New Hampshire Department of
BUSINESS AND
ECONOMIC AFFAIRS

Federal and State Planning and Zoning Case Law for New Hampshire Local Officials

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FEDERAL AND STATE PLANNING AND ZONING CASE LAW

FOR NEW HAMPSHIRE LOCAL OFFICIALS

Current Through
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NH DEPARTMENT OF BUSINESS AND ECONOMIC AFFAIRS
OFFICE OF PLANNING AND DEVELOPMENT

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The following are summaries of federal and state cases relevant to New Hampshire planning boards and zoning boards of adjustment as complied by NH OPD over time from various sources, many of which are cited throughout the text of this publication. Federal cases are decisions of the United States Supreme Court or United States District Court, District of New Hampshire. State cases are decisions of the New Hampshire Supreme Court and are noted as such by the case number form, 123 N.H. 123.

Each case includes a case number, a summary of the case, and a hyperlink to the full decision. Where available, a source and practice pointer which explains how a board should incorporate a decision into its future deliberations are also included.

1952

***Gelinas v. Portsmouth*, 97 N.H. 248 (1952)**
The court first stated the present five conditions for a variance when they found that a residentially zoned lot in a low, swampy area used as a dump and adjacent to a newly constructed, heavily used four-lane highway was absolutely valueless unless used for commercial purposes. Furthermore, the lot was located in an area which was becoming commercial as a result of the construction of the new highway, creating a situation causing unnecessary hardship.

1957

***Shell Oil Company v. Manchester*, 101 N.H. 76 (1957)**
The Manchester ZBA denied a permit to build a filling station. The court reversed the decision and determined that the permit was to be treated as a special exception and therefore the only function of the board was to determine if the special exception requirements of the ordinance had been met.

***Dumais v. Somersworth*, 101 N.H. 111 (1957)**
Somersworth ZBA revoked a permit issued by the building inspector for a three-stall garage in a residential district for the storage of "trucks and/or private cars." The supreme court partially vacated the revocation deciding that the permit properly allowed construction and use of the building for the storage of private automobiles but confirming the revocation concerning the use of the garage for the storage of trucks. The court found that the appeal was timely filed since inquiry had been made to the building inspector as soon as the abutter became aware that construction was about to start.

1958

***Vlahos Realty Co. v. Little Boar's Head Dist.*, 101 N.H. 4 (1958)**
Conditional Variance granted for ice cream/convenience store. Conditions include cleanliness, restrictions on lights, music, signage, hours of operation, fencing, a yearly permit subject to renewal by the Zoning Inspector. Only for owner or lessee of owner. Zoning Inspector denied renewal to subsequent owner, who filed for declaratory judgement action. Supreme Court recognized the broad authority of the ZBA to "make such order or decision as ought to be made", but there are limits.

Practice pointer: Conditions need to be attached to the land, not the person.

1962

Jaffrey v. Heffernan, **104 N.H. 249 (1962)**
Zoning ordinance was held to be invalid because of the failure of the ordinance to provide for a zoning board of adjustment.

1967

Bosse v. Portsmouth, **107 N.H. 523, 226 A.2d 99 (1967)**
The court found spot zoning when the legislative body rezoned an area surrounded by single-family residential to light industrial although hundreds of acres of industrial property were vacant.

Bourassa v. Keene, **108 N.H. 261 (1967)**
Trucking company owner was ordered by the city to cease using the premises as the trucking company headquarters. The trucking company appealed directly to the superior court and the abutters intervened, seeking dismissal because the plaintiff failed to initially apply for a rehearing before the board of adjustment.

1972

Merriam v. Salem, **112 N.H. 267 (1972)**
Board of adjustment's denial of an application for a mobile home park was upheld by the trial court. During the trial, the plaintiff's attorney called as his only witness, the chairman of the board of adjustment, and proposed various questions calling for interpretations of law and others designed to obtain his reasons for voting as he did, insisting that they have a right to examine board members' "subjective and objective standards in granting and denying variances and exceptions."

1974

Alcorn v. Rochester, **114 N.H. 491 (1974)**
The board of adjustment had stated that it "lacked jurisdiction" in a particular case. The court remanded the case back to the board so that the real basis for the decision could be made. A year later, when the board had not clarified its decision, the court stated that the board's action indicated a lack of basis for the denial and ordered the plaintiff's appeal sustained unless the board complied with the order within 60 days.

1975

Trustees of Lexington Realty Trust v. Concord, **115 N.H. 131 (1975)**
No meaningful review if no specific findings of facts are made.

Hanson v. Manning, **115 N.H. 367 (1975)**
Hardship scrutiny has been brought into the present era when the court found evidence that the zoning restrictions would make development of the plaintiff's land more difficult because of the existence of ledge and wetlands. The court pointed out, however, that there was nothing to distinguish the plaintiff's land from other land in the same area with respect to suitability for which it was zoned. It then went on to hold that "[a]lthough RSA 31:72 (now RSA 674:33) authorizes the granting of a variance when the literal enforcement of the ordinance will result in 'unnecessary hardship,' it does so

only when that hardship is 'owing to special conditions.' Absent 'special conditions' which distinguish the property from other property in the area, no variance may be granted even though there is a hardship."

Society for the Protection of NH Forests v. Site Evaluation Committee, **115 N.H. 163 (1975)**
The Society for the Protection of NH Forests and the Audubon Society of New Hampshire appeal from the decision of the site evaluation committee, a State administrative agency, approving the location of a nuclear generating facility in Seabrook, New Hampshire. The court remanded the case for the limited purpose of requiring that the site evaluation committee provide basic findings of fact on the existing record to support the ultimate conclusions it has reached.

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

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

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

1976

Garripay v. Town of Hanover, **116 N.H. 34 (1976)**
The planning board legally denied a subdivision application because the access road connecting the proposed subdivision to the main network of town roads would be inadequate to handle the increased traffic created by the 49 proposed new homes.

Practice pointer: Subdivisions may be denied if they are "scattered and premature," meaning that they pose a danger to the public through insufficiency of services.

1977

Trottier v. City of Lebanon, **117 N.H. 148 (1977)**
Board of adjustment was upheld in its interpretation that a right-of-way did not constitute a street and, therefore, building permit could not be issued.

1978

Shaw v. City of Manchester, **118 N.H. 158 (1978)**
Where the ZBA originally denies a variance, the petitioner has 20 days to apply for a rehearing. If the rehearing is granted and the ZBA then grants the variance, new aggrieved party has 20 days to apply for another rehearing. If that request for a rehearing is denied, he then has 30 days to appeal to superior court.

1979

Ouimette v. City of Somersworth, **119 N.H. 292 (1979)**
Somersworth ZBA granted a variance to build above-ground gasoline storage tanks so defendant, Agway Petroleum Co., could expand their business onto land they held an option on in the business district B. Testimony centered on the hardship to Agway if the variance were denied. Evidence was presented that Agway could find no other suitable lot with the correct dimensions and slope for its above-ground storage tanks. Abutting business owner appealed issuance of the variance raising the issue of the authority of the local zoning board to grant a variance when the only hardship alleged results from the special needs of an option holder of the property as opposed to special characteristics of the property. The court found for the plaintiff, holding, in part, that "[t]he hardship alleged by the defendants is that Agway cannot expand its business if barred from moving to this lot because of the zoning ordinance. Reliance on these factors to support a variance reflects a fundamental misconception of the function of a variance in a comprehensive zoning scheme. Agway's inability to move cannot support a variance from a comprehensive zoning scheme. The inability to use land for one particular purpose is irrelevant to whether a variance should be granted."

Weeks Restaurant Corp. v. City of Dover, **119 N.H. 541 (1979)**
Weeks Restaurant Corp., which is located in the interior of a traffic circle in Dover, was found to have standing to protest the construction of another restaurant which was near, but not immediately adjacent to the Weeks property.

1980

Win-Tasch Corp. v. Merrimack **120 N.H. 6 (1980)**
1964 – Town adopts min lot size and grandfather clause. Lot size modified several times but no change to the grandfather clause. Subdivision created in 1968 in compliance with regulations. Building permits issued over the years until 1976. Builder appeals to ZBA for both an Appeal of Administrative Decision and a Variance. Despite the letter from the Town Attorney on "administrative gloss" interpretation of the grandfather clause, ZBA denies both.

Practice pointer: administrative gloss can be changed by the voters, not the ZBA. Members of ZBA are not liable for damages so long as they act in good faith.

Sprague v. Acworth, **120 N.H. 641 (1980)**
Owner of a small, oddly shaped lot on a lake was granted a variance to build. A new ordinance required various setbacks from the lake, road and side lot lines which resulted in a triangularly shaped buildable area of only 195 square feet. The court found that these factors would have essentially prevented any use of the lot.

Fisher v. Dover, **120 N.H. 187 (1980)**
McQuade Realty was granted a variance to convert a 32-room house into a multi-family apartment complex in 1973. The variance was appealed to superior court, remanded back to the ZBA who again granted the variance on December 5, 1974. A second appeal to superior court resulted in a second remand to the ZBA. On May 13, 1976, the ZBA now denied the variance and no appeal was made by McQuade Realty. On July 30, 1976, McQuade filed a second application for a variance which was substantially the same as previously requested which was now granted by the ZBA. After affirming the decision at a rehearing, the plaintiff once again appealed to superior court which upheld the variance noting that the plaintiff had not sustained her burden of overcoming the statutory

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

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

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

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

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

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

1981

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

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

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

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

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

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

be reached."

Fisher v. Boscawen, **121 N.H. 438 (1981)**
Plaintiff was denied a special exception for a gravel pit after the ZBA submitted the application to the planning board for its consideration. The planning board determined that the proposed location of the gravel pit was not appropriate and the ZBA's subsequent denial included as a reason that "[t]he special exception may not be permitted without approval of the site as an appropriate location by the Planning Board."

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

1983

Governor's Island Club v. Town of Gilford, **124 N.H. 126 (1983)**
A landowner requested a variance to subdivide a lakefront parcel into two lots, each with less than the square footage required by the zoning ordinance. The court found that no basis existed for a hardship, which must distinguish the parcel from other lots in the same area. "The land involved here fails to meet this test. It is undisputed that Gagne's shorefront parcel is entirely suitable for use as a residential lot; it has been so used at least since 1937. The zoning ordinance has the same effect on this parcel as it does on every other parcel smaller than 60,000 square feet; vis., to render a subdivision of that parcel impermissible. Any resulting injustice is general, rather than specific, and if it is to be remedied, that must be done by way of an amendment to the zoning ordinance rather than by a variance."

1984

Sklar Realty, Inc. v. Merrimack and Agway, Inc., **125 N.H. 321 (1984)**
Agway, Inc. sought to construct a dry feed plant in the Town of Merrimack. Agway submitted a site plan to the planning board and applied to the town's board of adjustment for a special exception to the zoning ordinance to allow it to build in a wetlands area. The board granted the exception with conditions. Later, Agway revised the plans to address concerns of the planning board. An abutter challenged whether the special exception was still valid after the plan had been revised. The court held that the plan must be resubmitted to the board of adjustment for a determination of whether the special exception granted to a wetlands ordinance survived the revision. The court also ruled that a compliance hearing must be held so abutters can be satisfied that any conditions set by the planning board to be fulfilled before final approval have, in fact, been met.

Winslow v. Town of Holderness Planning Board, **125 N.H. 262 (1984)**
Since the planning board is a quasi-judicial body, a board member should be disqualified if he is not indifferent. The board's decision is voidable if the disqualified member participates. Speaking as a private citizen at a public hearing, Mr. Mastro spoke in favor of a proposed subdivision that did not meet the requirements of subdivision regulations. After Mr. Mastro became a member of the board, the board approved the subdivision proposal, with conditions, by a clear majority, 6-1. The supreme court applied the criteria used for disqualification of board of adjustment members: "standards that would be required of jurors in the trial of the same matter" because, in this case, the planning board

was acting in a quasi-judicial capacity. Stricter rules of fairness are required than when a legislative function is involved.

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

1985

***Davis v. Barrington*, 127 N.H. 202 (1985)**
The planning board denied an eight-unit condominium subdivision approval citing six reasons. After review by a master, the court agreed with his finding that two of the six stated reasons for denial were valid and that was all that was needed to deny the application.

1986

***Rancourt v. Town of Barnstead*, 129 N.H. 45 (1986)**
The planning board denied a proposed subdivision because of 1) the impact the subdivision would have on the town's growth rate; 2) its impact on the schools; and 3) a concern for natural resources. Because the town's growth control rates were set forth in the master plan, and the town had not enacted ordinances providing for growth management or a capital improvement plan, that denial was illegal.

Practice pointer: 1) Planning boards may not deny applications based on language found in the Master Plan, which, in New Hampshire, function as a guide in the land use planning process. 2) When a planning board purports to apply its limited growth recommendations on an ad hoc basis in place of limited growth legislation, it circumvents the legislative process.

1988

***New London Land Use Assoc. v. New London*, 130 N.H. 510 (1988)**
Lakeside Lodge consists of 17 housekeeping units on a 17-acre parcel in a residential district that requires two acres per dwelling unit. Since the Lodge was in operation before the zoning ordinance was enacted, the nonconforming use on less than the required acreage was allowed to continue. The board of adjustment granted the owners a special exception to allow a planned unit development. The existing buildings would be razed and replaced with 17 condominium units and a clubhouse building. Although the number of dwelling units would remain the same, the living, storage and common space would more than double.

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

***Jensen's v. City of Dover*, 130 N.H. 761 (1988)**
Special exception denial for an 86-unit mobile home park was upheld by the court on the basis that there was sufficient evidence on the issues of adverse effect on overall land values and traffic impact to support the board's denial.

1989

***Devaney v. Windham*, 132 N.H. 302 (1989)**
Plaintiff owned a cottage on a lot that did not meet the setback requirements of the zoning ordinance at the time of purchase. When he began to remodel the camp without a building permit, the town issued a cease-and-desist order. He continued to add on to the camp, including a second story on the building, a two-story addition, and an unapproved septic system. A requested variance was denied, a further cease and desist order issued, but the work continued. Superior court granted the Town's request for an injunction that required the plaintiff to return the building to dimensions complying with the zoning ordinance.

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

***Condos East Corp. v. Town of Conway*, 132 N.H. 431 (1989)**
Planning board illegally denied a subdivision based on its conclusion that the proposed access was insufficient and inadequate absent a second access, and that the development was unsuitable due to exceptional damage to health and peril from fire due to the excessive slope of the access road, despite the fact that three experts testified that the access road would not create a hazard either to the public safety or to the road itself.

Practice pointer: Even though board members may rely upon their personal knowledge and experience when reviewing plans, the board may not blatantly ignore this expert advice, which was completely uncontradicted.

1990

***Lemm Development Corp. v. Town of Bartlett*, 133 N.H. 618 (1990)**
The Board of Selectmen illegally denied a building permit for amenities (tennis court, swimming pool, bathroom) which developer sought to construct which were not shown on the approved subdivision plan, and the board had not yet adopted site plan review regulations.
Practice pointer: Planning board has no authority, under subdivision regulations, to review or control the construction of facilities.

***Crossley v. Town of Pelham*, 133 N.H. 215 (1990)**
If the land is reasonably suited for a permitted use, no hardship can be found and no variance can be granted, even if the other four parts of the five-part test for the granting of a variance have been met.

Landowners went before the Pelham ZBA for a variance to replace the one-car garage on their nonconforming lot with a larger two-car garage. Neighbors appealed the granting of the variance to

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

1991

***Granite State Minerals v. Portsmouth*, 134 N.H. 408 (1991)**
Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid.

1992

***Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992)**
A marina had been operating for several years as a viable commercial entity before requesting variance to expand; owner was clearly making reasonable use of his property and thus hardship justifying variance did not exist. The decision of the ZBA granting a variance to a nonconforming marina for construction of an additional boat storage facility was reversed. In order to validly grant a variance, a ZBA must make specific factual findings showing, among other things, that the deprivation resulting from a denial of a variance is so great as to deprive the owner of ANY reasonable use of his land, and that the hardship is the result of some unique condition of the land and not the personal circumstances of the owner. The party seeking the variance has the burden of producing evidence sufficient for the board to establish these requirements.

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

1994

***Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632 (1994)**
Plaintiff abutters appealed order of superior court upholding issuance by the ZBA of a special exception authorizing an apartment as an accessory use to a convenience store.

1995

***Dziama v. City of Portsmouth*, 140 N.H. 542 (1995)**
RSA 677:3 (Rehearing by Board of Adjustment) requires an aggrieved party to file a new Motion for Rehearing that raises any new issues that result from the granting of an earlier Motion for Rehearing. If an applicant did not have to file a second Motion for Rehearing when conditions changed, the board would not have an opportunity to correct any errors that it may have made and the superior court would be limited to consideration of errors alleged in the original rehearing motion.

Plaintiff was denied relief by the ZBA on a procedural basis. ZBA granted motion for rehearing reversing itself on the procedural denial, but denying the request on a substantive basis. Plaintiff did not file an additional Motion for Rehearing, but appealed directly to the superior court. The superior court dismissed the appeal on the basis that the plaintiff should have filed a second Motion for Rehearing. The plaintiff took the position that under *Shaw v. City of Manchester*, 118 N.H. 158 [1978] only one Motion for Rehearing need be filed. The supreme court found that the law was unclear and while indicating that from this point forward a second motion for rehearing must be filed if the reason for denial is changed, the plaintiff was allowed to go back to the board and file a Motion for Rehearing.

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

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

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

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

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

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

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

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

two family dwelling and installing pavement in excess of the maximum allowed and violated the variance by constructing a two-car garage. The trial court ordered the modification of the garage and removal of certain pavement. The supreme court affirmed that the home, garage and driveway all violated the zoning ordinance.

***Ray's State Line Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995)**
Interveners appealed decision of superior court reversing the denial by the defendant of application of the plaintiff for permits to change two sign faces on existing signs and to make an internal change to about 100 square feet out of the 2,000 square foot nonconforming convenience store. The supreme court affirmed.

***Miller v. Town of Tilton*, 139 N.H. 429 (1995)**
Appeal by plaintiffs of superior court order denying their Motion for Summary judgment and validating the rezoning of their land by defendant Town of Tilton. The supreme court affirmed.

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

***Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital*, 139 N.H. 450 (1995)**
Plaintiff, operator of a health club 1.7 miles from Exeter Hospital, appealed grant of site review for new athletic facility at the hospital to be open to patients and the general public. Plaintiffs requested certiorari from the superior court claiming standing to appeal on the basis that they owned property within the town and because the fitness center would compete against their businesses. Superior court denied certiorari, ruling they were not "persons aggrieved." ZBA denied separate administrative appeal on a similar basis. Superior court granted Defendant's Motion for Summary judgment and supreme court affirmed.

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

1996

***Geiss v. Bourassa*, 140 NH 629 (1996)**
In 1989, a special exception was granted allowing "office and storage and maintenance of the vehicles and equipment of Ken's Waste Disposal business." At the hearing, the applicant had stated that they would keep about twenty-five containers on the property and there would be no storage of garbage. No objections were raised. Over the years, more and more empty dumpsters became stored on the property, a mechanic occasionally worked on a truck late into the evening and from time to time a truck would be stored overnight loaded with garbage.

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

Conforti v. City of Manchester, **141 N.H. 78 (1996)**
A preexisting nonconforming 1912 movie theater in Manchester was renovated and the owner began holding live rock concerts. The city notified the owner that the live shows violated the zoning ordinance. This administrative decision was appealed to the ZBA which denied the appeal. This denial was upheld by both the superior and supreme courts stating that live rock concerts were not a permissible expansion of the nonconforming use as a movie theater.

1997

Peabody v. Town of Windham, **142 N.H. 488 (1997)**
New owners of a former well drilling business (preexisting nonconforming use) began to bring asphalt paving equipment onto the site and were told to stop by the building inspector and the property be returned "to those uses permitted by the zoning ordinance or the non-conforming use of a company that drills wells." The plaintiff appealed the administrative decision and the ZBA denied the appeal and ordered that no paving equipment or vehicles with residual paving materials be parked or repaired on the property.

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

The court went on to affirm that although nonconforming uses are protected, the property owner's rights to do as they please are not unlimited since the controlling policy of zoning law is to carefully limit the expansion of nonconforming uses with the goal of reducing them to conforming uses altogether. As a result, the court reversed all of the superior court's rulings and upheld the limiting conditions attached by the ZBA.[1]

1998

Cormier v. Town of Danville ZBA, **142 N.H. 775 (1998)**
The Town of Danville denied a special exception for an excavation asserting that the road the trucks would use was a "historic landmark" and "natural landmark" which the excavation would adversely impact, thus failing to meet two of the Danville special exception criteria. The plaintiff appealed to the superior court which agreed with the ZBA and upheld its denial, but the supreme court reversed.

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

[1] 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

natural features or historic landmarks, the decisions of the ZBA and trial courts were reversed.[2]

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

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

1999

Cohen v. Town of Henniker, 134 N.H. 425 (1991)

Planning board illegally denied application to convert preexisting nonconforming apartments to condominium form of ownership because they did not comply with the then applicable zoning ordinance.

Practice pointer: Although RSA 356-B:5 allowing towns to require approval for condominium conversions, that approval may not be denied if conversion would not in fact have an effect on land use.

Brewster v. Town of Amherst, 144 N.H. 364 (1999)

Planning board legally revoked site plan approval after a pattern of complaints and alleged violations by the owners, followed by hearings before the board and promises of remedial action, only to recur again.

Practice pointer: While planning boards are to use their revocation powers judiciously, they are not required to ignore a history of violations and non-compliance.

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

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

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

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

The case turned on the court's determination that both the language inserted into the zoning ordinance and the circumstances surrounding the adoption of the amendment by the voters demonstrated that it was not the intent to grant any greater expansion rights to nonconforming uses than are generally available under state law. (See RSA 674:19 and the many supreme court cases that have referred to the statute in working out the details of how and to what degree a preexisting nonconforming use may

[2] 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

be altered or expanded.)[3] Hollis voters subsequently approved an amendment to the zoning ordinance that broadened the rights of property owners to expand non-conforming uses, thus circumventing the supreme court's opinion.

2000

Town of Seabrook v. Vachon Management, 144 N.H. 660 (2000)

Town's requested injunction against live nude dancing should have been granted because the change of use from retail sales of computer equipment to mud wrestling, which predated the adoption of the zoning ordinance prohibiting it, required site plan review, which it had not obtained.
Practice pointer: Change of use from one permitted use to another triggers site plan review, even if the change of use is not substantially different.

2001

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

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

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

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

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

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

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

- It would be injurious to the public welfare and would be visible from the road;
- It could have a profoundly detrimental impact on the environment, a pond, and the aquifer;

[3] 2000 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 6, 2000.

- A false statement was presented to the ZBA;
- The operation was not in the best interests of the community;
- The application did not fully comply with the gravel ordinance; and
- It would have a long-term negative impact on the aquifer and would be injurious to the residents of the Town.

