. See, Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 53 (2005); and Malachy Glen, 155 N.H. at 107; but see, Harborside at 518-519 (applicant did not need to show signs were “necessary” rather only had to show signs were a “reasonable use”). Thus the determination of “reasonableness” is likely within the ZBA’s purview so that the ZBA must have both the evidentiary basis and the clear findings to support its decision on this issue. Boards should expect to see a variety of arguments and evidentiary presentations, including economic arguments, by both applicants and abutters as to what is or is not reasonable concerning a given site. Be on the lookout for more Supreme Court opinions interpreting this criterion.