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

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

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

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

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

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

Some Thoughts:

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

2003

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment, **149 N.H. 63 (2003)**
The Hooksett Planning Board was hearing an application for a gas station/convenience store, and the conservation commission submitted to it a memo claiming that the use wasn't permitted under the zoning ordinance. The Planning Board sought the opinion of the code enforcement officer (CEO), who determined that the use was permitted. The commission appealed that determination to the ZBA, which found in favor of the CEO. The commission's motion for rehearing was denied by the ZBA. The commission then appealed to superior court. The ZBA moved to dismiss the case, arguing

that the commission didn't have standing to appeal to superior court. The court denied the motion. The ZBA appealed the denial of the motion to dismiss to the supreme court. The supreme court found in favor of the ZBA - meaning that the commission did not have standing to appeal to superior court - and reversed the lower court. Therefore, case dismissed. This seems simple enough but the supreme court's opinion is a rich analysis of statutory history that warrants reading. It resulted in a rare 3-2 split among the justices and an invitation to the legislature for clarification.

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

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

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

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

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

I think that a different result might occur if the conservation commission could demonstrate that it was an abutter or had some other particularized interest in the matter being considered. So, if the conservation commission owned or held an easement on abutting property, or if it could demonstrate

that land it controlled would be adversely impacted by a proposal even though not directly abutting, then the conservation commission might be able to demonstrate standing to move for rehearing and also to appeal to superior court. Note that the supreme court dismissed the notion that the conservation commission should be considered party to the action because it has a statutory duty to protect the town's natural resources. The court said that duty only allows it to appeal to the ZBA, not to take the action any further than that.

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

2004

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

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

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

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

…We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by

it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon's part and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA 'acted reasonabl[y] and lawfully' in denying the variance." Having come to this conclusion with regard to the spirit of the ordinance, Broderick chose not to address the other variance criteria.

The trouble with Broderick's opinion is that no other Justices agreed with him. Duggan wrote a concurrence, with which Dalianis joined, coming to the same conclusion but for different reasons. Nadeau wrote a dissent, with which Brock (sitting by special appointment) joined. This decision looks like one of the characteristically split opinions of the U.S. Supreme Court, in miniature.

The Duggan Concurrence

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

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

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

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

Nadeau's Dissent

The court's Simplex opinion, which was unanimously decided (Brock, Broderick, Dalianis, and Horton (upon whose Grey Rocks dissent the Simplex opinion was largely based)), was written by Justice Nadeau. You may recall that the impact of the decision was to effectively recast how ZBAs were supposed to deal with the hardship question in variances (the other criteria were not addressed in Simplex). The bottom line of Simplex can be found in this quotation from it, appearing in Nadeau's instant dissent: "...there is a tension between zoning ordinances and property rights as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." And so, the pendulum swung back toward property rights.

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

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

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

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

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

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

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

On appeal, the superior court vacated the ZBA's decision. Applying the *Simplex* test (because *Boccia* had not yet been decided at the time of the superior court decision), the court decided that the applicants had satisfied the "hardship" requirement. The supreme court reversed and remanded the case back to the lower court with instructions to determine if the newly announced *Boccia* standard was met. The supreme court did not mention the "public interest" or "substantial justice" findings of the ZBA, either of which were sufficient grounds for denial. It appears the supreme court viewed this case as an "area" variance case with seemingly no consideration that this might be a "use" variance.

2005

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

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

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

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

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

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

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

or that the variance was contrary to the public interest.

The town appealed the trial court's decision to the supreme court, which noted that since *Simplex,* it had "further refined" the unnecessary hardship standard in *Boccia.* The *Boccia* unnecessary hardship standard requires the applicant for an area variance to satisfy two factors: "(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance."

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

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

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

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

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

The court said the Hudson ZBA incorrectly focused on whether fewer than five dwelling units were more suitable. "In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material," the court wrote.

The court held that the developer satisfied the two *Boccia* hardship criteria for an area variance. Because the setback requirements from Windham Road and the wetlands buffer zone would leave a buildable space of only 20 to 25 feet wide and less than 200 feet long, the court wrote, "The evidence supports the conclusion that there is no reasonable way for the plaintiff to achieve the permitted use without a variance. We hold that the plaintiff's proposed use is a permitted use and that special conditions of the property make it impossible to comply with the setback requirements. From a

practical standpoint, an area variance is necessary to implement the proposed plan." (Susan Slack, NHMA Legal Services Counsel, *New Hampshire Town and City*, April 2005.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court said the evidence was sufficient to establish that the applicant met the *Simplex* unnecessary hardship standard. The fact that manufactured housing parks were a permitted use in the zoning district was "most significant" in supporting the conclusion that the 25-site limit per parcel interfaced with the applicant's reasonable use of the property, according to the court. Evidence supporting the conclusion that unique conditions of the property created a hardship included the fact that the

applicant could not subdivide the parcel because of insufficient road frontage; the current location of the existing mobile homes; campground sites and swamp land made construction of a road with sufficient frontage "almost impossible;" and improvements to the park's private road would not remedy the road frontage problem.

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

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

According to the court, "To counter the fact that the hardship was self-created because the landowner had actual or constructive knowledge of the zoning restrictions, the landowner can introduce evidence of good faith." Among the ways an applicant can show good faith, the court said, are compliance with rules and procedures of the ordinance; use of other alternatives to relieve the hardship before requesting a variance; reliance upon the representations of zoning authorities or builders; no actual or constructive knowledge of the zoning requirement.

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

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

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

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

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

McDonald filed an appeal to the superior court and the ZBA moved to dismiss the case, arguing that McDonald should have filed a second motion for rehearing and that because she had not, the superior court lacked jurisdiction to hear the appeal. The supreme court disagreed, ruling that if the ZBA's argument were correct, it would mean that someone in McDonald's position would have to appeal to superior court from the initial variance denial once the rehearing request was rejected, and also file a

second motion for rehearing to challenge the issue that was newly raised by the ZBA in its decision denying the initial request for rehearing. The supreme court held that such an application of the appeal statutes would lead to absurd and wasteful results.

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

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

Court defines "public interest."

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

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

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

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

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

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

for the Board finding that it was not in the public interest to grant the variance" to the Rod and Gun Club.

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

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

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

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

The court concluded that the ZBA erred by looking to the vote upon the September 2001 warrant article as a declaration of the public interest. The relevant public interest is set forth in the applicable zoning ordinance. The record shows that the purpose of the ordinance creating the residential zone in which the plaintiff's property is located is to "recognize the unique scenic, historic, rural and natural characteristics" of this part of the town "while encouraging development… in a manner which will protect these important characteristics." Rather than examining whether the variance would unduly conflict with basic zoning objectives by altering the essential character of the neighborhood or by

threatening the public health, safety, and welfare, the ZBA relied upon the effect that the variance would have upon the town's incipient plan to build a telecommunications tower elsewhere. This was also a mistake. Thus, the supreme court agreed with the trial court that the ZBA incorrectly defined the relevant public interest when it denied the variance. However, rather than order the ZBA to issue the variance as the trial court had done, the supreme court remanded the case back to the trial court with instructions that the variance case be sent back to the ZBA for further proceedings so that, presumably, the ZBA could rehear the case using the correct analysis of what constitutes "public interest" and the "public rights of others."

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

2006

Conditional Approval of Site Plan Not Final Approval

***Simpson Development Corporation v. City of Lebanon*, No. 2005-207 (2006)**

The purpose of allowing conditional approvals by planning boards is to avoid requiring that any impediment to full approval result in formal disapproval and the wasteful necessity of starting all over. Thus, according to the Court, a conditional approval under RSA 676:4, I(i) is only an "interim step in the process of the board's consideration" and is not a final approval. For a valid final approval under the statute, there must be no unfulfilled conditions precedent.

The planning board granted the developer approval for a 57-lot cluster subdivision containing 53 single-family homes. The approval was conditioned upon, among other things, the creation of an open space area that included all land not encompassed by the curtilage of the subdivided lots within the developed portion of the property. On January 13, 2003 the developer sought to amend its cluster subdivision plan to add nine lots. On June 9, 2003, the board approved the amendment with conditions and on July 14, 2003 amended its June 9, 2003 approval to add the following language: "When the Planning Office is notified that Conditions 3, 9 &10 above have occurred, this approval shall become FINAL APPROVAL and the Notice of Action and Subdivision Agreement shall be prepared and signed by the Chairperson as provided in Sections 6.13, 6.25 and 7.4(f) of the Subdivision Regulations."

Subsequent to the board's conditional approval, their attorney informed them that they did not have the authority to permit the amendment because the additional nine lots would be sited in the designated open space area. As a result, on October 14, 2003, the board voted to void its conditional approval of the amendment.

The developer argued, among other things, that the board's June 9, 2003, decision was a final approval that barred the board's October 14, 2003 action. The Court did not agree, finding that the conditional approval never became final because not all of the conditions precedent were satisfied before the conditional approval was revoked.

Specifically, condition 10 required the developer to "submit for review and approval of the Planning Office any amended declarations of covenants and restrictions that will govern the homeowner's association." The city's zoning ordinance required review by the city attorney who determined that the board did not have the legal authority to approve the plan amendment because to do so would violate the zoning provision that prohibited development in the designated open space area of the cluster subdivision. Further, RSA 674:21-a provides that any open space or other development restriction that is part of a cluster development submitted with or contained in an application which

is subsequently approved shall be deemed a condition of the approval. As a result, the Court found that the developer did not receive the approval required by condition 10 of the June 9, 2003 approval so the approval never became final. Because the June 9, 2003 conditional approval was not final, the board was not barred from reviewing and voting to void the approval.

(From *New Hampshire Municipal Association Court Updates*, 2006)

Rehearing motion satisfies statute's requirement.

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

This case examines the issue of what satisfies the requirement of RSA 677:3, I with regard to a party's obligation to "set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable" when applying to the zoning board of adjustment for rehearing.

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

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

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

In deciding this case, the New Hampshire Supreme Court pointed out that the rehearing process is designed to give the ZBA an opportunity to correct any mistakes it may have made before an appeal

to court is filed. This goal is accomplished by requiring applicants for rehearing to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In this case, the court found that the plaintiffs' motion directly listed the grounds upon which it was based. The court wrote, "If nothing else, the plaintiffs' motion put the ZBA on notice that the plaintiff believed that the ZBA has misinterpreted *Boccia* when it found that there were feasible alternatives to the screened deck they sought to build." The court held that the motion for rehearing satisfied the spirit and letter of RSA 677:3.

The town next argued that the trial court decision should be affirmed because the court dismissed the plaintiffs' appeal on the alternative ground that it did not comply with RSA 677:4 which governs appeals of ZBA decisions to superior court. The court disagreed, pointing out that the only reason the trial court found that the motion did not comply with RSA 677:4 was because it found that it did not comply with RSA 677:3. The court pointed out that the trial court ruled that incorporating the motion for reconsideration to the ZBA "is an acceptable means of informing the trial court in an RSA 677:4 appeal of the specific grounds upon which the decision is alleged to be unreasonable or illegal." Therefore, having previously resolved the question of whether the plaintiffs complied with RSA 677:3 in favor of the plaintiffs, the court concluded that the plaintiffs were also in compliance with RSA 677:4. The trial court's dismissal of plaintiffs' appeal was reversed and remanded.

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

Garrison v. Town of Henniker, **154 N.H. 26 (2006)**

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

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

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

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

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

As discussed above, to demonstrate "unnecessary hardship" applicants must show that "a

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

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

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

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

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

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

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

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

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

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

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

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

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

> As our cases since Simplex have emphasized, the first prong of the Simplex standard is the critical inquiry for determining whether unnecessary hardship has been established. (John R. Harrington & a. v. Town of Warner, 152 N.H. 74, 80 [2005]) To meet its burden of proof under this part of the Simplex test, the applicant must demonstrate, among other things, that the hardship is a result of the property's unique setting in its environment. This requires that the zoning restriction burden the property in a manner that is distinct from other similarly situated property. While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In

addition, the burden must arise from the property and not from the individual plight of the landowner. Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. As we explained in Bonnita Rancourt & a. v. City of Manchester, 149 N.H. 51, 54 [2003], "hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable'."

The court found that the evidence CRJ presented did not demonstrate that its proposed site was unique, as compared to the surrounding lots. While there was evidence that the property was located near public transportation and treatment facilities, as well as other city services that the residents of the halfway house might need, there was no evidence that CRJ's property was unique in this respect. "Presumably," the supreme court noted, "all of the buildings in this location share these characteristics."

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

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

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

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

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

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

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

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

Pursuant to RSA 676:5, I, "any person aggrieved" by any decision of an administrative officer may appeal to the ZBA. "[T]he selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing" within thirty days after a decision of the ZBA (RSA 677:2). An appeal from the ZBA's decision on the motion for rehearing may then be brought in the superior court within thirty days by "[a]ny person aggrieved" by the order or decision of the ZBA. RSA 677:4 [Supp. 2006]. The same statute defines "person aggrieved" as "any party entitled to request a rehearing under RSA 677:2." To demonstrate that he is a

"person aggrieved," the plaintiff must show some "direct definite interest in the outcome of the proceedings." *Caspersen v. Town of Lyme*, 139 N.H. 637, 640 [1995]. "[S]tanding will not be extended to all persons in the community who might feel that they are hurt by" a local administrator's decision. *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450, 452 [1995] (quotation and ellipsis omitted). "Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case." *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 54445 [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.

(From *2007 Land Use Law Update*, Timothy Bates, Esq., OEP Spring Conference, April 2007)

Court upholds variance conditions.

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

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

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

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

The superior court dismissed the petitioner's argument that the cost condition was arbitrary for lack of defined terms because she had failed to raise the issue in her motion for rehearing before the ZBA. The lower court had found that the ZBA was concerned about potential safety issues if Mark Street Extension is never built because other lot owners might use the petitioner's driveway to access their lots via the unfinished road. The lower court held that the cost condition was reasonable in that it was intended to encourage the owners of the subdivision property to construct Mark Street Extension.

The lower court also held that the liability condition was reasonable and similar to one of the conditions upheld in *Wentworth Hotel v. Town of New Castle*, 112 N.H. 21, 28 [1972].

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

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

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

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

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

Please be advised that the foregoing case summary is based upon a supreme court slip opinion. Slip opinions are subject to change following motions for rehearing and/or motions for reconsideration.

The court may also modify the opinion without motion. The final version of the court's opinion is that which appears in the *New Hampshire Reports*.

2007

Board's Preference Not a Substitute for 'Undue Hardship or Injustice'

***Philip Auger & a. v. Town of Strafford & a.*, No. 2006-646 (2007)**

The plaintiffs, abutters and neighbors of a proposed conservation development subdivision (CDS), appealed the planning board's approval of the proposed CDS and yield plan. The proposed CDS plan contains 17 building lots serviced by a cul-de-sac, and 31.8 acres of open space burdened by a permanent conservation easement. The yield plan contains 18 lots serviced by a loop road and shows less than 20,000 square feet of wetlands impact.

The zoning ordinance provides a CDS as "a method of subdivision design that provides for the protection of natural, environmental, and historic land features by permitting variation in lot sizes and housing placement." It allows a residential subdivision where dwellings are allowed on reduced lot sizes and when a portion of the tract is set aside and will never be built upon. A CDS must meet certain requirements specific to such developments as well as all other zoning and subdivision requirements. In order to determine the number of houses that may be built in a CDS, the planning board may require a "yield plan" which shows the number of houses that could be built in a conventional development that meets all applicable state and local requirements.

The CDS as approved by the planning board included a waiver of a subdivision regulation that states that no more than ten lots may be serviced by a dead-end street. The board's subdivision regulations allow for the granting of waiver when "strict conformity to these regulations would cause undue hardship or injustice to the owner of the land." The plaintiffs argued that there was no evidence that the loop road would cause the owners "undue hardship or injustice" and that without such a finding, the board could not grant the waiver. The Court agreed, finding that the board had no evidence before it that the loop road configuration would cause any hardship to the property owner, much less "undue hardship." Instead, the record revealed the sole reason that the board decided to waive the 10-lot requirement was because it preferred the cul-de-sac design, not because the loop road design would cause "undue hardship or injustice" to the property owner. Absent evidence of "undue hardship or injustice", the board could not waive the subdivision regulation provision. Thus, the Court reversed the trial court's decision to uphold the board's approval of the proposed CDS.

The Court, in the interest of judicial economy, addressed other issues raised by the plaintiffs since they would likely arise on remand. Of particular interest to all land use boards was the Court's discussion of the claim by the plaintiffs that their procedural due process rights were violated because a board member that voted on the CDS missed two of the multiple hearings on the proposal. In rejecting this argument, the Court noted that the board member in question missed only two hearings over several years and voted after having visited the site and reviewing the applicable notes. The Court explained that prior decisions relied upon by the plaintiffs that held that all panel members must be present to hear all testimony were cases that turned on issues of credibility. When credibility is a factor to be considered in the decision-making process, all members who will vote on the case must be present to hear the testimony in order to effectively assess the issue of credibility. However, since the planning board's decision in approving the CDS did not turn upon credibility, the requirement that all board members hear all testimony did not apply in this case.

Land use boards should note that the Court found it compelling that the board member missed only two of multiple hearings on the proposal, visited the site and reviewed all notes on the case before voting. When a board member has not been to all hearings on a proposal, it is important to make sure

that he or she is sufficiently apprised of all aspects of the case if he or she intends to vote. If this is not possible, a discussion of whether it is appropriate for the member to participate in the vote should be held.

Next the Court turned to issues relating to the board's approval of the yield plan. The subdivision regulations required the plan to show all wetlands and proposed wetlands disturbance in sufficient detail so that the board could assess the impact, and to show that the proposed wetlands disturbance would be minimized in accordance with DES requirements. The yield plan as approved by the board depicted the location of the wetlands, but it did not contain detailed information about the proposed disturbances and impact on those wetlands as required by the subdivision regulations. The Court held that such a finding by the trial court required it to reverse this aspect of the board's decision, and thus vacated the trial court's decision to remand this issue to the board.

Finally, the Court addressed the plaintiff's argument that the board erred when it approved the yield plan with a right of way that was less than 50 feet, as required by the subdivision regulations. The board approved the yield plan with a 45-foot right of way on the condition that if a court, in related litigation ruled that the right of way could not be used for the project, the yield plan would be nullified. Later, when approving the CDS, the board required that the road with the right of way be upgraded to provide access to the CDS. All parties agreed that the street with the right of way exists only as a paper street. Once again, the Court held that to the extent the board waived the 50-foot requirement contained within the subdivision regulations, it did so in error absent evidence of undue hardship or injustice.

Practice pointer: This case illustrates the importance of observing the requirements of subdivisions regulations with respect to granting waivers. In order to grant a waiver, the board must find that the conditions necessary for granting the waiver, as described in the regulations, exist—board preference in not enough.

(From *New Hampshire Municipal Association Court Updates*, 2007)

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

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

Here's an area variance case with something for everyone! Ignoring the rather convoluted procedural background and wrangling, the applicant proposed to construct a self-storage facility and applied for variances to place the paved access road and the storage unit structures within the 100-foot wetlands buffer zone established in the Chichester Zoning Ordinance. The ZBA granted a variance to allow the access road but denied the variance to allow the storage unit structures. The superior court reversed the denial of the second variance and the New Hampshire Supreme Court agreed with the trial court that the ZBA should have granted the area variance. Let's explore how it all happened.

Public interest and spirit of the ordinance are related.

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

To begin, the New Hampshire Supreme Court, citing the *Chester Rod and Gun Club* case that is reported below in these materials, stated that the requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.

Here are some guidelines the court cited from *Chester* that address the question of whether a variance would or would not be contrary to the public interest:

> [T]o be contrary to the public interest… the variance **must unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's basic zoning objectives**. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine **whether it would alter the essential character of the locality**… Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine **whether granting the variance would threaten the public health, safety or welfare**. (emphasis added)

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

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

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

Unnecessary hardship – two factors.

1. Special Conditions of the Property

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

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

2. Other Reasonably Feasible Methods

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

> If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost

prohibitive. Under this factor, **the ZBA may consider the feasibility of a scaled-down version of the proposed use, but must be sure to also consider whether the scaled-down version would impose a financial burden on the landowner**.

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

Substantial justice.

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

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

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

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

Land use boards can reconsider their decisions.

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

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

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

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

opportunity to correct any errors in its decisions before any appeal is heard in the superior court.

Practice pointers:

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

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

2008

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

Naser d/b/a Ren Realty v. Town of Deering ZBA, **157 N.H. 322 (2008)**

The supreme court affirmed in part, reversed in part, and remanded the trial court's decision which upheld the ZBA. The ZBA decision denied a variance and also found that the open space subdivision application did not comply with the zoning ordinance. At issue was the applicant's usage in its yield plan of approximately fifty acres previously burdened by a conservation easement given to the town. The planning board had determined that this usage was improper, and the applicant appealed that decision to the ZBA and applied for a variance to allow the usage in the yield plan.

In first analyzing the yield plan issue, the supreme court looked to the zoning ordinance's definitions of "buildable area" and "yield plan:" respectively, "the area of a site that does not include slopes of 25% or more, submerged areas, utility right-of-ways, wetlands and their buffers" and "a plan submitted… showing a feasible conventional subdivision under the requirements of the specific zoning district..." The court agreed with the town that under these definitions, the yield plan showing development of lots within the Conservation Easement Area was neither "feasible" nor "realistic" since such land could not be developed. Thus, the court found that there was no error in finding that the yield plan did not comply with the ordinance.

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

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

trial court's decision on the variance was reversed and remanded for consideration of the unnecessary hardship and substantial justice criteria.

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

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

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

***Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 (2008).**

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

In affirming the denials, the supreme court noted with favor the lower court's finding that the number of pre-existing, nonconforming lots around the lake was not a basis for bypassing the zoning ordinance requirements. Additionally, the court stated that the spirit of the ordinance was to "limit density and address issues of over-development and overcrowding on the lake." Once again, the court relied heavily upon its decision in *Malachy Glen* and stated that the factors of "alter the essential character of the locality" or "threaten public health, safety or welfare" are not exclusive. In combining its analysis of the "public interest" and "spirit of the ordinance" criteria, the court addressed the applicant's argument that its replacement of a nonconforming use with a "less intensive, more conforming use" is consistent with the public interest and spirit of the ordinance: "We recognize that there may be situations where sufficient evidence exists for a zoning board to find that the spirit of the ordinance is not violated when a party seeks to replace a nonconforming use with another nonconforming use that would not substantially enlarge or extend the present use." However, this was not such a case. The court also noted (with an erroneous reading that *Malachy Glen* did not involve a change in the ordinance) that the town had the ability to change its ordinance to take the current character of the neighborhood into account, including the unique natural resource of the lake.

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

Tucker & Ciandella, PLLC.

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

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

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

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

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

2009

Farrar, unnecessary hardship for mixed use and "substantial justice."

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

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

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

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

Finally, the supreme court addressed the "substantial justice" criteria and cited the *Malachy Glen* decision, above, for the standard that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (1) the use would not alter the character of the neighborhood, injure the rights of others or undermine public interest; (2) the applicant currently resides at the property and wished to remain; (3) the applicant had made substantial renovations to the historic structure; (4) the structure would not be economically sustained as a single

family residence; (5) the residential appearance of the building would not change; (6) adjoining buildings are currently offices; and (7) if the property was used entirely as offices, the traffic and intensity of usage would be greater.

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

2010

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

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

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

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

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

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

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

(From *New Hampshire Town and City*, September 2010)
2011

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

Golf Course Investors of NH, LLC v. Jaffrey, **161 N.H. 675 (2011)**
In order to appeal an administrative decision to the zoning board of adjustment, a person must have standing to appeal; that is to say, the person must be "aggrieved" by that decision (RSA 676:5, I). This case examines the factors to be considered when determining whether applicants have standing as "persons aggrieved" for purposes of an appeal to the ZBA. The ZBA cannot exercise jurisdiction over an appeal unless it finds that the appealing party is aggrieved according to RSA 676:5, I.

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

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

To establish standing, an appealing party must show "some direct, definite interest in the outcome of the action or proceeding." Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party's property to the property for which approval is sought; (2) the type of change being proposed; (3) the immediacy of the injury claimed; and (4) the appealing party's participation in the administrative hearings (*Weeks Restaurant Corp. v. Dover*, 119 N.H. 541 [1979]). Applying the four factors to the residents, the court found that the residents failed to demonstrate that they were aggrieved. With regard to proximity, the residents' properties ranged from 450 feet to 2,400 feet from the GCI property. The type of change being proposed was not dramatic in that the footprint of the building was not being changed, and, importantly, the residents expressed their approval of the improvements proposed for the building. With regard to the immediacy of the injury claimed, the residents did not identify any injury they might face as a result of the planning board's approval. And only one of the residents even attended the planning board proceedings, and that participation was minimal.

This case illustrates the importance of findings of facts. The court is obligated to accept the ZBA's factual findings as prima facie lawful and reasonable, "except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it that said order or decision is

unreasonable." Here, the court pointed out that the ZBA did not include any discussion of how they arrived at the conclusion that the residents were "aggrieved" and, thus, the court was not obligated to defer to the ZBA's findings.

Doctrine of expansion of nonconforming use not applicable to use by special exception. Applicant may ask for a variance from one or more special exception requirements.

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

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

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

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

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

(From *New Hampshire Town and City*, June 2011)

Court examines the new hardship standard.

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

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

In *Harborside*, Parade Residence Hotel ("Parade") obtained variances from the Portsmouth Zoning Board of Adjustment to install two parapet and two marquee signs on its hotel and conference center.

Neither type of sign is permitted in the zoning district in which Parade's hotel is located. On appeal, the trial court upheld the ZBA's grant of a variance for the marquee signs. The trial court, however, reversed the parapet sign variances on the basis that "[t]he only apparent benefit to the public" from having the parapet signs installed "would be an ability to identify [Parade's] property from far away." This purpose, the trial court stated, "does not outweigh the clear provision of the ordinance." Both parties appealed to the supreme court seeking a partial reversal of the trial court's decision.

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

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

(From *Granite State Planner*, Timothy Corwin, Fall 2011)

2013

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

Stephen Bartlett & a. v. City of Manchester, **164 N.H. 634 (2013)**
This case clarifies that a superior court may rule on whether a variance is necessary at all, even if the applicant doesn't ask the court that question. However, this may only be done if the record developed at the ZBA level contains enough facts on which the court can base its decision.

The applicant, a church ("Brookside"), sought a permit to allow a "work-based, self-help organization" to occupy a portion of the carriage house on the property. The City denied the application saying the proposed use violated a portion of the City's zoning ordinance. The denial letter noted that further action on the application could only be taken under RSA 674:33. (This is the statute giving the Zoning Board of Adjustment the authority to grant variances from the zoning ordinance.) Brookside applied for a variance from the ZBA, which was granted. Bartlett, an abutter, appealed the grant of the variance to the superior court.

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

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2013)

Filing deadlines that fall on a weekend or legal holiday.

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

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

The supreme court reversed the superior court and remanded the case back to the ZBA. In doing so, the court relied on the plain language of RSA 21:35, II which states, "If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day." Since the 30 day window for filing an appeal fell on Saturday, February 5th, an appeal filed on the next business day, Monday, February 7th, was timely filed.

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

was added by the legislature in 2008 and became effective on January 1, 2009, well after Radziewicz had filed their appeal.

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

2014

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

Daryl Dembiec & a. v. Town of Holderness, **167 N.H. 130 (2014)**
The New Hampshire Supreme Court reversed the decision of the superior court and held that the petitioners were not required to exhaust administrative remedies before bringing their equitable estoppel claim in court.

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

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

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

The court held that exhaustion of administrative remedies was not required because the ZBA did not have the authority to take the requested action and, therefore, further administrative action was useless. A ZBA's authority is conferred by statute, which gives a ZBA authority to hear appeals from administrative decisions and to grant variances, special exceptions, and equitable waivers where particular statutory prerequisites are met. However, the statute does not give a ZBA general equitable jurisdiction. Therefore, the Holderness ZBA did not have the authority to adjudicate an equitable estoppel claim. Furthermore, this was not a question of construction, interpretation, or application of the zoning ordinance or of the compliance officer's refusal to issue the certificate of compliance: there was no dispute that the ordinance prohibited more than one dwelling unit on a lot. Instead, the

Dembiecs claimed that even though the compliance officer correctly interpreted the zoning ordinance, it was inequitable for him to decline to issue a certificate of compliance because the Dembiecs reasonably relied upon the building permit issued by the Town. Therefore, their claim was an entirely new claim for relief and one which the ZBA was not empowered to hear. Consequently, the case was sent back to the superior court.

(From *New Hampshire Municipal Association Court Updates*, August 2015)

2015

ZBA did not exceed authority by "converting" appeal.

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

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

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

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

Second, the court determined that the abutter's appeal was timely. Because the ZBA determined that the abutter's appeal was actually from the planning board's decision on August 21, the abutter had 20 days, per town ordinance, from the written decision, which was issued on August 28. Relying on RSA 676:5 and the case of *Atwater v. Town of Plainfield*, 160 N.H. 503 (2010), the court determined that the June 19 decision was not an appealable decision of the planning board under RSA 676:5, III because the board did not make a decision interpreting zoning at that hearing. Instead, the June 19 decision

was merely a procedural decision to accept jurisdiction. Although there was some discussion about whether the proposed use was allowed, the ultimate discussion and decision was tabled until August 21, at which time the planning board voted to approve the application. Thus, when the August 28 decision was issued, the abutter had 20 days to appeal. Furthermore, the court stated that when the planning board accepted jurisdiction on June 19, it did not also "accept" the code enforcement officer's "decision" that the use was permitted. The code enforcement officer never made an administrative decision; he instead simply gave his opinion, as part of the technical review committee, that the use would comply with zoning.

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

(From *New Hampshire Municipal Association Court Updates*, 2015)

2016

One Bite at the Apple Applies to Planning Board Decisions

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

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

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

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

As a final matter, the Court upheld the planning board's determination that CBDA's modified application was not materially different than its first. Although CBDA had addressed some of the board's concerns, the subsequent application did not resolve one of the board's principal reasons for

denial: the permanency and immobility of the homes in the proposed park. Therefore, the record supported the board's refusal to consider CBDA's second application.

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

(From *New Hampshire Municipal Association Court Updates*, 2016)

2017

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

***Signs for Jesus v. Town of Pembroke*, 230 F.Supp.3d 49 (2017)**
Hillside Baptist Church and Signs for Jesus were denied a permit to install an electronic sign on the Church's property in Pembroke and they brought an action against the Town alleging violations of the United States Constitution, the New Hampshire Constitution, and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2017)

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

***Dartmouth Corp. of Alpha Delta v. Town of Hanover*, N.H. Supreme Ct. No. 2016-0304 (2017)**
A non-conforming use has the burden to prove it was being operated in a manner inconsistent with a subsequently adopted zoning ordinance. The burden of proving the non-conforming manner of operation is on the party claiming the non-conforming status. Thus, once the Alpha Delta fraternity was decertified by Dartmouth College the burden was on Alpha Delta to prove it was a pre-existing student housing use that was never operated in conjunction with an institutional use such as Dartmouth College.

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

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2018)

2018

Variance Denial Based in Part on "Cumulative Effect" Upheld

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

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

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

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2018)

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

Allegations of Bias Must be Raised at the Earliest Opportunity

***Rochester City Council v. Rochester ZBA*, N.H. Supreme Ct. Case No. 2017-0501 (2018)**

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

In 2016 the ZBA granted that variance request, but in its written decision the Board did not explicitly address the unnecessary hardship requirement of RSA 674:33, I (b). The City Council filed a motion for rehearing arguing it was illegal and unreasonable for the ZBA to approve a variance without clearly

finding hardship. That motion for rehearing was rejected by the ZBA. On appeal to the Superior Court the City sought to expand the ZBA certified record to support an allegation of bias and conflict of interest by the ZBA Chair. The City also principally argued that the ZBA's decision was erroneous because it neither seriously considered the hardship question, nor made written findings of fact on the hardship issue.

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2018)

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

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

***Trustees of Dartmouth College v. Town of Hanover*, N.H. Supreme Ct. Case No. 2017-0595 (2018)**

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

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

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

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

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

The Court also ruled that the planning board relied upon personal feelings and engaged in ad-hoc decision making when it concluded that the IPF was out of harmony with the town and its environs. The Court observed that the planning board cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings. and then justify their reasoning through the application of general considerations. Although the Court emphasized that

site plan review cannot be reduced to the mechanical process of determining conformity with specific zoning and site plan regulations, in this instance, the Hanover Planning Board's reliance solely upon general considerations to override the IPF site plan's conformity with specific regulations and ordinances, without sufficient evidentiary support for doing so was deemed unreasonable. Consequently, the Supreme Court reversed the trial court order upholding the planning board decision.

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

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

(From *New Hampshire Municipal Association Court Updates*, 2018)

2019

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

***David F. Dietz et al. v. Town of Tuftonboro*, N.H. Supreme Ct. Case No. 2017-0536 (2019)**

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

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

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

On appeal the Dietz's' argued that the trial court erred because RSA 674:33-a requires that the ZBA make written factual findings as to each element of the statute, something the Tuftonboro ZBA did

not do. The NH Supreme Court disagreed concluding that the language of the statute only requires that the ZBA make findings, not that it must set forth those findings in writing. Moreover, the Court observed, the minutes of the ZBA meeting reflect the board discussed and analyzed the four equitable waiver requirements.

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

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

(From *New Hampshire Municipal Association Court Updates*, 2019)

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

***Denis Girard v. Town of Plymouth*, N.H. Supreme Ct. Case No. 2018-0495 (2019)**

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

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

water bodies, this was a sufficient designation of natural features to be protected so as to impliedly include wetlands.

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

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

(From *New Hampshire Municipal Association Court Updates*, 2019)

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

***Working Stiff Partners v. Portsmouth*, N.H. Supreme Ct. Case No. 2018-0491 (2019)**

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

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

(From *New Hampshire Municipal Association Court Updates,* 2019)

2020

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

***Three Ponds Resort, LLC v. Town of Milton*, N.H. Supreme Ct. Case No. 2019-0278 (2020) (unpublished opinion)**

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

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2020.)

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

***Bellevue Properties v. Town of Conway*, N.H. Supreme Ct. Case No. 2019-0302 (2020)**

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

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

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

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

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

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

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

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

(From *New Hampshire Municipal Association Court Updates*, 2020.)

2021

30-day Time Period for Appealing a Planning Board Decision is Calculated Starting with the Day after the Date of the Decision

***Krainewood Shores Assoc. v. Moultonborough*, N.H. Supreme Ct. Case No. 2019-0719 (2021)**
After a planning board decision permitting development of a vacant lot as a condominium storage facility for boats, snowmobiles and motorcycles, two abutters appealed to the Superior Court. The date of the planning board decision was May 8, 2019. The appeal was filed in the Superior Court on June 8, 2019. The town and the permit holder moved to dismiss because under RSA 677:15, I the 30-day period to timely appeal started running on May 9, 2019 and expired on June 7, 2019, divesting the

Superior Court of jurisdiction to hear the appeal. The plaintiff countered that considering language referenced in RSA 677:15 required counting the days allocated to timely appeal from the day following the day after the planning board decision. According to the plaintiffs, the 30-day period would have expired on June 8, but because June 8 was a Saturday, the period actually expired on Monday, June 10. See RSA 21:35, II. Therefore, they reason, their electronically-filed June 8 appeal was timely.

Because RSA 677:15, I states that the counting of calendar days is to be done in accordance with RSA 21:35, the plaintiffs argued that this required the commencement of counting the time period to begin on the day after the date of the planning board decision. Although the Supreme Court agreed this was a plausible argument, it agreed with the defendants that the language of the statute, and the legislative history required that the counting of the days to determine a timely planning board appeal commences on the day following the date of the decision.

(From *New Hampshire Municipal Association Court Updates*, 2021.)

A Notice of Violation can Serve as the Initiation of an Enforcement Action and Also as the Basis for an Administrative Appeal

***New Hampshire Alpha of SAE Trust v. Town of Hanover*, N.H. Supreme Ct. Case No. 2020-0034 (2021)**

In the latest ruling from the long-running battle between the New Hampshire Alpha Chapter of Sigma Alpha Epsilon, Dartmouth College, and the Town of Hanover, the New Hampshire Supreme Court parsed the language of the statute conferring jurisdiction on the ZBA to determine that the ZBA had subject matter jurisdiction over SAE's appeal.

As background, in 2016, Dartmouth College notified the Sigma Alpha Epsilon fraternity that they are officially derecognized by Dartmouth College, and that effective March 15, 2016 as a consequence of its suspension by the national organization. Subsequently, Dartmouth notified the Hanover Planning & Zoning Office of the suspension.

The zoning administrator for the Town issued a "Notice of Zoning Violation" to SAE, informing SAE that the SAE facility is no longer being operated in conjunction with an institutional use and, therefore, is in violation of the zoning ordinance. That notice also informed SAE of the penalties for violating the zoning ordinance.

SAE appealed the notice to the ZBA, and subsequent appeals resulted in the New Hampshire Supreme Court issuing New Hampshire Alpha of SAE Trust v. Town of Hanover, 172 N.H. 69 (2019) (SAE I), which included a remand for further proceedings. While that case was pending before the ZBA, SAE challenged the ZBA's ability to have subject matter jurisdiction in a filing at the Superior Court. SAE alleged, in part: (1) the zoning administrator's notice commenced an informal enforcement proceeding against SAE; (2) SAE's challenge was to the zoning administrator's decision to institute an enforcement proceeding, not to the construction, application or interpretation of the ordinance; (3) the courts, and not the ZBA, have exclusive jurisdiction to adjudicate alleged violations of zoning ordinances.

On appeal, the New Hampshire Supreme Court held that the ZBA may hear and decide an administrative appeal of a notice of violation to the extent that it is alleged that the administrative officer committed an error involving the construction, interpretation or application of a zoning ordinance, but may not hear and decide issues arising from the notice of violation beyond contesting an officer's construction, interpretation or application of a zoning ordinance. In this case, SAE's

appeal to the ZBA sought reversal of the zoning administrator's decision that SAE's property is in violation of the zoning ordinance by alleging that the zoning administrator erred in construing, interpreting or applying the terms of the ordinance. Therefore, the ZBA had subject matter jurisdiction because the issue was not an enforcement action, but merely the administrative official's interpretation of the zoning ordinance.

Practice pointer: Municipalities must be aware that because a ZBA has limited jurisdiction, when they are using a notice of violation as both the initiation of an enforcement action and also as the basis for an administrative appeal, that it is possible for an aggrieved party to appeal that interpretation prior to any kind of court review of an enforcement action.

(From *New Hampshire Municipal Association Court Updates*, 2021.)

Cell Tower Location Allowed Where a Gap in Wireless Service Exists

***GMR Holdings v. Lincoln*, U.S. District Ct., District of N.H. Case No. 21-cv-117-SM, Opinion No. 2021 DNH 173 (2021)**

AT&T retained GMR Holdings, to locate and develop a wireless telecommunications site in Lincoln, New Hampshire. As part of the process of locating a suitable site on which to construct the necessary wireless facilities, GMR prepared a radio frequency ("RF") report which showed that much of Lincoln is without reliable wireless service. Based on the report, GMR looked for a technologically suitable site that was within the two (of seven) zones where wireless facilities were permitted. GMR identified five suitable locations.

Two of the five locations were owned by owners unwilling to lease their sites for a wireless facility. One was a residential property, and another was a motel. Both were rejected by GMR on the basis of their current use. The fifth and final site was at a landscaping business and had two suitable locations for the facility. One was atop a 20' high knoll on which grew several mature trees. The other was where GMR proposed to build the facility on the basis that Lincoln's zoning ordinance encouraged wireless facilities to avoid cutting mature trees (and was not notably opposed by the abutting neighbor).

As the proposed location would require a 120' (rather than allowed 100') tower and structures would be within 125% of the "fall zone" of the tower, a conditional use permit for the extra 20' and a waiver of the "fall zone" requirement were necessary under Lincoln's zoning ordinance. After a hearing and a balloon test (whereby balloons were used to determine the proposed tower's visibility from nearby landmarks), the planning board rejected GMR's application.

GMR filed suit with the Federal District Court, alleging that the Town's denial of the authorizations necessary to construct the wireless communications facility amounted to an effective prohibition of personal wireless service facilities in the area and that the planning board's decision was not supported by substantial evidence – all in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).

In analyzing the case, the Court noted that the Telecommunications Act provides, in part, that "the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." To prevail on a claim of "effective prohibition" claim, a claimant must establish: (1) that there is a gap in cellular service coverage in the

area of the proposed tower; and (2) that there are no feasible alternatives to the site proposed to, and rejected by, the Planning Board.

As all parties agreed that there was a gap in cellular coverage for AT&T in Lincoln, the only issue was whether there were feasible alternatives to the site proposed. In examining the town's defense, the Court rejected the claim that state or federal land were available as feasible alternatives because both had requirements related to proving that now suitable private land was available. Further, in examining the alternative locations, the Court found that there were two sites based on the overlay of the RF map and the zoning map: on the knoll or off the knoll. Both would require compromise – both required a waiver of the "fall zone" requirement, and placement on the knoll would result in the destruction of a number of mature trees and be more visible whereas placement off the knoll would require a conditional use permit for a tower that was 20' taller than if it was on the knoll. Ultimately, the Court found that the planning board's rejection of GMR's application was in violation of the Telecommunications Act and ordered that the planning board issue all necessary permits to allow GMR to construct the tower.

Practice pointer: Municipalities should be aware that the federal Telecommunications Act governs placement of cell towers and where, as here, a gap in coverage exists for a particular carrier, the overlay map comprised of the RF map and zoning map showing permissible areas for a tower will likely determine where a cell tower will be allowed to be located.

(From *New Hampshire Municipal Association Court Updates*, 2021.)

2022

Under RSA 236:112 Property Inundated with Junk is a "Junk Yard" Even if the Owner is Not Selling Junk.

***Town of Lincoln v. Joseph Chenard*, N.H. Supreme Ct. Case No. 2020-0316 (2022)**

The defendant, Joseph Chenard, appealed a ruling that he was operating a junk yard in violation of RSA 236:114. The defendant owns four lots located in the town's "general use" zoning district which allows junk yards by special exception. The defendant's properties were littered with junk, scrap metal, and broken cars. The defendant did not have a license to operate a junk yard business, nor did he have special exception from the town.

The town filed suit arguing that the defendant was operating a junk yard without proper authority and sought penalties and attorney's fees. The court found the defendant to be in violation of RSA 236:114 and ordered him to resolve the violation or face a $50 per day fee. The court did not award attorney's fees to the town.

The defendant appealed the court's decision arguing that the trial court erred by applying the junkyard statute to the defendant's non-business personal property, and that the wrong statute was applied. The town appealed the denial of attorney's fees.

The court first looked to RSA 236 to define the nature and purpose of a junk yard. RSA 236:112 defines a junk yard as "a place for storing and keeping, or storing and selling, trading, or otherwise transferring old or scrap…". RSA 236:111 states that the express purpose of the subdivision on junk yards is to "conserve and safeguard the public safety, health, morals and welfare . . . the maintenance of junk yards is a useful and necessary business." The defendant argues that because the definition in

RSA 236:112 refers to a junk yard as a business, his properties do not qualify as he was only storing personal property and was not engaged in the sale or transfer of any of the junk.

The court disagreed stating that RSA 236:112 plainly states that a junk yard is defined not just by a place of selling junk but also storing and keeping junk. The court further defined the word "business" to conclude that it can encompass junk yards not operated as a commercial business. Finally, the court noted that the statute even carves out an exemption from the definition of junk yard under RSA 236:111-a for "noncommercial antique motor vehicle restoration activities".

The defendant next argued that the trial court failed to identify which of his four lots constituted a junk yard. The court disagreed and stated that the trial court took a view of each of his four lots which included his home lot and three adjacent lots located across the street. Because the court viewed each of the lots and described them as each containing a significant amount of personal property, it was reasonable to conclude that all four lots fell into the definition of junk yard.

Finally, the defendant argued that the court applied the wrong statute because his land was within New Hampshire's limited access highway system for I-93 and therefore RSA 236:90-:110 were the correct statutes to apply. The court found that pursuant to RSA 236:111-a, a town has authority to regulate all junk yards in the town that fall within the definition of junk yard in RSA 236:112, I including those that are located adjacent to the interstate and turnpike system, but which are not an establishment or place of business.

The court then addressed the town's appeal for attorney's fees. The town argued that because the court found that the defendant was running a junk yard as defined by RSA chapter 236, even though he wasn't engaged in the selling of junk, the defendant was in violation of the town's zoning ordinance and therefore attorney's fees should be awarded. The court found that the town's zoning ordinance did not explicitly adopt the wording of RSA 236:112 and therefore turned to the dictionary definition of junk yard. The dictionary defined a junk yard as a yard used to keep usually resalable junk. The court determined that "usually resalable" should be interpreted to mean that there must be some indication that the junk was being sold for it to qualify. Since the defendant was only storing personal property, it did not qualify as a junk yard for these purposes and therefore was not in violation of the town's zoning ordinance.

Practice Tip - Municipalities should take special note to amend their own zoning ordinances to specifically adopt the statutory definition of a junk yard under RSA 236:112 if they want to seek an award of attorney's fees for a violation of the local zoning ordinance under RSA 676:17, II.

(From *New Hampshire Municipal Association Court Updates*, 2022.)

Public Bodies Can Censure Fellow Board Members for Conduct that is Detrimental to the Best Interests of the Public Body

***Houston Community College v. Wilson*, U.S. Supreme Ct. Docket No. 20–804 (2022)**

David Wilson, a member of the Board of Trustees of the Houston Community College System was censured by the Board for conduct that was not consistent with the best interests of the College. The Board also imposed certain penalties by barring Wilson from election to Board positions, making him ineligible for reimbursement for college related travel, restricting access to funds available for community affairs and recommending training related to governance and ethics. Wilson sued the College claiming the Board's censure violated the First Amendment. However, only the actual words of censure were considered by the Supreme Court when addressing his First Amendment claims

As a general matter the Supreme Court observed that the First Amendment prohibits government from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech. A plaintiff pursuing a First Amendment retaliation claim must show that the government took an adverse action in response to her speech that would not have been taken absent the retaliatory motive. The Court concluded that the verbal censure did not prevent Mr. Wilson from doing his job, and it did not deny him any privilege of office, and Wilson acknowledged the censure was not defamatory. Considering those circumstances, the Board's censure did not materially deter Mr. Wilson from exercising his own right to speak, and therefore did not offend the First Amendment. In making this decision the Court provided the following overview of the freedom of speech and public service by elected representatives:

In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. As this Court has put it, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement" that it was adopted in part to "protect the free discussion of governmental affairs." Mills v. Alabama, 384 U. S. 214, 218 (1966). When individuals "consent to be a candidate for a public office conferred by the election of the people," they necessarily "pu[t] [their] character in issue, so far as it may respect [their] fitness and qualifications for the office."

Practice pointer: Public bodies can censure fellow board members for conduct that is detrimental to the best interests of the public body, and such verbal censures would not violate the First Amendment, provided the censure did not deny a privilege of office, and did not prevent the censured member from doing their job as an elected or appointed official.

(From *New Hampshire Municipal Association Court Updates*, 2022.)

Municipalities Can Adopt Sign Codes that Impose More Stringent Regulations or Prohibitions for Off-premise Signs as Opposed to On-premise Signs

***City of Austin v. Reagan National*, U.S. Supreme Ct. Docket No. 20–1029 (2022)**

Two outdoor advertising companies challenged a provision of the City of Austin sign code that prohibited changes to a grandfathered billboard because it was an off-premise sign. The City had modified its sign code to define an off-premise sign to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed." The City Code prohibited the construction of any new off-premise signs, but allowed pre-existing off-premise signs to remain as grandfathered uses. However, grandfathered signs could not be modified to change the method or technology used to convey a message. When Reagan National Advertising of Austin sought to digitize some of its grandfathered, off-premise billboards the City denied those applications. Reagan National filed suit claiming the code's prohibition on digitizing off-premise signs but not on-premise signs violated the First Amendment.

The Supreme Court had to resolve whether the Austin sign code provision was content neutral in its application to the Reagan National billboard. Under prior First Amendment rulings, anytime a sign code requires the government to read and interpret the content of a sign, a much more stringent level of legal scrutiny applies that in many instances renders the sign code provision unconstitutional under the First Amendment. Reed v. Town of Gilbert, 576 U.S. 155 (2015). However, in this instance the Court concluded that the challenged sign code only requires reading a billboard to determine whether it directs the reader to the property on which it stands or to some other, offsite location.

Since the Austin sign code did not discriminate based on the topic discussed or the idea or message expressed it did not trigger a level of legal scrutiny that would have voided the regulation. Instead, the Court applied intermediate scrutiny and thereby ruled the Austin sign was facially content neutral. The Court did remand the case back to the lower courts to determine whether there was a constitutionally impermissible purpose or justification that underpins Austin's facially content-neutral restriction that may be content based.

Practice pointer: Municipalities can adopt sign codes that impose more stringent regulations or prohibitions for off-premise signs as opposed to on-premise signs. A sign code can define an off-premise sign as one advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed. A sign code that bans off premise signs should provide protection for pre-existing, non-conforming off-premise signs under RSA 674:19.

(From *New Hampshire Municipal Association Court Updates*, 2022)

More clarity established as to what constitutes a final approval vs. a conditional approval by a Planning Board by determining whether or not conditions associated with the approval process are conditions precedent or conditions subsequent.

Stergiou v. City of Dover, **N.H. Supreme Ct. Case No. 2021-0139 (2022)**

In 2019, a developer applied for permission to construct a mixed-use development project in the City of Dover. The Planning Board issued an approval with instructions for the developer to provide the board with copies of the site plan in various formats within 90 days. The developer failed to meet this requirement and failed to ask for an extension. The developer then asked for "re-approval" in 2020 and it was granted with conditions that varied slightly from the original conditions. Abutters then filed a petition seeking to appeal the "re-approval." The trial court concluded the conditions imposed in the 2019 were conditions precedent and thus the decision was not a final decision appealable under RSA 677:15. The court also concluded that because it appeared to be undisputed that those conditions were not satisfied prior to the 2020 approval, the 2019 approval never became final. The appellant arguments hinged on whether the planning board's conditions were conditions precedent or conditions subsequent. This is important because "only a final approval is a decision of the planning board from which an aggrieved party may appeal under" RSA 677:15, I. *Sklar Realty v. Town of Merrimack,* 125 N.H. 321, 327 (1984). "A conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I." *Saunders v. Town of Kingston,* 160 N.H. 560, 564 (2010). Conditions precedent contemplate additional action on the part of the municipality and thus cannot constitute final approval. RSA 676:3, I states that if the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval. It is statutorily required that the board explicitly identify whether its approval imposes conditions necessary to obtain final approval. The court looked to the decisions of the planning board in this case and concluded that the conditions imposed in both the 2019 approval and the 2020 "re-approval" were substantially similar. Therefore, when looking at the 2019 approval the court concluded that the Planning Board intended this approval as the board's final decision on the site plan and thus the conditions were conditions subsequent. The court next addressed which approval started the 30-day clock for the abutters to appeal. If it is the 2019 approval, the time has expired. The City's site plan regulations stated that approvals remain valid for 5 years. In this case, the "re-approval" was done because the developer failed to get the site plan copies to the board within 90 days. The court ruled that this failure to get copies did not invalidate the entire approval as the remedy provided was simply to seek an extension and had no effect on the overall approval or the 5-year time period. Consequently, the 2020 "re-approval" process by the board was

an invalid operation and everything centered on the original 2019 approval. Since the 2019 approval was the original and final approval date, the time for an appeal had expired.

Practice pointer: When granting land use board approvals with conditions, be clear whether hose are conditions precedent or conditions subsequent. If a board intends to make final approval conditioned on the fulfillment of certain conditions precedent, be clear that the failure to comply with those conditions means there is no final approval.

(From *New Hampshire Municipal Association Court Updates*, 2022)

Special exceptions declare certain uses to be essentially desirable provided the proposed use cannot be incompatible with uses permitted by right

***Avanru Development v. Town of Swanzey*, N.H. Supreme Ct. Case No. 2021-0015 (2022)**
This appeal from a decision of the Zoning Board of Adjustment for the Town of Swanzey addressed whether the ZBA unreasonably denied a special exception for a proposed 76-unit multi-family dwelling on a parcel in the town's business district. The Superior Court vacated the ZBA decision and remanded for further proceedings and the Supreme Court affirmed that decision. Due to a tie vote by the four members of the Supreme Court who participated in this decision, only one issue involving the interpretation of the Swanzey Zoning Ordinance received the benefit of the Court's interpretive construction.

Among the reasons why the zoning ordinance permitted the granting of a special exception for a multi-dwelling use in the business district was whether such an approval would not reduce the value of any property within the district, nor be injurious, obnoxious, or offensive to the neighborhood.

The Superior Court concluded that the ZBA erroneously relied upon public comments opposing the project improperly basing its decision on aesthetics, and by judging the application solely on its popularity. The Supreme Court agreed with the Superior Court that the Ordinance required the ZBA to identify the "unique problems" a multi-family dwelling use may present if constructed in its proposed location within the business district. However, the ZBA did not identify or address any unique problems that may be inherent in, or associated with, the multifamily dwelling use. Absent consideration of issues associated with this proposed use in the business district, the ZBA could not properly determine whether Avanru had established that the proposed project would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious, or offensive to the neighborhood. Because it was undisputed that the exact same structure could be built by right if the use were a hotel or nursing home, the ZBA erred by not analyzing the implications of the use on the business district, but instead focused on aesthetic issues.

Practice pointer: Special exception provisions that permit additional uses in certain zoning districts in effect declare such special exception uses to be essentially desirable subject to a determination that the proposed location must be considered in light of special restrictions or conditions tailored to fit the unique problems which the use may present. The proposed special exception use in some places or in some respects might be incompatible with the uses permitted as of right in the particular district.

(From *New Hampshire Municipal Association Court Updates,* 2022)

Past waivers granted by the planning board do not compel the board to continue to grant such waivers in the future when the circumstances of the proposal have changed

***Appeal Of Chichester Commons, LLC.*, N.H. Supreme Ct. Docket No. 2021-0476 (2022)**

The petitioner owned a parcel of property located in the town's commercial village district. In 2015, the petitioner sought to build an elderly housing facility on the parcel of land spanning 2.3 acres. The town zoning ordinance had a density requirement larger than 2.3 acres for a project such as this. The petitioner requested a waiver of the town's density requirement from the planning board (such authority granted to the planning board as an innovative land use control) in 2015 and it was granted. However, the petitioner never went through with the project. In 2018 the petitioner altered the design for the project from elderly housing to an affordable housing complex.

The petitioner again requested a waiver of the density requirement. The town granted the waiver and approved the site plan. The petitioner again did not move forward with the project. In 2020 the petitioner proposed a third project. This project was similar to the 2015 project in that it was for elderly housing. However, the overall design was different, and the lot size had changed as the petitioner combined another lot making the total acreage 5.5 acres.

The petitioner filed a request to amend the site plan approval which was approved in 2018 for the affordable housing project. The planning board ruled that the petitioner's application was incomplete because this was not an amendment but a new proposal and required a new application. Thereafter, the petitioner filed a new application. However, this time around the town's zoning ordinance was different than the ordinance in effect back in 2015 and 2018. The board denied the application stating that the petitioner failed to demonstrate that the request for a waiver satisfied one of five waiver requirements. The petitioner appealed to the Housing Appeals Board and his appeal was denied.

The Supreme Court first considered the petitioners argument that the 2015 waiver did not expire. However, the court ruled that the petitioner's current proposal is not the same as its 2015 proposal as much about the project has changed since then. The town's ordinance required that the board consider the impact of the currently proposed project in light of any changes since the 2015 waiver was granted.

The petitioner next argued that the subsequent application doctrine in *Fisher v. City of Dover* applied here. The court ruled that the subsequent application doctrine does not compel boards to grant successive waivers of zoning requirements. *Fisher* did not apply to circumstances where the board had previously granted an application, only where it had previously denied one. Therefore, the 2015 waiver does not apply to the current version of the petitioner's project and does not compel the board to grant a new request.

Practice pointer: If an applicant fails to move forward with a project that was granted a waiver or variance, they are not automatically entitled to same or a similar waiver years later if the project has changed or the zoning ordinances are different.

(From *New Hampshire Municipal Association Court Updates*, 2022)

Under RSA 672:1, III (e) Municipalities Must Ensure the Exercise of Zoning and Planning Powers do not Discourage the Development of Workforce Housing

***Appeal of Town of Windham*, N.H. Supreme Ct. Case No. 2021-0473 (2022)**

Under RSA 672:1, III (e) municipalities must ensure the exercise of zoning and planning powers do not discourage the development of workforce housing. The Town of Windham appealed a decision of the Housing Appeals Board (HAB) concerning a housing project involving both workforce and market rate units. The applicant sought to construct sixteen single-family condominiums, which,

together with the existing single-family house, would result in seventeen total units. Windham's zoning ordinance permitted workforce housing in the applicable zoning district but required that at least 50 percent of the units be workforce housing. The applicant sought a waiver of that percentage, as permitted under the ordinance, where the 50 percent requirement "creates a financial burden and makes the development not financially viable."

In support of its waiver request, the applicant submitted a workforce feasibility analysis from an independent engineering firm, which concluded that developing 50 percent of the units as workforce housing would not be financially feasible and would likely generate a financial loss of approximately $130,000. The Town's engineer reviewed and agreed with that analysis. The planning board denied the waiver because the applicant's financial information did not support the request. The applicant appealed the denial of the waiver request to the HAB. The HAB vacated the board's denial of the waiver and remanded to the board with instructions to reconsider an appropriate workforce housing percentage in light of the duty imposed under RSA 674:58, III to provide reasonable and realistic workforce housing development opportunities.

The Town appealed that decision to the Supreme Court. The primary focus of the Court's decision was on the alleged illegality of the HAB ordering the planning board to reconsider the denial of the waiver of the required percentage of workforce housing units under the zoning ordinance. The Town argued that it was the applicant's burden to propose a more appropriate percentage of workforce housing, and it was error to put the onus on the Town to determine the appropriate percentage of workforce housing.

The Supreme Court rejected this argument, stating that the Town's position was in conflict with the mandate of RSA 672:1, III(e) that the opportunity for workforce housing shall not be unreasonably discouraged by municipal planning and zoning. Furthermore, the Court reasoned that the Town's approach would permit the planning board to engage in dilatory tactics, contravening its duty to assist citizens in the land use application process.

This decision is an order disposing of this case in which no formal opinion of the Court was issued and therefore has no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order and so long as it was issued in a non-confidential case. N.H. Sup. Ct. RULE 20

Practice pointer: When addressing land use applications that incorporate workforce housing the burden is on the municipality to ensure that development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.

(From *New Hampshire Municipal Association Court Updates*, 2022)

A previously denied land use application can be materially different under Fisher v. Dover if information sought at the time of the first application is provided as part of the second application.

***Transfarmations v. Town of Amherst*, N.H. Supreme Ct. Case No. 2021-0214 (2022)**

Transfarmations applied for a conditional use permit (CUP) from the Amherst Planning Board seeking permission for a 64 unit planning residential development with a mixture of workforce housing and over-55 housing under the Town's Integrated Innovative Housing Ordinance. The town ordinance required that the applicant must establish that there will be no significant adverse impacts upon the public health, safety and general welfare from the proposed use. At a public hearing held on December

4, 2019 the board voted to deny the application in part because a traffic study had not yet been completed. After the vote to deny was taken the Board chair then stated that the applicant could reapply for a CUP with more information.

After filing an appeal with the Superior Court, Transfarmations resubmitted its application along with a 43-page traffic study. The planning board first scheduled a public hearing to address whether the application met the materially different standard for subsequent applications that were previously denied under *Fisher v. Dover* and *CBDA Development LLC v. Thornton*. A planning board having rejected one land use application may not review subsequent applications absent a material change of circumstances affecting the merits of the application. Following its discussion, the Board voted that the revised application was not materially differ from the first precluding acceptance and consideration of the application on the merits.

On appeal the NH Supreme Court stated its post-*Fisher* cases recognize that evidence of an invitation to submit a modified application to meet a land use board's concern acts as additional evidence that a subsequent application so modified is materially different. The Court observed that the only information mentioned by any voting Amherst Planning Board member as missing from the first application was a traffic study. Accordingly, the Court agreed with Transfarmations that the Board expressly invited a revised application with more information, a completed traffic study.

The court reiterated that when a denial identifies a lack of information as the deficiency in the initial application, the court has held that a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher* if the new application provides the information missing from the prior application.

Practice pointer: When a ZBA or planning board decision denies approval of an application, and that denial identifies a lack of information as the deficiency in the initial application, a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher v. Dover* if the new application provides the information missing from the prior application.

(From *New Hampshire Municipal Association Court Updates*, 2022)

2023

Planning Board Deviation From Past Practices When Reviewing a Land Use Project Can Result in Reversal of a Board Decision

Appeal of Town of Amherst v. Housing Appeals Board, N.H. Supreme Ct. Case No. 2021-0570 (2023)

Migrela Realty Trust II and GAM Realty Trust (hereinafter Applicant) sought approval of a mixed elderly restricted and unrestricted housing project in the Town of Amherst. The project was granted a Conditional Use Permit for an increased project density of up to 54 units. During the review process for the subdivision/site plan the project was reduced to 49 units, with 14 of those units age restricted 65-and-older consistent with RSA 354-A:15, and the remaining units unrestricted.

The Amherst Planning denied approval due to perceived conflicts between federal law on age restricted housing and concern the project would be under a common, condominium regime. The Applicant appealed to the Housing Appeals Board (HAB) and the Board vacated and remanded the

matter back to the planning board with instructions to undertake a collaborative discussion of state and federal age-restricted housing rules and the provision of condominium documents that addressed concerns about mixed-age housing.

The HAB ordered the planning board to make a new decision based upon legitimate unsatisfied planning board requests if the new vote is to deny, or if an approval include customary and reasonable approval conditions.

The Supreme Court affirmed the decision of the HAB finding that the original rejection by the planning board on the federal law age-restrict housing issue was inconsistent with the board's past practice of resolving those matters through town counsel review of condominium documents as a condition of approval. As stated by the Court "[w]e cannot say that it was unjust or unreasonable for the HAB to conclude that the Board's failure to follow this customary practice, and instead, to deny the application based on its own concerns about legal compliance, was unreasonable." The Court also affirmed the decision of the HAB that the rural aesthetic concerns of the planning board were previously addressed during the CUP process.

Practice Pointer: When a planning board deviates from well-established past practices when reviewing a land use project this could provide a basis to find the action of the board is unreasonable leading to overturning a board decision.

(From *New Hampshire Municipal Association Court Updates*, 2023)

NH Supreme Court Reverses Superior Court's Decision Upholding Conditions Placed on Church's Special Exception Regarding Occupancy & Hours of Operation; Affirms Superior Court's Decision to Dismiss Constitutional Claims and Grant Wetlands Special Exception

***Christ Redeemer Church v. Town of Hanover, Jeff Acker & a. v. Town of Hanover*, N.H. Supreme Ct. Case Nos. 2021-0349 and 2021-0356 (2023)**

The Christ Redeemer Church (Church) in Hanover purchased a set of lots on a two-lane road with a thirty-mile-per-hour speed limit and roughly 3,100-vehicle daily traffic and in 2018 applied to Hanover's Zoning Board of Adjustments (ZBA) for special exceptions from the town's zoning ordinance to build a permanent church there (it had previously operated out of rented space at Hanover High School). The proposed church building would measure 21,250 square feet, would seat 415 people, would include a parking lot with a 120-car capacity, and would have necessary supporting infrastructure on the lot. One third of the parking spots and the entirety of the church would be built in Hanover's Single Residence District. Because the rest of the parking and the related infrastructure would be in the Rural Residence District, a use special exception from the ZBA would be required to proceed with building. Additionally, because the northwest portion of the property was in a wetland buffer zone, a wetlands special exception would be required. The Church submitted a host of evidence including a traffic study and sound level assessment and the ZBA conducted a third-party technical review to determine whether the proposed building might affect water resources given the proposed location. After five public hearings, in which Jeff and Lara Acker (Ackers), who lived across the street from the lots in question, were involved, the ZBA granted the Church the wetlands special exception but denied the use special exception. The Ackers moved for rehearing and it was denied; the Church moved for the same and it was granted.

At the Church's 2019 rehearing, the ZBA granted the Church the use special exception with a number of conditions:

1) Seating numbers in the sanctuary and maximum occupancy of the building could be no more than 300 (down from the proposed 415);
2) Hours of occupation and operation would be 7am to 9pm on weekdays and 8am to 9pm on weekends;
3) Only 113 parking spaces would be permitted, with a traffic coordinator recommended;
4) The sanctuary windows must be closed at all times except during emergencies or in case of HVAC failure; and
5) The Church must install a noise mitigation screen around mechanical equipment.

Both the Church and the Ackers filed for rehearing and when it was denied, brought suit against the Town of Hanover in the Superior Court. The Ackers brought two appeals under RSA 677:4, one for each special exception; the Church brought a nine-count complaint challenging Hanover's Zoning Ordinance under the First Amendment, the Equal Protection Clause, and Substantive Due Process doctrine and the first, second, and fourth conditions of the use special exception under the Federal Religious Land Use and Institutionalized Persons Act and RSA 677:4. The Superior Court granted Hanover's motion for summary judgment on the Church's constitutional claims and denied the Church's and granted Hanover's motions for summary judgment under RUIPA, except for the Church's challenge to the fourth condition (window closure). The Superior Court also affirmed the ZBA's granting of the special exceptions except for the window closure condition, and awarded the Church nominal damages in the amount of one dollar and court costs in the amount of $280. It denied the Church's requests for attorneys' fees and motion for reconsideration; the Church and the Ackers appealed to the Supreme Court of New Hampshire.

The Supreme Court reversed the Superior Court's decision upholding the hours of operation condition because no evidence in the record indicated that church events a bit earlier in the day, such as a 6am prayer breakfast, would cause any detrimental effect on the surrounding area or road; the ZBA had based the condition on when other churches in Hanover held their events, but the Supreme

Court held that because they were on different roads than the proposed church, the effects would be different. The Supreme Court also reversed the Superior Court's upholding of the maximum occupancy conditions, reasoning that basing occupancy limits on the number of allowed parking spaces and estimated vehicle occupancy was flawed because people could come to church by other means of transportation and because the ZBA did not give a justification for departing from the Ordinance or for the inconsistencies in occupancy numbers the departure would cause. The Court held that the Church's constitutional and RLUIPA claims and attorney fees, builder's remedy, and additional damages requests were not worth further discussion.

The Supreme Court affirmed the Superior Court's decision upholding the ZBA's granting of the wetlands special exception because it found that the ZBA had evidence upon which it could have reasonably based its decision to grant the special exception.

Ultimately, the Supreme Court reversed the Superior Court's decision upholding the conditions on the Church's use special exception regarding hours of operation and occupancy limits and affirmed the Superior Court's decision rejecting the Church's additional claims and upholding the ZBA's granting the Church the wetlands special exception.

(From *New Hampshire Municipal Association Court Updates*, 2023)

Under the Definitions Provided by the Conway Zoning Ordinance, Short-term Rentals are Allowed in the Residential District.

***Town of Conway v. Kudrick*, N.H. Supreme Ct. Case No. 2022-0098 (2023)**

The defendant owns several properties in the residential district of the Town of Conway that he rents for periods of time as short as a single night. In June 2021, the Town sought a declaratory judgment ruling in superior court that the zoning ordinance prohibits short-term rentals (STRs) like these in residential districts if the rentals are not owner-occupied. The superior court ruled against the Town and the Town appealed.

The appeal before the Supreme Court presented a single issue: whether the zoning ordinance permits non-owner occupied STRs in residential districts based on the meaning of the term "residential/dwelling unit" as defined by the ordinance. Importantly, that definition required that the persons occupying the dwelling unit were "living as a household," and the Court's determination as to whether STRs were allowed in that zone required an analysis of the meaning of that phrase.

In examining the question, the Court held that "[i]t is the occupants' use of the property, however, not the owner's, that dictates how the property is being used." Therefore, the relevant question was not how the owner of the property treated its use, but how the occupants of the property treated its use. In looking to the activities of those occupying the defendant's property as compared to other properties, the Court found that "the occupants of the defendant's properties exclusively engage in residential activities" and "the duration for which a property is used does not impact whether the property is used for residential purposes."

The dissent disagreed that duration does not impact use. However, the concurring opinion addressed the dissent's argument by stating that "land use regulations require clarity to inform landowners of uses that are permitted and not permitted ...Where, as here, there are many ways to define a household, it is imperative that we focus on the activities taking place on the land, rather than the identity of the individuals conducting them. Any ambiguity arising from language chosen for the regulation of land use should be resolved in favor of vindicating a landowner's property rights."

Practice Pointer: Municipalities wishing to regulate STRs should review their zoning ordinances to determine whether the terms used are sufficiently clear that an average person will understand what qualifies as an STR and where STRs are and are not allowed within the municipal boundary. Municipalities should follow the lead of the City of Portsmouth in *Working Stiff v. Portsmouth,* 172 N.H. 611 (2019) and define "dwelling unit" as "[a] building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. This use shall not be deemed to include such transient occupancies as short-term rentals, hotels, motels, rooming or boarding houses." It would also be prudent to define the word transient - here is one example: "A dwelling unit where lodging is provided for compensation for stays of between one and 14 consecutive nights, and where the dwelling unit would normally be considered a residential living unit not associated with regulated commercial activities such as a hotel, motel, rooming/boarding/lodging house, or bed-and-breakfast."

(From *New Hampshire Municipal Association Court Updates*, 2023)

Superior Court Did Not Err when it Dismissed the Plaintiffs' Untimely Zoning Appeal, and when it Concluded that the Planning Board made a Sufficient Regional Impact Determination

***Richard Anthony & a. v. Town of Plaistow*, N.H. Supreme Ct. Case No. Rockingham 2021-0410 (2023)**

The Supreme Court of New Hampshire heard this case on appeal from the Superior Court. Milton Real Properties of Massachusetts, LLC (hereinafter "the intervenor") made an application to Plaistow's Planning Board (hereinafter PB) to consolidate two adjacent lots in Plaistow's commercial zoning district and to receive site plan approval for a proposed construction equipment rental and maintenance facility, a wash building, and a display and storage area. Richard and Sanaz Anthony (hereinafter "the plaintiffs"), informally expressed some displeasure about this proposal, but did not appeal the February 6, 2019, code enforcement officer determination that the proposed commercial uses were permitted under the zoning ordinance.

The PB conditionally approved the site plan in June of 2019, thereby adopting the favorable code enforcement officer's zoning determination. Plaintiffs appealed that decision to the Superior Court. The Superior Court held that because the PB's approval was conditional, the Court lacked jurisdiction over the site plan appeal, and remanded to the PB. Upon further clarification the Superior Court also ruled that it lacked jurisdiction to adjudicate the zoning issue until the Zoning Board of Adjustments (hereinafter ZBA) rendered its decision on the zoning questions.

The plaintiffs did not appeal that decision.

When the PB issued its final approval decision, the plaintiffs appealed to the ZBA challenging the zoning determination that the project was a permitted use of land in the zoning district. The ZBA dismissed that appeal for lack of jurisdiction because the plaintiffs filed it in an untimely fashion. The plaintiffs moved for a rehearing and when that was denied, they appealed the ZBA's dismissal to the Superior Court. The Superior Court dismissed the ZBA appeal based on untimeliness, ruling that both the Court and the ZBA lacked subject matter jurisdiction. Plaintiffs did not appeal this dismissal and that became a final judgment.

At the same time that they filed their unsuccessful ZBA appeal, the plaintiffs filed an appeal in the Superior Court, challenging the PB's approval of the intervenor's site plan for the same reasons they did in their appeal to the ZBA. However, as before, the Superior Court ruled that the untimeliness of the plaintiffs' ZBA appeal meant that they had failed to exhaust their administrative remedies with the ZBA; additionally, it held that the PB had implicitly found that the proposed development would not have a regional impact and thus was compliant with RSA 36:56, and that the plan was reasonably considerate of abutters' interests. When the Superior Court denied the plaintiffs' motion to reconsider, they appealed to the Supreme Court of New Hampshire.

The plaintiffs argued that contrary to the Superior Court's ruling, the zoning issue was properly before the court. However, under RSA 677:15, I-a, anyone who takes issue with a PB decision regarding a plat or subdivision may file a petition in the Superior Court within 30 days of the Board's official vote, except for PB decisions that are appealable to the ZBA under RSA 676:5, III. The Court ruled the zoning issue was not properly before the Court because the ZBA had previously ruled the appeal of the original zoning determination was untimely, and although the plaintiffs could have challenged the jurisdictional determinations of the ZBA and superior court they elected no to do so, and the superior court's decision became final in May of 2021.

The plaintiffs also argued that the Superior Court erred in concluding that the PB made a proper regional impact determination. A local land use board must promptly review applications and "determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact." RSA 36:56, I. The Court found that the PB had satisfactorily reviewed any potential regional impact issues in compliance with that statute.

The plaintiffs also argued that the decision was unlawful and unreasonable for five reasons: first, because the lots in question were next to a residential neighborhood; second, because there were not enough visual buffers between two areas; third, because the ground and surface water, wetlands, and aquifer could potentially be impacted by the placement of the washing facility; fourth, because the potential contamination issues caused by the washing facility would not be addressed or resolved by the groundwater monitoring system in place; and finally, because the proposed project could affect the abutters' quiet enjoyment of their own properties. Based on the rigorous reviewing process the PB applied to the site plan, including reviews by the town's outside consultant and its Conservation Commission, the Court ruled against the plaintiffs on all five issues.

(From *New Hampshire Municipal Association Court Updates*, 2023)

Where Town Ordinance Combined a Special Exception Process with Excavation Permitting under RSA 155-E, with the ZBA Acting as Regulator, Appeals were Governed by the 10-Day Motion for Rehearing Deadline in RSA 155-E:9

***Juliana Lonergan & a. v. Town of Sanbornton*, N.H. Supreme Ct. Case No. Belknap 2022-0142 (2023)**

This case went to the New Hampshire Supreme Court on appeal from the Superior Court.
R.D. Edmunds Land Holdings, LLC (hereinafter "the intervenor") owns a 19-acre tract of land in Sanbornton's General Agricultural District. In July 2020, they applied to the Zoning Board of Adjustments (hereinafter ZBA) for a special exception to the town zoning ordinance (hereinafter "ordinance") to operate a gravel pit excavation site upon this tract. In Sanbornton, the ZBA may grant special exceptions to allow uses of land for excavation of earth materials within certain statutory restrictions. In August of the same year, the ZBA held a public hearing on the application, at which Juliana and David Lonergan (would create noise and dust and affect traffic and the nearby aquifer; the ZBA decided they could not rule without hereinafter "the plaintiffs"), abutters of the tract in question, expressed concerns that this excavation site additional information. Two hearings later, in February 2021, the ZBA granted the intervenor the special exception; in March 2021 the plaintiffs filed with the ZBA for a rehearing and, when the ZBA denied this, appealed the ZBA's decision to the Superior Court, which denied it and affirmed the ZBA's decision. The plaintiffs then appealed the Superior Court's decision to the Supreme Court.

The Town of Sanbornton and the intervenor moved to dismiss the appeal, arguing that the Supreme Court lacked subject matter jurisdiction under RSA 155-E:9 because the plaintiffs had not filed for rehearing in a timely manner. The Supreme Court noted that a party may challenge subject matter jurisdiction at any time during the proceedings, including on appeal. In this instance, the town ordinance designated the ZBA as the regulator of excavation permits under RSA chapter 155-E and it incorporated the excavation permitting process into the special exception process allowing for a one-time permit process benefiting all parties. Thus, when the ZBA granted the special exception that also constituted the grant of an excavation permit under RSA chapter 155-E. Consequently, the timeliness of plaintiffs' motion for rehearing was measured by a 10-day deadline specified under RSA

155-E:9 and not the 30-day deadline specified under RSA 677:2. Since the motion for rehearing was not submitted within 10 days of the ZBA's decision, that rendered plaintiffs' appeal untimely denying the Supreme Court subject matter jurisdiction to consider plaintiffs' appeal.

The plaintiffs attempted to argue that the town meeting that designated the ZBA as the regulator was not duly warned and was thus invalid under RSA 155-E:1, III (a). However, under RSA 31:126, claims of statutory invalidity against municipal legislation are barred after five years, and the ZBA was made regulator more than five years prior to these proceedings, so the Court dismissed this argument. Additionally, the plaintiffs tried to claim that RSA 155-E:9 was not applicable to their untimely filing because RSA 155-E as a whole has to do with excavation permits, not special exceptions, and that this discrepancy meant that the notice of public hearing for the intervenor's application constituted insufficient notice under RSA 676:7. The Court disagreed with this argument noting that RSA 676:7 only mandated notice of the time and place of the required public hearing and was silent on other information the notice must include.

The Court held that RSA 155-E:9 indeed applies to the plaintiffs' appeal and that because they failed to file their appeal in a timely fashion, the ZBA and accordingly both Courts lack subject matter jurisdiction over it. The Supreme Court vacated the Superior Court's order and remanded the issue with instructions for dismissal of the appeal.

(From *New Hampshire Municipal Association Court Updates*, 2023)

New Hampshire Supreme Court Affirms that Zoning Boards Cannot Factor Anticipated Future Noncompliance with Zoning Laws into its Decisions, Even if an Applicant has Previously Violated the Zoning Ordinance at Other Properties

***Jeffrey E. Raymond, Trustee of J&R Realty Trust v. Town of Plaistow*, N.H. Supreme Ct. Case Nos. 2022-0236 (2023)**

In 2020, property owner J&R Realty Trust submitted a site plan application to the Town of Plaistow regarding a 1.18-acre lot in the town's "Commercial 1" zoning district. The plan showed an existing building to be razed and replaced with a two-story, 2,200-square-foot office building and one-and-a-half-story, 3,400-square-foot warehouse for use under lease by a home improvement business involved in the sale, service, and installation of windows, siding, roofing, decks, and gutters. The Commercial 1 district allows several uses, including "Trade Business." Upon reviewing the proposed development, Plaistow's building inspector determined the plan's proposed use constituted a "Contractor's Storage Yard" under the zoning ordinance, which is not permitted in the Commercial 1 district. The Trust appealed the inspector's ruling to the Zoning Board of Adjustment arguing that the use would be more similar to Trade Business, and also sought a variance, hoping that the use be allowed even if the decision were not reversed.

In December 2020 and January 2021, the ZBA heard these arguments. In both hearings, the prospective tenant's zoning violations at other properties were raised by ZBA members concerned that enforcement costs would be high and they could not rely on voluntary compliance, calling it "a trust issue." The property owner said that the new warehouse would create the storage space needed to cure the noncompliance. In both hearings, the ZBA decided against the application. It said that the primary use would be "industrial in nature," which it interpreted as adverse to the intent of the ordinance and refused to grant a variance. In declining to overrule the building inspector's determination that the use was Contractor's Storage Yard, the ZBA noted that the company calls itself

"contractors" on its website and, commented again, it could not be trusted adhere to the zoning requirements in light of its past transgressions.

The Trust appealed to Superior Court, claiming that the ZBA's denials were insufficiently supported by the record and "influenced by improper considerations" (the prospective tenant's zoning violations at other properties). The Superior Court found for the Town of Plaistow, saying the plaintiff failed to show how the ZBA's decision violated the law or was unreasonable. The Supreme Court overturned the Superior Court's orders decision It addressed both issues: whether the proposed use is a Trade Business or Contractor's Storage Yard, and whether it was lawful and reasonable for the ZBA to consider violations at other properties.

First, the Supreme Court found that the proposed use does fall within the plain language of the zoning ordinance's definition of a Trade Business, because there would be an office building with management, sales, and retail workers, plus a showroom. The plaintiff also convinced the court that "light vehicles" including box trucks and trailers would not violate the prohibition against heavy equipment. The Supreme Court said the website's mention of "contracting work" was not dispositive and that certain types of contractors are allowed under Trade Business according to the ordinance.
Second, the Supreme Court found that "the ZBA erred in considering evidence of the purported zoning violations at the other Plaistow property when it affirmed the zoning determination…" Citing a Connecticut case *Miklus v. Town of Fairfield*, the Court wrote that a ZBA cannot base a decision on anticipating that a company might violate the ordinance by unauthorized use later. 225 A.2d 637, 659 (Conn. 1967). The proper way to handle future violations, according to the Court, is to use the proper enforcement mechanisms when the time comes. The Court pointed to *Farrar v. City of Keene*, in which it held that arguments that a company would not use a site for the proposed and allowed use "is an issue for code enforcement," not the ZBA. 158 N.H. 684, 692 (2009).

The Supreme Court reversed the Superior Court's and ZBA's decisions, ordering the site plan be treated as a Trade Business, thus making its approval likely and confirming that it conforms to the zoning ordinance.

Practice Pointer: the evidence that zoning boards are permitted to consider is limited and does not include past zoning violations at other properties by owners or prospective tenants, and decisions made on those grounds alone will be subject to overturning by the courts.

(From *New Hampshire Municipal Association Court Updates*, 2023)

Municipalities Can Receive Attorney's Fees and Costs under RSA 676:17, II in Cases Where They Prevail in Enforcing the Municipal Zoning Ordinance Through Injunction

***City of Laconia v. Robert Kjellander*, N.H. Supreme Ct. Case Nos. 2022-0276 (2023)**

On two lots on opposite sides of Roller Coaster Road in Laconia, Robert Kjellander stores property that the City of Laconia had defined as "scrap" and "junk." On the property were over 50 motor vehicles, over 30 boats, farm equipment, a coal stove, trailers of wood, and "vegetation growing in and around" other belongings. The city determined this was a nonconforming "junkyard," which was not allowed in the district according to the Laconia zoning ordinance. Beginning in 2004, the city sent at least ten notices to Kjellander informing him that his use of the property as a junkyard was a violation, but he never cured the violation. The ordinance defines a junkyard as follows: Any business or any place of storage or deposit, whether in connection with another business or not, which has stored or deposited at the business or place: two or more unregistered motor vehicles which are no

longer intended or in condition for legal use on the public highways; used parts of motor vehicles or old iron; metal, glass, paper, cordage, or other waste or discarded or secondhand material which has been a part, or is intended to be a part, of any motor vehicle, the sum of which parts or material shall be equal in bulk to two or more motor vehicles; or scrap, waste, reclaimable material or debris, whether or not stored, for sale or in the process of being dismantled, destroyed, processed, salvaged, stored, baled, disposed or other use or disposition.

Under RSA 676:15, the city brought action in Superior Court in 2019 seeking an injunctive order compelling the defendant to cure the zoning violation. The court ruled for the city, granting a preliminary injunction ordering Kjellander to "cease adding items or material of any sort to contribute to the junkyard conditions on the property" or obtain a variance from the Laconia Zoning Board of Adjustment to legally operate a junkyard. In 2021, the Superior Court found at trial for the city. It said the use was an illegal junkyard as defined in the ordinance and awarded the City attorney's fees and costs, as guaranteed by statute. Kjellander appealed to the Supreme Court.

Arguing that his own personal property and effects on his private property were not "scrap," thereby making the use not a junkyard, the defendant said they were materials he would make personal use of "in due time," including using iron in his blacksmithing and building a shack from the stored wood. He also said that while motor vehicles are commonly regarded as junkyards, his other materials were inconsistent with the definition of a junkyard. The Court disagreed, noting that the Laconia ordinance alludes to scrap as "used parts of motor vehicles *or* old iron" (emphasis added), indicating a broad reading of what can constitute scrap. As the Court only overturns trial court decisions based upon the interpretation of a statute or ordinance if there is an error in the law, it upheld the ruling that the use designation as junkyard was appropriate.

The defendant also argued that the trial court erred in its award of attorney's fees to the City of Laconia. In New Hampshire, customarily, attorney's fees can only be awarded if authorized by statute, which they are in this case.

In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

RSA 676:17,II. A municipality can recover reasonable attorney's fees and costs if the cause of action is to enforce by injunction a municipal ruling, ordinance, or similar. Again, the Supreme Court noted that it prefers to defer to the trial courts in determining the appropriateness of the award, writing "if there is *some support* in the record… we will uphold it" (emphasis added). The defendant's principal argument was that the zoning determination was wrong, thus the fees should not have been awarded. As the Court had already ruled to uphold the use determination, this argument was unsuccessful. The defendant also argued that the statute ought only be applied to "any zoning or planning board issue," but the Court held that the statute plainly includes enforcement of municipal ordinances.

The defendant also argued that there were possible unconstitutional takings and the attorney's fees should be pro-rated based on the city not winning on all of its injunctive requests, because the city did

not genuinely "prevail" for the same reason. Because these issues were "insufficiently briefed," the Supreme Court did not consider those issues.

Practice Pointer: RSA 676:17,II allows municipalities to collect attorney's fees and costs if they prevail in enforcing through a court-issued injunction a local ordinance, in addition to a planning or zoning decision by land use boards.

(From *New Hampshire Municipal Association Court Updates*, 2023)

New Hampshire Supreme Court Says that Untimely Orders May Open Towns to Court Appeals as "Good Cause" for Plaintiffs not Exhausting their Municipal Requests for Rehearing

***Bradley M. Weiss & a. v. Town of Sunapee*, N.H. Supreme Ct. Case No. 2022-0309 (2023)**

Bradley Weiss and Cathleen Shea sought a variance for an "east side setback" for a residential property in Sunapee, New Hampshire, in 2021. On April 1, 2021, Sunapee's ZBA held a hearing to consider the application for a variance (due to protocols associated with the COVID-19 pandemic, the hearing was held remotely), but denied the motion by a vote of 3 to 2. Members voting no said the applicants showed insufficient evidence of hardship. The meeting minutes were approved at a subsequent meeting on May 25, 2021, but the written decision confirming the rejected application was not issued until August 3, 2021. RSA 676:3, II (2022) requires the written decision be "placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote." Nevertheless, on April 27, 2021, plaintiffs moved for a rehearing. That rehearing occurred in June, when the board again denied the variance. Next, the plaintiffs appealed to Superior Court, foregoing a second motion for rehearing.

Ordinarily, an aggrieved party could be required to file a new motion for rehearing to address any new issues that are thrust upon the appealing party due to a ZBA's rehearing decision; to hold otherwise would deny the board of adjustment an opportunity to correct its errors and would limit the court to consideration of the errors alleged in the original rehearing motion. *Dziama v. City of Portsmouth*, 140 N.H. 542, 545 (1995). In this matter, the plaintiffs argued that through the June rehearing decision the ZBA applied the same grounds as in the April hearing, negating the second rehearing requirement; the focus in both, they say, was on "hardship." The Town argued the bases for denial included newly raised issues, and so moved to dismiss, arguing that the court did not have jurisdiction because the appeal-exhaustion requirement was not met.
RSA 677:3, I (2016) controls whether a second motion for rehearing is required of the plaintiffs. It reads in part:

No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2…

The application for rehearing must meet the RSA 677:2 requirement of being made within 30 days. The Superior Court only has subject matter jurisdiction for appeals regarding the grounds set forth in the application for rehearing, but only those grounds (unless they show good cause for including additional grounds). Additionally, the ZBA must have the opportunity to consider specified grounds for appeal before a party can prosecute a Superior Court appeal; for the Superior Court to hear an appeal on an issue, that issue must be considered by the board, subject to a motion for rehearing, and either re-heard or dismissed by the board.

The Superior Court dismissed for lack of subject matter jurisdiction because the lack of a second rehearing motion meant the appeal-exhaustion requirement had not been met, but in doing so it did not consider the question of whether the plaintiffs could show good cause for not requesting a second rehearing. The plaintiffs argued that the good cause arose from the Town's failure to make a timely written order of its decision, such that the two denials could be compared. Without the written decision, they argued, they could not have identified the additional grounds that may have arisen in the first rehearing.

The Supreme Court reversed the Superior Court's ruling to dismiss for lack of subject matter jurisdiction and remanded it to the Superior Court to determine whether the plaintiffs showed good cause to be allowed to specify additional grounds for their appeal. Material to the Court's decision in favor of the plaintiffs was the four-month delay in issuing its written decision.

Practice Pointer: Boards should heed the requirement in RSA 676:3, II that written decisions be posted within five business days of the meeting where the decision was made, or they may extend the petitioner's window to motion for rehearing, opening further avenues for judicial appeals.

(From *New Hampshire Municipal Association Court Updates*, 2023)

If a Governmental Record has been Retained in an Electronic Format, Including on Back-up Tapes, it May Be Expected for a Municipality to Recover those Documents Pursuant to a Right-to-Know Request

***Laurie A. Ortolano v. City of Nashua,* N.H. Supreme Ct. Case No. 2022-0237 (2023)**

In June of 2021 the Plaintiff, Laurie Ortolano, submitted a request under RSA 91-A for correspondence, including emails sent and received by certain current and former City employees. The City responded by saying that it no longer had "reasonable access" to one of the former employees emails from the time of her employment.

Ortolano filed suit, and at trial an Information Technology specialist for the city testified that by the time Ortolano requested these emails they had been automatically deleted from the email server pursuant to the City's record retention policy. He also testified that the City utilized a backup drive, called a U-drive, and this drive did not contain any relevant emails either. However, he went on to state that the emails may still exist in yet another location. The City engaged in regular system back-ups of their computers which created "back-up tapes". He testified that it was possible to convert records from those back-up tapes into a readable format and search them. This process of converting the backup-tapes to a searchable format would have only added "a couple of hours" to the time it took to search for the responsive documents, however this type of search was not originally performed.

The court ordered that the City perform a search of their back-up tapes. The City contended that the back-up tapes are not readily accessible as defined in the statute and that because the City had already deleted the emails from the email serve and U-drive, the records were "initially and legally deleted" under RSA 91-A:4, III-b. The court, however, stated that it was undisputed that the City's back-up tape system exists, can be searched, and that files such as those requested by the petitioner are retrievable from the back-up tapes". Consequently, the court found that these files were reasonably

accessible and not initially and legally deleted. As a result of its failure to search the back-up tapes, the City was ordered to perform remedial training.

These findings of the lower court were upheld by the New Hampshire Supreme Court. The Supreme Court largely relied on its interpretation of the term "readily accessible". Essentially, the court concluded that the back-up tapes were readily accessible, and thus should have been searched because the process of searching those tapes would only have taken a few hours. Furthermore, files are only initially and legally deleted when they are no longer readily accessible. Consequently, the City violated the requirements of RSA 91-A when it denied the plaintiff's Right-to-Know request without first searching the back-up tapes for records.

Practice Pointer: It is unclear to what extent municipalities will be expected to search through "back-up" tapes for records, but if it will only take a few hours to perform any type of search, municipalities will be expected to do so. Furthermore, when deleting electronic records it is vital to ensure that they are deleted from every location where they may have been backed up in order for them to be considered initially and legally deleted.

(From *New Hampshire Municipal Association Court Updates*, 2023)

HAB was Reasonable to Overturn ZBA's Decision Blocking Apartment Development Because ZBA Failed to Consider Economic Unviability was Sufficient to Show Plan is Not Feasible and it Did Not Have Facts to Say the Two Application were Materially the Same

***Appeal of James A. Beal & a. v. Housing Appeals Board*, N.H. Supreme Ct. Case No. 2022-0182 (2023)**

After years-long challenges from "a group of abutters and other concerned citizens," the New Hampshire Supreme Court reached a decision allowing development of a housing development along North Mill Pond in Portsmouth. In 2021, Iron Horse Properties, LLC, requested various approvals from the Portsmouth planning board regarding its planned redevelopment of the property. The company's proposal provided for three apartment buildings totaling 152 housing units and requisite parking. Previously, the site had industrial, and railroad uses, and the old rail infrastructure remained and, according to the developer, created a safety hazard. Iron Horse had submitted a proposal once before, for 178 units, but it was denied a variance by the ZBA. Its proximity to North Mill Pond means it contains a 100-foot wetlands buffer, which required conditional use permit to permit construction. In addition to the rail setback and wetland buffer, the site contains view corridors to ensure that sightlines from perpendicular city streets to the water are not interrupted, and it contains a municipal sewer easement for pipes carrying wastewater to a nearby pumping station. Due to these restrictions and other land use requirements, Iron Horse sought a site review permit, lot line revision permit, and two conditional use permits: one for shared parking and one of building in the wetland buffer zone. On April 15, 2021, the planning board approved all the permits.

A "group of abutters and other concerned citizens" filed an appeal to the zoning board, which granted the appeal, effectively reversing the planning board's approvals. Iron Horse filed a motion for rehearing, which was denied, then appealed to the Housing Appeals Board. Of the nine claims the citizen group made before the ZBA, the Housing Appeals Board ("HAB") dismissed three and reversed six, meaning Iron Horse had prevailed. The group then appealed to the Supreme Court. Supreme Court in reversing HAB decisions is limited to "errors of law" and "clear preponderance of the evidence … that such order is unjust or unreasonable." R.S.A. 541:13. Similarly, the HAB must accept the factual findings of municipal boards as reasonable, and it is limited in reversing such

decisions only for "errors of law" and when convinced "by the balance of probabilities … that said decision is unreasonable." R.S.A. 777:6 and 678:9, I-II.

The first thing the Court had to address was whether the proposed project met the six criteria for a conditional wetland use permit under the Portsmouth zoning ordinance. Even though the petitioners express "some doubt" about all six criteria, they only briefed – and so the court only ruled on – two of them.

One was subsection (2), which allows conditional use permits in a wetland buffer only if "[t]here is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration." The petitioners argued that "smaller, truncated, and/or reconfigured versions" of the building could be placed elsewhere on the lot without violating the rail setback, view corridors, and sewer easement. The Court found for Iron Horse that the Planning Board and HAB did not err in finding no alternative was "reasonably feasible" or "viable" (which the Court says are synonyms). This is because the representative for the developer indicated at the initial hearing in 2021 that a smaller project would not be viable financially, as the project could not be built within economic likelihood of paying for itself. The Court found economic challenges sufficient to show infeasibility. It also found that the board was entitled to accept the representative's claim as fact. In doing so, it cited *Dietz v. Town of Tuftonboro*, in which it wrote, "it was not unreasonable for the [boards] to credit the representations made by [the applicant's] attorney that 'the cost would be prohibitive.'" 171 N.H. 614, 624 (2019).

The next criterion was in subsection (5): "The proposal is the alternative with the least adverse impact to areas and environments…" Similar to above, the Court found that moving the buildings to encroach less on the wetland buffer was not a workable alternative because it either would have required shrinking the buildings (infeasible) or run into the rail setback, view corridors, or sewer easement. It considered the representative's statement before the planning board again, as well as the four previously considered site plans, all of which would have also encroached into the buffer. The Court notes that the Portsmouth city attorney advised the planning board and that the wetland buffer had been previously disturbed as weighing toward the board was not unreasonable.

The second thing the court had to consider was whether the permit was lawful in the first place; local boards have wide discretion, but that discretion does not survive illegality. Under the doctrine of *Fisher v. Dover* land use boards cannot grant applications without material changes from a similar application that had been previously denied. Before the 2021 permit applications, Iron Horse applied for a variance in 2019 for a slightly different version of the project, which the ZBA rejected; in its appeal here, the ZBA said the new proposal was not materially different, and the Housing Appeals Board disagreed. The petitioners said the HAB must accept ZBA findings as fact and cannot allow approval of a previously rejected proposal. The Court disagreed.

The Court highlighted the material differences. The 2019 plan noted the height of the buildings at 60 feet, requiring a variance from the allowed 50 feet. The final 2021 plan measured it at 50 feet from the "new average grade plane" and even though the petitioners objected to the measurement, they conceded it was "exceeding 50' and reaching almost 60' in height." The HAB was right to find that the zoning board did not have the facts upon which to base its ruling that the proposals were materially the same, so the Supreme Court affirmed the HAB's ruling.

The Supreme Court affirmed the Housing Appeals Board decision as neither legally erroneous nor unjust or unreasonable and effectively ended challenges preventing the new housing development in Portsmouth.

Practice Pointers: (1) local land-use control boards may take the representations of a party or its attorney as true for the purpose of making decisions on applications; (2) a developer may show that alternative site plans are infeasible or unviable even if only because it will be more difficult for the developer to justify its investment; and (3) for a board to say that an application is too similar to a past rejected application, the factual record must support that finding.

(From *New Hampshire Municipal Association Court Updates*, 2023)

If a Town Select Board Issues a Decision Denying a Petition to Lay Out or Accept a Class IV, V, or VI Highway, that Decision Constitutes "Refusal" under RSA 231:38.*

***Lauren C. Shearer v. Town of Richmond*, N.H. Supreme Ct. Case No. 2022-0362 (2023)**

In 2022, the Superior Court granted summary judgment for the Town of Richmond in a case arising from a property owner's petition to lay out a class V highway. Lauren Shearer petitioned the select board to layout Bowker Road as a Class V highway in order to gain access to his property. Bowker Road was formerly a town road, laid out in 1766 and discontinued in 1898. Shearer's original layout petition was submitted to the select board in June 2021.

The Richmond select board scheduled a public hearing for November, which it noticed in October. Before the hearing could take place, Shearer emailed the town saying he would not participate in the hearing and filed a petition in Superior Court with two complaints. For one, he said the notice was given only 29 days prior to the hearing, not 30 as required by statute. RSA 231:9. For the other, he alleged that the town "neglected" to lay the road as petitioned. The hearing was cancelled and rescheduled for January 26, 2022; it was noticed on December 13, 2021, greater than 30 days prior. After the January hearing, the Board of Selectmen released a decision in March 2022 denying the petition to lay out Bowker Road as a class V road.

In the meantime, the proceedings before the Superior Court continued on the issue of the town allegedly "neglecting" to lay the road. The petition was made under New Hampshire RSA 231:38, I, which creates a cause of action "[w]hen selectmen have neglected or refused to lay out or alter [a class IV, V, or VI] highway." In January, shortly before the select board meeting, the Town filed a motion for summary judgment arguing the complaint did not sufficiently show it had "neglected" to lay the road: "plaintiff failed to demonstrate a material factual dispute on the issue of neglect." Shearer, representing himself, cross-filed for summary judgment. After the select board released its decision in March, the town submitted it along with an affidavit to the court to supplement the summary judgment motion. The Superior Court granted Richmond's motion and denied Shearer's, so the town prevailed. Shearer motioned for reconsideration, arguing that clearly the board's decision not to lay the road was a "refusal." The Superior Court denied the motion for reconsideration in part because it said it could not review the issue of "refusal" because the initial complaint had only raised "neglect." Shearer appealed to the Supreme Court.

The Town of Richmond argued that the Superior Court was right to only weigh "neglect" and not "refuse," as it was not initially briefed. Additionally, it argued that because of this, the complaint was not timely under the 60-day requirement of RSA 231:34, as more than 60 days passed between the November filing and Shearer first raising refusal. It also argued that this would be a new substantive claim, which cannot be raised in this type of motion. The Supreme Court disagreed.
The plaintiff argued and Court supported that the issue actually had been raised previously, thus it was preserved and not a new claim. It was raised by the Town of Richmond when it submitted its affidavit

after the board of selectmen formally denied the petition. The Supreme Court, citing the dictionary definition of "refusal" and its 2011 ruling in *Crowley v. Town of New London*, said that the denial decision was refusal under RSA 231:38, I. Even if it had not already been raised, the Court implied that it would have been open for Superior Court review anyway. First, raising refusal late would not be inappropriate because the refusal itself had not happened until March, months after the initial complaint; second, New Hampshire's courts follow the principle that a party should not lose because of a "procedural technicality." *In re Proposed Rules of Civil Procedure*, 139 N.H. 512, 515 (1995). The motion for summary judgment for the town was reversed.

On the issue of whether to apply RSA 231:34 or 231:38, the Court said that RSA 231:38 applies because there was a refusal, not just a modification. Even if not, the 60-day tolling period under RSA 231:34would have started from the March decision, not the November filing.
The Supreme Court remanded the case back to the trial court after reversing its ruling on the town's motion for summary judgment. It did not change the Superior Court's denial of the *plaintiff*'s summary judgment motion, however. Now that neither of the opposing motions is granted, a trial shall be scheduled for the Superior Court to try the facts.

*This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. R. 12-D(3) and 20(2).

Practice Pointer: If a town select board issues a decision denying a petition to lay out or accept a class IV, V, or VI highway, that decision constitutes "refusal" under RSA 231:38 permitting the aggrieved party to appeal to the Superior Court.

(From *New Hampshire Municipal Association Court Updates*, 2023)

If a Municipality or Agency has Promised a Date by which Documents Requested under Right-to-Know Law will be Available, it Must Either Make the Records Available by Then or Notify the Requester of any Delay*

***Albert S. Brandano v. Superintendent of the New Hampshire S.A.U. 16 & a.*, N.H. Supreme Ct. Case No. 2022-0084 (2023)**

School Administrative Unit 16 ("the SAU") received a Right-to-Know request from Albert Brandano on July 4, 2021. The request sought documents relating to "Diversity, Equity, Inclusion and Justice" (DEIJ) committees from July 2019 through June 2021. In the request, Brandano identified documents related to that topic "in SAU16 or any School District in SAU16." There were eight request in total: (1) charters, member lists, and similar founding documents for DEIJ committees; (2) agendas, work product, and minutes from DEIJ committee meetings; (3) "All emails or other written communication" between DEIJ committee leaders and other SAU officials regarding "DEIJ activity"; (4) "All records of any DEIJ Activity" of any school board or subcommittee; (5) "All records of any DEIJ Activity of any SAU16 officer"; (6) contracts or applications related to DEIJ activities; (7) other records of expenses incurred supporting DEIJ activities; and (8) "All records of any DEIJ-Activity-related curriculum materials, for example books, that were distributed, assigned, recommended, or suggested to any SAU16 teachers or students." The superintendent confirmed receipt of the request by email on July 7.

In his email response to Brandano, Superintendent David Ryan explained that most of the requested material was publicly available via the SAU's website. He said that he needed five days to respond to requests (6) and (7) and 45 days to respond to request (3), as they would require time and labor to compile. On July 16, he sent material in response to requests (6) and (7) and said he would provide documents responsive to request (3) within "the 45 days previously indicated."

After those 45 days had passed, the plaintiff twice contacted the SAU to say that the SAU had not provided the missing information within the time as promised. On September 28, Brandano filed a complaint asking the Superior Court to order production of the information he requested and award attorney's fees and costs. On October 14th the SAU provided invoices from three schools in response to request (7) and filed a motion to dismiss, and thereafter a hearing was held on October 20. Despite the SAU still having not answered request (3), the court granted preliminary dismissal of the complaint on the condition the SAU adequately responded to request (3) within 45 days of the decision. Superintendent Ryan sent a PDF containing emails with some identifying information redacted in response to request (3) a week later, and in January he emailed Brandano saying all responsive documents had been sent. The plaintiff then filed a motion to compel, which was denied, and he appealed the order granting the motion to dismiss and denial of his request for attorney's fees.

On the appeal of the granted motion to dismiss, the Court found that the order was appropriate. The SAU successfully argued that it was the wrong target of the request, as documents requested were held by individual schools, not the SAU itself, which the Court says are distinct agencies for the purpose of RSA 91-A. "By its plain language, the statute identifies a school district as a public agency separate from a school administrative unit. RSA 91-A:1-a, V." It also agreed with the defendant that it need not produce every conceivable document to comply with a request, just to "[demonstrate], beyond material doubt, that, as of the date of the hearing, they conducted a search reasonably calculated to uncover all relevant documents." Citing ATV Watch v. N.H. Dep't of Transp., it said, "the issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover" them. 161 N.H. 746, 753 (2011). (While the SAU did not submit one in this case, the Court advised that an agency could demonstrate such a search by submitting a thorough and detailed affidavit.)

On Brandano's motion to compel, which claimed over 300 pages of documents were missing, the Court again affirmed the trial court's decision and found for the SAU. On Brandano's claim that the PDF was over-redacted, the Court was convinced by the SAU's statement that it redacted names of parties not subject to the order only, i.e. not officials or DEIJ committee leadership, such as parents and vendors. Regarding the missing-pages claim, the SAU said it was "junk mail" and messages unrelated to the Right-to-Know request. The Court reviewed the documents to parse these claims and found that the trial court did not err in denying the motion to compel, as the SAU had already provided everything it was required to. Everything not provided was either not responsive to the request or already available. In doing so, it quoted Triestman v. U.S. Dept. of Justice, Drug Enfor.: "[T]o require an agency to collect and produce information that has already been made public would not further the general purpose of FOIA, which is to satisfy the citizens' right to know what their government is up to" and "FOIA does not obligate an agency to serve as a research service for persons seeking information that is readily available to the public." 878 F. Supp. 667, 671 (S.D.N.Y. 1995).

Finally, on the issue of attorney's fees, the Court had to evaluate whether the initial legal action was necessary to motivate the SAU to provide the documents under RSA 91-A. Because the SAU created a self-imposed deadline, and failed to meet that deadline, and still did not act on request (3) until after the trial court ruled on the motion to dismiss months later, the Court concluded that it "knew or should have known" it violated RSA 91-A. So, while Brandano is not entitled to attorney's fees related

to seven of the eight requests, he can collect attorney's fees for costs incurred in getting the SAU to respond to request (3). The Court emphasized the "self-imposed deadline" in reaching this conclusion.

The Superior Court will consider the attorney's fees award on remand.

*This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).

Practice Pointer: It is not always necessary to provide to a requester the date by which you will provide them with requested documents, but if you do, take care to adhere to it or inform the requester if there is a reasonable delay. Additionally, if requested information is already publicly available, it is sufficient to show the requester where they can find it on their own.

(From *New Hampshire Municipal Association Court Updates*, 2023)

Media Members who are Resident Citizens of Neighboring States Filing Right-to-Know Requests on Behalf of Publications with New Hampshire Addresses Likely Count as "Citizens" Under RSA 91-A

***In Re: City of Rochester*, Office of the Right to Know Ombudsman Docket No. RKO 2023 18 (2023)**

The original version of RSA 91-A:4 stated that "*Every citizen* … has the right to inspect all public records … and to make" copies and abstracts thereof (emphasis added). Pt. 1, Art. 8 of the NH Constitution provides that ". . . the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Finally, today's Right-to-Know Law addresses this question in two places. RSA 91-A:4, I says, "*Every citizen* … has the right to inspect all governmental records … and to copy and make memoranda or abstracts of the records" (emphasis added). RSA 91-A:4, IV(a) does not bestow this access as a right, but presents it like an obligation of the government, saying, "Each public body or agency shall, upon request … make available for inspection and copying any such governmental record" that it has, except as prohibited by statute or RSA 91-A:5.

In August of 2023, the Right-to-Know Ombudsman (RKO) received an appeal on whether a person who is not a resident and citizen of New Hampshire can use RSA 91:4 to gain access to public records. Harrison Thorp, a resident and citizen of Lebanon, Maine, a handful of miles from where Lebanon and Rochester border one another, operates a digital publication called the "Rochester Voice" ("the *Voice*"). The *Voice* is registered for trademark protection in New Hampshire as an "online newspaper" and lists as its mailing address as a post office box in Milton, New Hampshire. Thorp, acting for the *Voice*, had submitted a Right-to-Know request to the City of Rochester, which he reports on. Rochester declined to grant the request, arguing that only New Hampshirites have the right to use RSA 91-A to gain access to public records as "citizens." The city argued "citizen" in the statute (which is not defined) is the same as "Resident; Inhabitant" under the law, defined as, "a person who is domiciled or has a place of abode or both in this state … and who has, through all of his or her actions, demonstrated a current intent to designate that place of abode as his or her principal place of physical presence."

The U.S. Supreme Court issued non-binding dicta supporting this position in its 2013 case *McBurney v. Young*, in which it identified New Hampshire as one of the several states whose "freedom of information laws … are available only to their citizens." Still, the U.S. Supreme Court does not have

final say over the meaning and intent of New Hampshire's statutes or state constitution, so the RKO in his decision considered the likely intent of the legislature and policy impacts of each interpretation. He looked at the public journals from the legislature at the time it passed RSA 91-A but found no discussion of why it used the phrase "Every citizen" or what it means. He then acknowledged the outcomes that were possible under different interpretations. It would be plausible under one interpretation, he said, for a legal permanent resident who owns property and is regularly engaged in civic affairs to be denied this right if they are not a naturalized citizen. So, he looked at all the facts that connected Thorp and the *Voice* – residence in a neighboring jurisdiction, a New Hampshire mailing address, and practice as a journalist whose coverage area is centered in New Hampshire – to find that the statute is "likely [to] be viewed as sufficiently expansive to encompass the enterprise undertaken by Mr. Thorp in this case."

The Right-to-Know Ombudsman is charged with speedy resolution of cases, so he made this ruling while acknowledging that he has no authority to interpret or create binding precedent for the meaning of the law. That power is reserved to the New Hampshire Supreme Court's alone (see *Bel Air Associates v. N.H. Dept. of Health and Human Services*, 154 NH 228, 232 (2006)). Until the Supreme Court has ruled on this question, the U.S. Supreme Court's dicta and the Right-to-Know Ombudsman's narrow order are the guidance we have.

Practice Pointer: If requests are for public records are made by a person or entity not a citizen of New Hampshire NHMA recommends that such requests be honored if the person makes the request in person or agrees to come to the municipal offices to retrieve the records.

(From *New Hampshire Municipal Association Court Updates*, 2023)

NH Supreme Court Reverses Housing Appeals Board (HAB) Decision and Reinstates Planning Board Decision Because the HAB Wrongly Substituted its Judgment for the Decision of the Planning Board*

***Appeal of Town of Roxbury v. Housing Appeals Board*, N.H. Supreme Ct. Case No. 2022-0238 (2023)**

Greatwoods Unity Forests, LLC (Greatwoods) applied to subdivide a 159-acre lot fronting Middletown Road in Roxbury into three lots. Two of the lots would be about 6 acres each and, with a remainder parcel of 148 acres.

It was reported to the Planning Board that the zoning requirements would allow the lot to be divided into up to 31 lots, although just the two plus remainder were proposed, that would allow for two-family residences to be built on each, for a total of six possible households. At the meeting, the town's fire chief and the Board's chairman expressed concern about added traffic on Middletown Road, which "becomes virtually impassable during mud season," according to the chair. The surveyor for the property, who is a road agent in another municipality, said, "[i]f Middletown Road is already considered to be substandard, the Town should address that matter on its own initiative."

The Board denied the application, citing the expense to maintain Middletown Road, let alone with additional usage. It called the road unsafe and said the effects of added traffic were too much a burden to accept. In its memorandum of decision, the Board listed conditions making the road dangerous for new households, including its dead end without a passable outlet, narrow sections, and absence of guardrails and sidewalks. It said, "Middletown Road is at its capacity to safely support the present density of residencies." It cited the state law that says, in part, a town can block "subdivision of land

as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services." RSA 674:36, II(a).

Greatwoods appealed to the Housing Appeals Board ("HAB"), arguing that the decision was illegal and unreasonable as not based on facts found in the record. For example, Greatwoods said that since three of the four voting members of the Board lived on Middletown Road this meant their personal opinions clouded their decision making. Counsel for the town argued to the contrary that board members appropriately their personal, firsthand knowledge, not opinion, to inform the decision making. After a hearing and site walk, the HAB reversed the Board's decision, finding for Greatwoods. The Town of Roxbury appealed to the NH Supreme Court.

The Supreme Court had to assess whether the HAB had wrongfully "substituted its judgment for that of the Board," or erred in determining the Board improperly applied the RSA 674:36 standard pertaining to "scattered or premature development," or incorrectly concluded that the Board's denial was overly concerned about future development.

Regarding the Town's argument that the HAB substituted its judgment for the Board's instead of containing itself to whether the Board's decision was supported by the record, the Court agreed with the Town that "[t]he scope of the HAB's review of a planning board's decision is not to determine whether it agrees with the board's findings, but, rather, is limited to whether there is evidence in the record upon which the planning board could have reasonably based its findings," (citing *Appeal of Chichester Commons*, 175 N.H. 412, 415-16 (2022)). The Court said that not only did the HAB "substitute its judgment" by relying on its own observations rather than the factual records, but also by "discrediting the personal knowledge of the Board members." While a planning board cannot base a decision on vague concerns or mere opinion (*See, Ltd. Editions Properties v. Town of Hebron*, 162 N.H. 488, 497 (2011)), it can consider its members' own knowledge and familiarity with the region. *Nestor v. Town of Meredith*, 138 N.H. 632, 636 (1994). The Court said what the planning board did here is more like *Nestor*, relying on personal observations, not mere personal opinion, especially because it was supported by the fire chief's testimony.

When addressing the argument by Greatwoods's the HAB was correct that the Board had no basis to deny the application as "premature or scattered," the Court pointed out that the Town has a provision in its subdivision regulations (§ 403) incorporating RSA 674:36, II(a), which addresses providing against subdivisions that would be "scattered or premature subdivision" that risk "danger or injury to health, safety, or prosperity." Pointing to its decision in *Garipay v. Town of Hanover*, the Court found again for the Town. That case said the Board must determine what amount of development would create a hazard as related to the services, including access for public safety vehicles and connection to public utilities. *Garipay*, 116 N.H. 34, 36 (1976). The HAB said the Board never addressed this test, but the Court found on appeal that the Board's conclusion that "The subdivision would increase danger to public health and safety, life and property, and is therefore denied" does directly address it. After all, the Court says that prematurity is a relative, not absolute, concept. *Id.*

On the issue of whether HAB erred by "concluding that the Board's decision to deny the subdivision application was based on a concern about future development," the Court held, that "any denial of subdivision approval will naturally have the secondary effect of limiting growth." *Ettlingen Homes v. Town of Derry*, 141 N.H. 296, 298 (1996).

The Supreme Court reversed the HAB's decision and reinstated the Board's denial of the subdivision application.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rules 12-D(3), 20(2).*

Practice Pointer: RSA 674:36, II(a) empowers local government to include in their subdivision regulations provisions to provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services.

(From *New Hampshire Municipal Association Court Updates*, 2023)

Kymalimi, LLC & a. v. Town of Salem, N.H. Supreme Ct. Case No. 2022-0202 (2023)

(In its entirety)

The intervenor DSM MB I LLC (DSM), appeals an order of the Superior Court *(Houran*, J.) directing the Planning Board (Board) for the Town of Salem (Town) to accept the site plan review application of Kymalimi, LLC (Kymalimi) as complete based on the permission of leaseholder Transform Lease Opco, LLC (Transform). We reverse. Additionally, we deny the plaintiffs' "Motion to Strike Town of Salem's *Memorandum of Law in Lieu of Brief*" as moot. *See Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253, 255 (2010) ("The doctrine of mootness is designed to avoid deciding issues that have become academic or dead.").

The following facts are supported by the record. Transform is the current holder of a lease concerning a portion of the property located at 167 South Broadway in Salem (the Property). DSM is the fee owner of the Property. The lease grants Transform exclusive control over a structure on the Property that once housed a Kmart store (the Building). The lease also grants Transform the right to use the parking areas, access routes, and other infrastructure on the Property, but those use rights are shared by other tenants. The lease further grants Transform the right to assign the lease, subject to the condition that the Building "shall not be used for any unlawful purpose." Transform has the right to extend the lease to a total term of seventy-five years, in which case the lease would terminate on January 31 2046. Kymalimi has executed a long-term sublease of the Building from Transform, with the intention of operating charitable gaming in the Building.

In March 2021, Kymalimi submitted an application for site plan review to change the use of the Building. Pursuant to RSA 676:4, the Board has adopted site plan review regulations that applicants must follow. *See Salem, N.H., Site Plan Review Regulations* § 268-1:3 (2012). In relevant part, the regulations require the applicant to provide a "[l]etter of permission from owner of property, if other than developer." *Id.* § 268-2:2.1.6. In addition, Section 2 of the Town's site plan review application form solicits information concerning the applicant and "owner of record if other than applicant." Section 2 indicates that "[w]ritten permission from owner is required." The terms "owner" and "owner of record" are not defined in this section. Section 7 of the form, which seeks information about abutters, states that "[n]ames should be those of current owners as recorded in the Tax Records." Kymalimi provided information about Transform in Section 2 of the application, noting that Transform is a leaseholder. Kymalimi also submitted a letter of authorization permitting Kymalimi and its agents "to act on Transform's behalf" in connection with the site plan application. During an April 13, 2021 meeting, the Board discussed whether Kymalimi's application was complete without aletter of authorization from the property owner, DSM. The Board determined by vote that the application was complete. The Board then heard a presentation from Kymalimi's representative

about the substance of the application. After a question arose as to whether the application was merely conceptual, a Board member made a motion to rescind the previous vote accepting the application as complete. The motion failed. The Board then discussed the application. After hearing comments from a representative of DSM, the Board voted to continue its discussion of the application to the next meeting.

On April 26, 2021, DSM sent a letter to the Board outlining a number of concerns with Kymalimi's proposed use of the Building. DSM's overarching concern was that the proposed change would "result in detrimental parking, traffic public safety, and other impacts to the shopping center." During an April 27, 2021 meeting, the Board voted to reconsider its prior "acceptance of the plan based on lack of owner consent." The Board then voted not to accept the application because DSM, the property owner, had not provided written consent. In response Kymalimi and Transform initiated this action against the Town under RSA 677:15. DSM joined as an intervenor.

In January 2022, the trial court held a hearing on the plaintiffs' complaint. At the hearing, Kymalimi argued that: (1) it was "procedurally improper for the Planning Board to . . . accept the application, undertake substantive consideration of it, as required by the statute, and then discontinue that process" after finding that the application was incomplete; and (2) that "as a matter of law," the Town's site plan application requirement of the permission of "owner of record" was "satisfied by Transform's written permission." Transform likewise asserted that "[a]n owner is not necessarily one owning fee simple" and that "[o]ne having a lesser estate may be the owner." Transform emphasized that it "is the owner of the possessory right to the space that is the subject of the application to the Planning Board."

The Town argued that the trial court did not have jurisdiction to address the merits of the complaint under RSA 677:15 because the Board had not yet voted to approve or disapprove the application. *See* RSA 677:15, I (2016) (a petition "shall be presented to the court within 30 days after the date upon which *the board voted to approve or disapprove the application*" (emphasis added)). The Town and DSM argued "that the Planning Board ultimately has the inherent authority to reconsider its own decisions." DSM asserted that because it "own[s] the shared common area" on the Property that is implicated in this application, it has "the right to review what would be presented to the board."

In March 2022, the trial court issued an order ruling that "the Board was wrong as a matter of law when it determined that Kymalimi's site plan application was incomplete because DSM had not provided written permission." At the outset, the trial court determined that although "this matter should have been presented to the Court via a petition for writ of certiorari, the Court nevertheless concludes that it may properly consider the merits of this dispute." *See DHB v. Town of Pembroke*, 152 N.H. 314, 318 (2005) ("Though the plaintiff's petition did not seek a writ of certiorari, courts are not limited by the 'technical accuracy or designation of legal forms of action.'"). The trial court was also "unpersuaded" by "Kymalimi's suggestion that the Board lacked the discretion to reconsider its April 13, 2021, vote accepting the application as complete." The court then turned to the "central issue" in this dispute: "whether the Board properly interpreted the terms 'owner' or 'owner of record' in the site plan regulations, as those terms are used in connection with the requirement that an application contain '[w]ritten permission' from the 'owner' in order to be complete."

Accordingly, the trial court concluded that "the Board was wrong as a matter of law when it determined that Kymalimi's site plan application was incomplete because DSM had not provided written permission." The court directed the Board "to accept the application as complete with Transform's written authorization, and to complete formal consideration of the application." DSM filed a motion for reconsideration, which the trial court denied. This appeal followed.

Because the trial court below treated the plaintiffs' complaint under RSA 677:15 as a petition for writ of certiorari, we will do the same. *See* DHB, 152 N.H. at 318. "The judiciary's certiorari jurisdiction is limited and gives a court 'no authority to provide de *novo* relitigation of the original issues or to substitute its judicial discretion for the administrative judgment below.'" *Ruel v. N.H. Real Estate Appraiser Bd.*, 163 N.H. 34, 44 (2011). The original proceeding in the trial court was limited to whether the agency unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously. *Id.* Our review of the trial court's decision is limited to ascertaining whether it made an error of law or reached a result unsupported by the record. *Id.*

When interpreting planning board regulations, which we do *de novo*, the general rules of statutory construction govern our review. *See Trustees of Dartmouth Coll. v. Town of Hanover*, 171 N.H. 497, 509 (2018). Thus, the words and phrases of the regulations should be construed according to the common and approved usage of the language. *Id.* Moreover, we will not guess what the drafters of the regulations might have intended, or add words that they did not see fit to include. *See Batchelder*, 160 N.H. at 256-57. We determine the meaning of the regulations from their construction as a whole, not by construing isolated words or phrases. *See* id. Where the regulations define the term in issue, that definition will govern. *See* id. Where, as here, no definition is provided in the regulations themselves, we must look to the regulations as a whole and attempt to discern the meaning intended by the drafters. *See* id.

DSM argues that "the trial court erred when it determined that a tenant of a building within the parcel of land at issue was an 'owner' entitled to give permission for planning board site plan review and redevelopment over the fee simple owner's objection." (Capitalization omitted.) We agree.

There is significant interplay between the Town's site plan regulations and the accompanying application for site plan review. The regulations provide a list of materials that must be submitted to the Board "at least 21 days prior to the next Planning Board meeting." *Salem, N.H., Site Plan Review Regulations* § 268-2:2.1. Among the required materials is the application form as well as a "[l]etter of permission from *owner of property, if other than developer*." *Id.* §§ 268-2:2.1.1, 268-2:2.1.6 (emphasis added). Section 2 of the application itself requests the "[n]ame, mailing address &telephone number of *owner of record if other than applicant*" and notes that "[w]ritten permission from *owner* is required." (Emphases added.) Given this context, it follows that the latter statement regarding permission implicitly refers to the "[l]etter of permission from owner of property" specified in the regulations. *Id.* § 2682:2.1.6. Therefore, we conclude that the phrases "owner of property" in the regulations and "owner of record" in the application are synonymous in that they refer to the same entity or individual. Under these circumstances, DSM - the fee owner of the Property - is the "owner of property." Thus, DSM is the particular "owner of record" to which Section 2 of the application refers for the purposes of providing permission.

The plaintiffs contend that Transform should be considered an "owner of record" because "its leasehold estate is a matter of record, with a Memorandum of Lease having been recorded in the Rockingham County Registry of Deeds." Transform is the leaseholder of the Building and therefore could be said to "own" a leasehold interest. Yet, DSM is still the "owner" of the Building itself. *See* R. Cunningham et al., *The Law of Property* § 1.2, at 5 (1984) (interpreting § 10 of *Restatement (First) of Property)* ("a person who has property interests conventionally grouped under a single descriptive term such as 'mortgage,' 'leasehold,' or 'easement' may properly be said either to 'own' or to 'have' the particular mortgage, leasehold, or easement although he is not the 'owner' of the . . . subject of the mortgage, leasehold, or easement"). Thus, Transform is not an "owner of property" for purposes of providing permission for Kymalimi's site development plan under the Town's regulations.

The plaintiffs further assert that "under the lease, Transform is an owner whose written consent to the site plan review application satisfied the regulations." (Capitalization omitted.) They emphasize that "tenants and subtenants may be owners of property with a sufficient ownership interest to pursue land use approvals independently of the fee simple titleholder or landlord." *See Snyder v. N.H. Savings Bank*, 134 N.H. 32, 37 (1991) (interpreting the phrase "then record owner of the premises" to apply to all persons having record interests in the property, thus entitling a lessee under a recorded lease to notice of a mortgage foreclosure under RSA 479:25, II). The plaintiffs also rely on *Appeal of Michele*, where we observed in the context of easements that "[b]ecause the term 'owner' encompasses property interests other than fee ownership, the Micheles' citation to the repeated use of the terms 'owner,' 'property owner,' and 'landowner' throughout the statutory scheme [of RSA chapter 482-A] does not advance their argument" that only fee owners can apply for a dock permit. *Appeal of Michele*, 168 N.H. 98, 103 (2015). Thus, the plaintiffs assert, "'Transform falls squarely within the common and approved usage of the term 'owner' as well as 'owner of record.'"

However, just as our statutory interpretation in *Snyder* and *Appeal of Michele* relied on the specific context and statutory language in those cases, our review here is necessarily rooted in the plain and ordinary meaning of the Town's site plan review regulations, application materials, and RSA 676:4. Absent from RSA 676:4 as well as the Town's site plan review regulations, application form, and site plan checklist is any mention of leaseholders or a requirement that the applicant provide the Board with a copy of a lease if there is one.

Thus, we conclude that the trial court erred in finding that Transform's permission satisfied the requirements of the Town's site plan regulations. Accordingly, we reverse the trial court's decision. *Reversed.*

Failure to enforce a municipal ordinance in the past does not per se bar enforcement in the future.

***Appeal of Andrews v. Kearsarge Lighting District*, N.H. Supreme Ct. Case No. 2021-0543 (2023)**

In 2017, the Board of Commissioners of the Kearsarge Lighting Precinct held a public hearing in response to "disruptive" behavior by visitors staying at short-term vacation rental properties in a residential district. The Kearsarge Lighting Precinct is a village district within Conway and Bartlett, and the Board of Commissioners is its primary governing body. The Andrew plaintiffs were Massachusetts residents who own two properties in the district that they use as short-term rentals.

At the 2017 hearing, public commenters complained that short-term rentals likely violated the district's zoning ordinance. That ordinance contains a "Guest Provision" in its section on permitted uses: "All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated." The Andrews and others did not occupy the vacation properties; this was not contested. Even though it was noted that this had not been enforced up to that time, the Board of Commissioners voted to issue citations regarding four properties, including the two belonging to the Andrews. The Andrews appealed their notice of violation and citations, and their hearing was held in February 2018.

Through counsel they raised the issue of past non-enforcement, but the ZBA unanimously denied the appeal, finding that the plain meaning of the Guest Provision was clear, and the Board of Commissioners acted accordingly. The ZBA said the provision's purpose was to "maintain a quiet,

peaceful neighborhood made up of residents, not transients," and requiring owners to reside at relevant properties can "serve as a check on guest behavior that might otherwise be incompatible with the neighborhood." It also ruled that the plaintiffs failed to show a previous instance wherein the Board of Commissioners interpreted the Guest Provision in a way that would not apply to short-term rentals. After applying for rehearing and being denied, the plaintiffs appealed to the Superior Court under RSA 677:4. The trial court heard the case in 2021 and ruled in favor of the ZBA. It denied a motion to reconsider, after which the property owners appealed to the Supreme Court.

First, the plaintiffs argued that the district committed a violation by depriving them of certain property rights without due process. Specifically, they say there was no due process because ZBA members were biased and may have decided how to vote before the hearing. The primary target of this complaint was a member whose son had spoken in support of the citations at the original Board of Commissioners public hearing and whose son-in-law is an attorney. Evidence (emails) was presented that the member spoke to them both before the hearing, but the Court said there was no evidence of bias because the presented emails only showed that he had spoken about the "challenges" the district faced and did not demonstrate prejudgment in either direction. Additionally, the plaintiffs argued there was a due-process violation because ZBA members considered information not found in the record. Citing to *Biggs v. Town of Sandwich* and *Dietz v. Town of Tuftonboro*, the Court found no problem with members considering information beyond the record, saying that ZBA members may base their conclusions on their own knowledge, experience and observations, as well as upon common sense.

Second, the Supreme Court addressed whether the Superior Court should have heard the plaintiffs' complaint that the Guest Provision violated the state zoning statute. Plaintiffs argued that the plain meaning of the provision would ban not only short-term vacation rentals but all rentals, which would restrict affordable housing, expressly prohibited by law (see Britton v. Town of Chester, 134 N.H. 434 (1991)). The trial court did not rule on this complaint because it found the plaintiffs, who are not renting affordable housing, did not have standing. The Supreme Court overturned this. Standing under the New Hampshire Constitution requires parties with adverse rights and an actual dispute with possible legal redress. Avery v. Comm'r, N.H. Dep't of Corr., 173 N.H. 726, 737 (2020). Here, the plaintiffs have an actual dispute rising from the district citations regarding their rights to certain property uses and the Court has the ability to declare the ordinance ultra vires, so all the standing requirements were met. The holding suggests it is not material whether the plaintiffs intended to use their property for affordable housing. That the ordinance plausibly revokes their right to rent affordable housing had they chosen to was sufficient to grant standing. The issue was remanded to the trial court for consideration.

Third, the Andrews argued that the district's history of not enforcing the ordinance makes enforcement now illegal. Within these arguments is the suggestion that this is a case of selective enforcement targeting the owners of these four properties. They argue that the district's failure to enforce demonstrated a policy of "de facto nonenforcement," which discriminated against the plaintiffs. However, the Court said that to prevail on this argument, a party must show more than just that the policy was "historically lax"; they have to show that there was selective enforcement with "conscious intentional discrimination." *Alexander v. Town of Hampstead*, 129 N.H. 278, 283 (1987). Past failure to enforce alone is not proof of discrimination. Id. Similarly, they argued that there was a "de facto policy" allowing short-term rentals until 2017 under the doctrine of administrative gloss. The doctrine of administrative gloss says that agencies (including a municipality) that have been interpreting an ambiguous ordinance one way over a period of years cannot change its interpretation without legislative action. *Nash Family Inv. Prop. V. Town of Hudson*,139 N.H. 595, 602 (1995). The Superior Court ruled, and the Supreme Court affirmed that this claim fails because there is no record

of the Board of Commissioners interpreting the Guest Provision in the past in a way that would allow short-term vacation rentals.

Lastly, the plaintiffs argued that the zoning decision constituted an unconstitutional "taking" – the New Hampshire Constitution says no part of a man's property shall be taken from him … without his own consent – because government regulations can be takings if they deprive a property owner of rights and are arbitrary or unreasonable. N.H. Const. pt. I, art. 12; *Huard v. Town of Pelham*, 159 N.H. 567. 574 (2009). The trial court ruled that the Takings Clause is not a basis for finding that the ordinance was invalid, and the Supreme Court agreed.

The case was sent back to the Superior Court for consideration of whether the Guest Provision is ultra vires now that the Supreme Court ruled the plaintiffs have standing on that claim. The other findings of the Superior Court were affirmed.

Practice Pointer: If a municipality has a de facto policy of not enforcing an ordinance or consistently interprets that ordinance in a particular way, it cannot change that practice without legislative action; but absent such a policy or consistent interpretation, it can undertake enforcement of an otherwise dormant ordinance so long as it is reasonable.

***This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs, but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).**

(From *New Hampshire Municipal Association Court Updates*, 2023)

***Town of Derry v. Housing Appeals Board*, N.H. Supreme Ct., Case No. 2022-0545 (2023)**
(In its entirety)

The Town of Derry (Town) appeals an order of the Housing Appeals Board (HAB) reversing the Town's Zoning Board of Adjustment's (ZBA) decision denying the request of the respondents, John Cooper and the Estate of Cooper, for a frontage variance. The Town argues that: (1) the HAB failed to apply the correct standard of review; (2) the HAB erred when it supplanted its judgment for the ZBA's judgment; (3) the HAB improperly conducted a de novo review of the three other variance factors set forth in RSA 674:33, I(a)(2) (Supp. 2022) not addressed by the ZBA; and (4) the HAB erred in its analysis of RSA 674:33, III (Supp. 2022).

NH Supreme Court concluded: (1) the HAB reasonably reversed the ZBA's decision on the diminution of property value factor; and (2) the Town failed to establish reversible error with respect to the HAB's analysis of RSA 674:33, III. The Court declined to address the HAB's analysis of the spirit of the ordinance factor and whether the HAB conducted an improper de novo review of the remaining three variance factors because these issues were not preserved. Accordingly, the Court affirmed.

The respondents own a lot in the town that lies in a low-medium density residential (LMDR) area. The town's Zoning Ordinance states that properties in LMDR areas must have 150 feet of road frontage to construct a home. The respondents' lot is 2.6 acres and has 108 feet of frontage along Ballard Road. A strip of land, roughly thirty feet wide, connects the main section of the property to Ballard Road. The strip of land was intended to be an access road for the lot's original purpose —

supplying water to the neighboring lots by way of a community well. The majority of the lot's acreage lies behind three other homes and sits upon a hill.

The respondents first applied for a frontage variance in 2003 and were denied. In November 2021, the respondents again sought a frontage variance from the ZBA so that they could build a single-family home on their lot. During two public hearings in November, only abutting property owners expressed disapproval. Collectively, the abutters claimed that the respondents had promised not to build on the lot, and that development of the lot would affect their privacy and cause water runoff concerns. During the deliberative portion of one of the hearings, one ZBA member, appearing to rely on the 2003 denial, commented that changes to the lot could diminish the values of other properties.

The motion to approve the variance failed on a 2-3 vote. Two members voted against the motion because they believed that granting the variance would be contrary to the spirit of the ordinance; the third member voted against the motion because he believed that other property values would be diminished. The notice of the ZBA's decision denying the respondents' request for a variance merely indicated the result of the vote and listed those two factors as the reason for denial. The record does not show that the ZBA considered the three other factors listed in RSA 674:33, I(a)(2) when making its decision. The ZBA denied the respondents' request for rehearing, and they appealed to the HAB.

The HAB reversed the ZBA's decision and granted the respondents' variance application subject to conditions not relevant to this appeal. The HAB found that the ZBA's decision on the two factors — that granting the variance would be contrary to the spirit of the ordinance and would result in the diminishment of the values of surrounding properties — was unreasonable based on the evidence in the record. The HAB then evaluated the three other variance factors set forth in RSA 674:33, I(a)(2) and found in favor of the respondents. To support its decision, the HAB analyzed RSA 674:33, III and explained that the statute was not clear as to "whether a failed vote to approve a variance is equivalent to a successful motion to deny." Without addressing that issue, the HAB noted that the posture of the ZBA's vote was relevant because it demonstrated that two members "felt that the [respondents] satisfied all five prongs of the variance test, including the three that were not cited in the ZBA's written notice of decision."

The Town moved for a rehearing and raised only two arguments: (1) that the HAB substituted its judgment for the ZBA's on the issue of diminution in property value; and (2) that the HAB incorrectly analyzed RSA 674:33, III, which led to a mistaken "emphasis on the number of votes in favor and opposed to the denial of the variance." The HAB denied the motion and clarified that its "intent was simply to recognize the vote posture while discussing the variance elements that were not cited by the Town as grounds for denial. The specific vote tally was not relied upon by the [HAB] as a basis for finding the ZBA's findings unreasonable or unlawful." This appeal followed.

When reviewing a zoning board's decision, the HAB must uphold the decision unless there is an error of law or the HAB is persuaded by the balance of probabilities, on the evidence before it, that the decision was unreasonable. RSA 679:9, II (Supp. 2022); see RSA 677:6 (2016); see also RSA 679:9, I (Supp. 2022) (appeals shall be consistent with those to the superior court pursuant to RSA 677:4 (2016) through RSA 677:16 (2016)). The appealing party bears the burden of proving the ZBA's decision was unlawful or unreasonable. RSA 677:6; see also RSA 679:9, I. The HAB must treat the ZBA's factual findings as prima facie lawful and reasonable. RSA 677:6; see also RSA 679:9, I. The HAB's review is not whether it agrees with the ZBA's findings, but, rather, whether there is evidence in the record upon which the ZBA could have reasonably based its findings. See Appeal of Chichester Commons, LLC, 175 N.H. 412, 415-16 (2022).

Our review of the HAB's decision is governed by RSA chapter 541 (2021). See RSA 679:15 (Supp. 2022). Accordingly, the HAB's order will not be set aside unless we are satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable. See RSA 541:13. The HAB's factual findings are "deemed to be prima facie lawful and reasonable." Id. "When reviewing the HAB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the HAB's findings are supported by competent evidence in the record." Appeal of Chichester Commons, 175 N.H. at 416.

The Town begins by arguing that the HAB applied the incorrect standard of review. We disagree In its order, the HAB correctly articulated the standard of review by stating that, when reviewing the board's decision, it would consider the ZBA's factual findings to be prima facie lawful and reasonable. The HAB also indicated that those findings would not be set aside unless, by a balance of the probabilities upon the evidence before it, the HAB found that the ZBA's decision was unlawful or unreasonable. The HAB's review, which focused upon whether the ZBA's findings were reasonable in light of the evidence before it, was consistent with this standard. Cf. Garrison v. Town of Henniker, 154 N.H. 26, 35 (2006). Accordingly, the HAB applied the correct standard of review.

The Town nonetheless argues that "the HAB erred when it determined the ZBA lacked a reasonable, lawful basis to deny [respondents'] variance based on [respondents'] failure to satisfy the diminution of property values." (Emphasis and capitalization omitted.) See RSA 674:33, I(a)(2). The Town asserts that the HAB "failed to consider the concerns raised by the abutters and shared by the ZBA" that the proposed variance would diminish surrounding property values, and in doing so, the HAB "shifted the burden of proof, ignored evidence in the record, and improperly put itself in the shoes of the ZBA." We disagree.

Zoning boards have the power to authorize "a variance from the terms of a zoning ordinance" if five factors are met. See RSA 674:33, I. "The variance applicant bears the burden of demonstrating that all five criteria are met." *Perreault v. Town of New Hampton*, 171 N.H. 183, 186 (2018). Zoning boards "resolve conflicts in evidence and assess the credibility of offers of proof." Harborside Assocs. V. Parade Residence Hotel, 162 N.H. 508, 519 (2011). However, the HAB should grant deference to a zoning board's findings only when "there is evidence in the record upon which the [zoning board] could have reasonably based its findings." Appeal of Chichester Commons, 175 N.H. at 415-16; see RSA 677:6; RSA 679:9, II. Zoning boards cannot rely upon an abutter's conclusory opinion that is based upon vague concerns rather than objective facts. See *Trustees of Dartmouth College v. Town of Hanover,* 171 N.H. 497, 507 (2018).

Here, we agree with the HAB that the record does not support the ZBA's finding concerning the diminishing property value factor. The official minutes from the two public hearings before the ZBA in November 2021 provide no comments from abutters referencing diminished values. The abutters addressed concerns about privacy and water runoff but did not link those concerns to any claims that property values would diminish. To the extent that the Town argues that the HAB erred in not considering the ZBA members' concerns, we note that only one ZBA member offered a substantive comment on the relevant factor during the ZBA's deliberation. We conclude that the ZBA member's comments were "vague concerns" based on the member's personal opinions and were not an adequate basis to conclude that granting the variance request would result in the diminution of property values. See Derry Sr. Development v. Town of Derry, 157 N.H. 441, 451 (2008) (explaining that a "board may not deny approval on an ad hoc basis because of vague concerns" and "the board's decision must be based upon more than the mere personal opinion of its members")

Further, in reviewing the ZBA's decision, the HAB may consider evidence that the zoning board did not find compelling because that is a "proper balancing of the probabilities based upon the evidence before the ZBA." *Continental Paving v. Town of Litchfield*, 158 N.H. 570, 577 (2009) (concluding that the superior court did not substitute its judgment for that of the ZBA). Here, the HAB considered, and the record supports, that a licensed land surveyor prepared the respondents' application for the variance, in which the surveyor stated that the variance would not diminish property values and, instead, they would likely increase. The surveyor reiterated during a hearing before the ZBA that granting the variance would not diminish property values. Accordingly, we conclude that the HAB did not err in ruling that the record does not support the ZBA's finding concerning the diminished property value factor.

The Town also argues that "[b]y discounting the abutters' testimony, the HAB shifted the burden of proof" onto the ZBA. The Town, however, seems to conflate the HAB's review of the record and its determination that the record did not support the ZBA's finding regarding the diminution of property values factor with shifting the burden of proof onto the ZBA. As previously discussed, the abutters' testimony and the single comment from the ZBA member do not reasonably support a finding that the variance would diminish property values. Thus, the HAB did not shift the burden of proof onto the ZBA, but, rather, concluded that the evidence in the record did not support the ZBA's finding. Cf. N. New England Tel. Operations, LLC v. Town of Acworth, 173 N.H. 660, 675-80 (2020) (concluding the trial court did not inappropriately shift the burden to the defendants by considering the report and data of one expert over that of another).

The Town next argues that the HAB exceeded its authority by conducting a de novo analysis of the three remaining variance factors — public interest, substantial justice, and unnecessary hardship — and that, instead, the HAB should have remanded the matter to the ZBA for determination of those three factors. See RSA 674:33, I(a)(2). However, the Town did not raise this argument in its motion to the HAB for rehearing. Cf. RSA 541:4. The Town argues that this issue is implicitly preserved through other arguments in the motion. The court was not convinced. Furthermore, the Town has not shown good cause to be allowed to specify additional grounds that were not set forth in its motion. See id. Therefore, the court did not consider this issue. See id.; Appeal of Walsh, 156 N.H. 347, 352 (2007).

Finally, the Town argues that, even if the HAB did not err in conducting de novo review of the three remaining variance factors, the HAB's review was nevertheless erroneous because it incorrectly interpreted RSA 674:33, III and, consequently, improperly relied on the posture of the ZBA's vote in its review. However, the HAB stated that the voting posture did not factor into its analysis of the three other factors, and the Town does not argue that the findings were otherwise erroneous. Therefore, the Town has failed to show reversible error. See Gallo v. Traina, 166 N.H. 737, 740 (2014).

For the foregoing reasons, the HAB's reversal of the ZBA's variance determination is not unjust or unreasonable. Accordingly, the court affirmed.

***Daniel G. Busa & a. v. Town of Auburn*, N.H. Supreme Ct., Case No. 2022-0439 (2023)**
(In its entirety)

The court has reviewed the written arguments, oral arguments, and the record submitted on appeal, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(2). The plaintiffs, Daniel and Marjorie Busa, appeal an order of the Superior Court (St. Hilaire, J.) granting the Town of Auburn's (Town) motion to dismiss the plaintiffs' petition for writ of mandamus for failing to exhaust their administrative remedies. The plaintiffs argue that the trial court erred because the Auburn Board

of Selectmen (Board) failed to issue a decision on their 2021 application to unmerge their lots, and thus, they could not exhaust their administrative remedies by appealing to the Zoning Board of Adjustment (ZBA).

We conclude that the Board did in fact reach a decision that could have been appealed to the ZBA pursuant to RSA 674:39-aa, III (Supp. 2020) (amended 2021). See RSA 674:39-aa, III ("All decisions of the governing body may be appealed in accordance with the provisions of RSA 676."). In 2019 and 2021, the plaintiffs applied to the Board to unmerge their lots pursuant to RSA 674:39-aa. As relevant here, in its 2021 decision the Board determined that the "2019 decision was a final decision that could have, but was not, appealed by the [plaintiffs]." Consequently, the Board determined that the plaintiffs "cannot now challenge" its prior decision that the lots were voluntarily merged. It therefore concluded, "[a]s a result, this Board will not take any action on the current application by the [plaintiffs] as the issue has already been acted on in 2019."

When determining whether an agency's decision "'constitutes a final administrative disposition of the issue,'" we have previously held that "'the crux of the matter is the practical impact of . . . the action.'" Appeal of Countrywide Home Loans, 163 N.H. 139, 143 (2011) (brackets omitted) (quoting New Hampshire Bankers Ass'n v. Nelson, 113 N.H. 127, 130 (1973)). The plaintiffs attempt to distinguish Appeal of Countrywide Home Loans by arguing that it involved our review of an agency decision following the agency's investigation and examination of the facts; whereas here, the Board "made no such investigation or review of the 2021 Application" before issuing its decision. We have never held that whether an agency conducts an investigation or engages in fact finding prior to reaching its decision is relevant to whether an agency's action or inaction constitutes a final decision. See id. Here, our conclusion is 2 consistent with our holding in Appeal of Countrywide Home Loans. The Board's statement that it "will not take any action on the current application" provided its final decision denying the plaintiffs' requested relief. See id.

In addition, assuming the argument is preserved for our review, we are unpersuaded by the plaintiffs' contention that it would have been "futile" to appeal to the ZBA. As previously detailed, the Board articulated the legal grounds for its decision to deny the plaintiffs' application. Thus, even if we credit the plaintiffs' argument that the Board was bound by RSA 676:3, I (2016), the Board satisfied the statutory requirements. Moreover, nothing in the relevant statutory framework foreclosed an appeal by the plaintiffs to the ZBA to review the merits of that decision. See RSA 676:5 (2016) ("Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof." (emphasis added)).

We have frequently reiterated that a writ of mandamus will not be issued "where the remedy by appeal or error to another administrative board or tribunal has not been exhausted." Bosonetto v. Town of Richmond, 163 N.H. 736, 746 (2012) (quotation omitted). In this case, it is undisputed that the plaintiffs failed to timely appeal both decisions of the Board to the ZBA as set forth in RSA 674:39-aa, III. Consequently, they have failed to exhaust their administrative remedies and mandamus relief is not warranted under these circumstances. Id. Indeed, the plaintiffs conceded at oral argument that, if we conclude that the Board rendered a final decision in 2021, the plaintiffs cannot prevail in this appeal. In light of our conclusion, we therefore affirm the trial court's decision granting the Town's motion to dismiss and need not address the plaintiffs' remaining arguments concerning the underlying merits of the plaintiffs' applications to the Board. Finally, the plaintiffs' request for attorney's fees and costs is denied because the plaintiffs are not the "prevailing party." See Sup. Ct. R. 23.

Affirmed.

Joy Street, LLC v. Town of Chesterfield, N.H. Supreme Ct. Case No. 2021-0383 (2023)

(In its entirety)

The court has reviewed the written arguments and the record submitted on appeal and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(2). The plaintiff, Joy Street, LLC, appeals a decision of the Superior Court (Ruoff, J.) affirming a decision of the Town of Chesterfield's Zoning Board of Adjustment (ZBA). We affirm.

The following facts are drawn from the certified record or are otherwise supported by the record. This case concerns a deck and walkways constructed out of "permeable pavers" located within the Chesterfield residential and Spofford Lake zoning districts. In April 2019, the plaintiff received a permit from the New Hampshire Department of Environmental Services (NHDES) to replace 504 square feet of deck and walkway with permeable pavers. Thereafter, the plaintiff installed additional permeable pavers, increasing the total square footage of pavers on the property to 2,071 square feet. NHDES inspected the installation on October 15, 2019, and on November 21, 2019, granted a permit allowing the plaintiff to "retain impacts associated with the installation of 2,071 square feet of pervious permeable patios and walkways.

On October 17, 2019, the Town of Chesterfield (the Town) notified the plaintiff that, under the relevant zoning ordinances, the pavers were impermeable structures which, together with the existing structures on the lot, exceeded the allowed impervious lot coverage. On November 7, 2019, the Town issued a "Notice of Violation and Cease and Desist Order" for violation of the Chesterfield Zoning Ordinance (CZO), notifying the plaintiff that it would be subject to statutory fines for each day that "violations continue." Specifically, the Notice advised that only the initial 504 square feet of pavers were permitted and all others needed to be removed as violative of the 20% coverage limitation under CZO 203.4. The plaintiff promptly filed an "Appeal From an Administrative Decision" seeking to have the November 7 decision reversed.

The ZBA held a hearing to review the plaintiff's appeal on February 18, 2020. During the hearing, the ZBA heard testimony on the nature of the pavers. There was also discussion about the maintenance and efficacy of the product over its 25-year lifespan. The ZBA also discussed the definition of 2 "impermeable" under the CZO, the reason that pavers like the ones at issue do not fall under that definition, and the proper process for receiving permitting from the Town.

The ZBA continued the hearing to its May 12, 2020 meeting. The scope of the May hearing was limited to whether the definition of "impervious" under the Shoreland Water Quality Protection Act (Shoreland Protection Act), RSA ch. 483-B (2013), or the CZO controlled. There was no dispute that under the CZO the pavers are considered "impermeable coverage" and that the construction brought the total impermeable coverage over the "20% of the area of the lot" allowed by the ordinance. Thereafter, the ZBA continued the hearing to June 11, 2020. Most of the discussion during the June 11 hearing concerned whether the definition in the Shoreland Protection Act or the CZO controlled under the circumstances. After some discussion about the evidence presented during the three hearings, the ZBA unanimously voted to deny the plaintiff's appeal. The plaintiff moved for rehearing, which was denied.

The plaintiff appealed the ZBA's decision to the superior court. The trial court first addressed whether the definition of "impermeable" contained in RSA chapter 483-B preempts the definition contained in the CZO and, therefore, controls. The court concluded that RSA chapter 483-B does not preempt the CZO because RSA 483-B:3, II expressly "allows stricter local laws to control over state laws," and

RSA 483-B:8 "encourages towns to 'adopt land use control ordinances [relative] to all protected shorelands which are more stringent than the minimum standards [contained] in [RSA chapter 483-B].'" (Quoting RSA 483-B:8, I.) As a result, the trial court determined that the ZBA was correct in concluding that the more stringent definition of "impermeable" under the ordinance applied. It ultimately affirmed the decision of the ZBA, finding that the plaintiff's "pavers were clearly impermeable under [CZO] 203.6 and thus the lot exceeded the total allowable impermeable coverage." This appeal followed.

Our review in zoning cases is limited. Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019). The party seeking to set aside the ZBA's decision bears the burden of proof on appeal to the trial court. Id. The factual findings of the ZBA are deemed prima facie lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is persuaded, based upon a balance of probabilities, on the evidence before it that the ZBA's decision is unreasonable. Id. The trial court's review is not to determine whether it agrees with the ZBA's findings, but to determine whether there is evidence upon which they could have been reasonably based. Id. The trial court reviews the ZBA's statutory interpretation de novo. Id. We will uphold the trial court's decision on appeal unless it is not supported by the evidence or is legally erroneous. Id. We review the trial court's statutory interpretation de novo. Id.

The present dispute concerns the relationship between RSA chapter 483- B and CZO 203.6.1 Resolution of this dispute requires us to engage both in statutory interpretation and the interpretation of a zoning ordinance. The interpretation of a statute is a question of law, which we review de novo. Avery v. Comm'r, N.H. Dep't of Corr., 173 N.H. 726, 733 (2020). In matters of statutory interpretation, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id. We interpret the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. Id. We do not consider words and phrases in isolation, but rather within the context of the statute as a whole, which enables us to better discern the legislature's intent in light of the policy or purpose sought to be advanced by the statutory scheme. Id. Absent an ambiguity, we will not look beyond the language of the statute. Id.

Likewise, the interpretation of a zoning ordinance is a question of law that we review de novo. Batchelder v. Town of Plymouth Zoning Bd. Of Adjustment, 160 N.H. 253, 256 (2010). The traditional rules of statutory interpretation generally govern our review. Id. Thus, the words and phrases of an ordinance should be construed according to the common and approved usage of the language. Id. When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent. Id. Moreover, we will not guess what the drafters of the ordinance might have intended, or add words that they did not see fit to Ie. Id. at 256-57. We determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases. Id. At 257. The plaintiff asserts that, although it "does not now contend or ever contended that the enactment of RSA 483-B preempted the impervious or impermeable coverage issue," the zoning ordinance "expressly included wording that preempts those provisions in its ordinance which conflict with the provisions of RSA 483-B." The plaintiff's argument relies on language in CZO 203.6, which states in relevant part:

> In the Spofford Lake District, all uses shall first be regulated by the Shoreland Protection Act (RSA 483.B — see Appendix B) and then permitted in compliance with the existing residential district . . . .

The plaintiff relies on the language in CZO 203.6 — "all uses shall first be regulated by the Shoreland Protection Act" — to support its assertion that the Town has created an ordinance that allows the statute to preempt its own regulation. The plaintiff interprets this language to mean that wherever the language of the municipal regulation is in conflict with the standards contained in RSA chapter 483-B, the standard contained in the statute preempts the municipal ordinance. We disagree.

The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, state law. Girard v. Town of Plymouth, 172 N.H. 576, 585 (2019). State law impliedly preempts local law when there is an actual conflict between the two. Id. Unless the state statute provides otherwise, a conflict resulting in preemption exists when a municipal ordinance or regulation permits that which a state statute prohibits or vice versa. Id. Moreover, even when a local ordinance does not expressly conflict with a state statute, it will be preempted when it frustrates the statute's purpose. Id. Because preemption is essentially a matter of statutory interpretation and construction, whether a state statute preempts local regulation is a question of law, which we review de novo. Id.

RSA chapter 483-B sets forth "minimum standards necessary to protect the public waters of the state of New Hampshire." RSA 483-B:2. These standards concern "the subdivision, use, and development of the shorelands of the state's public waters." Id. Reflecting a town's general regulatory authority over land use in its municipality, see RSA 674:16, II (2016) ("The power to adopt a zoning ordinance under this subdivision expressly includes the power to adopt innovative land use controls."), RSA chapter 483-B contains an express grant of authority allowing municipalities to "adopt land use control ordinances relative to all protected shorelands which are more stringent than the minimum standards contained in this chapter." RSA 483-B:8, I. Moreover, RSA chapter 483-B provides that "[w]hen the standards and practices established in this chapter conflict with other local or state laws and rules, the more stringent standard shall control." RSA 483-B:3, II.

The plaintiff contends that the zoning ordinance mandates that RSA chapter 483-B controls wherever the statute and ordinance conflict; however, nothing in the language of CZO 203.6 supports this position. Furthermore, the Shoreland Protection Act itself expressly allows the municipality to more stringently regulate land use, RSA 483-B:8, I, and expressly states that whenever there is conflict between the statute and the local authority "the more stringent standard shall control," RSA 483-B:3, II. This express grant of authority resolves any express or implied conflict between the statute and the 5 ordinance. As a result, we conclude that RSA chapter 483-B does not preempt the municipal regulations, either by its own terms or by the terms expressed in CZO 203.6.

No argument has been raised that the zoning ordinance's definition is arbitrary or unreasonable. Nor is there any dispute that, under the CZO, the pavers are considered "impermeable coverage" and that the installation of the pavers brought the total impermeable coverage over the "20% of the area of the lot" allowed by the CZO. As a result, we conclude that the additional pavers installed were not permitted. For this reason, we conclude that the trial court did not err in affirming the ZBA decision.

Affirmed.

David Pelletier & a. v. Town of Rye, **N.H. Supreme Ct. Case No. 2021-0441 (2023)**
(In its entirety)

The court has reviewed the written arguments and the record submitted on appeal, has considered the oral arguments of the parties, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(2). The appellants, David and Karen Pelletier, appeal an order of the Superior Court

(Honigberg, J.) upholding a decision of the Town of Rye Planning Board that approved the site plan and special permit application of the Samonas Realty Trust (the Developer). We affirm.

The trial court's order recites, or the record establishes, the following facts. In May 2018, the Developer began discussing a project proposal with the planning board. The property is next to a tidal marsh and currently contains ten rental cottages, a house, and a commercial building. The Developer proposed razing the existing structures and constructing four new buildings, each containing two townhouse units.

The Developer filed applications with the Town of Rye Zoning Board of Adjustment (ZBA) for height and set-back variances. The ZBA granted the variances and the appellants filed a motion for rehearing, which the ZBA denied. The appellants then appealed the ZBA's decision to the superior court. The Developer moved to dismiss the appeal, arguing that the appellants lacked standing. The Superior Court (Wageling, J.) denied the Developer's motion, concluding, among other things, that the visual impact of the project was a cognizable injury sufficient to establish standing. After considering the merits of the appeal, the superior court affirmed the ZBA decision.

In January 2019, the Developer applied for a special use permit from the Planning Board pursuant to section 304.6 of the Town of Rye Zoning Ordinance. See Rye, N.H., Zoning Ordinance § 304.6(B) (2019). Section 304.6 is titled "Tourist Accommodation Uses" and its stated purpose is "to allow land housing tourist accommodation uses which may have become economically or functionally obsolete to be redeveloped in residential use at densities compatible with the density of the surrounding area." Id. § 304.6(A). Over thenext two years, the planning board held six public hearings to receive input on the project. The trial court found that the planning board received multiple written reports regarding "surface water, flooding, traffic management, impervious surfaces, use and density, the existing natural wetlands, and every other relevant aspect of the proposed development." The appellants or their counsel often appeared at the hearings and site-walk and submitted comments in opposition to the project. At the request of the planning board, the Developer ultimately reduced the number of buildings from four to three, and the total number of units from eight to six.

At the January 2020 hearing, the planning board voted that the proposal satisfied Town of Rye Zoning Ordinance § 304.6(H). That section directed the board to "determine, by a vote on the record," that the proposed redevelopment satisfied six standards, including that "[t]he granting of the Special Use Permit will not be detrimental to adjacent property or the neighborhood," and that "[t]he architecture of the proposed dwellings is compatible with the architecture of dwellings located within 300 feet of the site." Id. § 304.6(H)(2), (5). After voting that the standards were met, the planning board voted to grant conditional approval for the Developer's special use permit, including thirtyfour conditions to be satisfied.

In February 2020, the appellants submitted a petition to the superior court appealing the conditional approval pursuant to RSA 677:15. See RSA 677:15 (2016). The Developer intervened in the action. In their petition, the appellants argued that conditional approval was unreasonable and unlawful because it precluded public input and consideration of unresolved issues. The appellants also contended that the decision was unlawful because the project was modified such that the variances were no longer valid. And lastly, the appellants asserted that "the Record will demonstrate that there was no evidence" to support the planning board's conclusion that Town of Rye Zoning Ordinance § 304.6(H)(2) and (5) were satisfied. In September 2020, the appellants filed a memorandum of law which reiterated these arguments.

The superior court determined that it lacked jurisdiction, stayed the case, and remanded it to the planning board to determine whether the conditions were satisfied. Following a compliance hearing in February 2021, the planning board found that the conditions were met and rendered final approval. The superior court lifted the stay and held a hearing in April 2021. And in August 2021, the superior court affirmed the planning board's decision to grant final approval of the project. The appellants filed a motion for reconsideration, which the court denied. This appeal followed. As a preliminary matter, the Developer and the Town of Rye filed a motion to strike portions of the appellants' appendix that they assert contain material not submitted to the planning board or superior court.2 Because the disputed materials do not affect our analysis, however, we need not address whether they are properly part of the record.

The trial court's review of a planning board's decision is limited. Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 503-04 (2018). The trial court must treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. Id. At 504. The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable. Id. The trial court determines, not whether it agrees with a planning board's findings, but rather whether there is evidence upon which its findings could have been reasonably based. Id.

Our review is similarly limited. We will reverse a trial court's decision on appeal only if it is not supported by the evidence or is legally erroneous. Id. We review the trial court's decision to determine whether a reasonable person could have reached the same decision as the trial court based on the evidence before it. Id. (quotation omitted).

On appeal, the appellants first argue that the trial court's order is "unreasonable and illegal" because its findings "violate collateral estoppel." The appellants rely on the earlier decision by the Superior Court (Wageling, J.) in the separate ZBA appeal, which found that the visual impact of the project was a cognizable injury and that the appellants therefore had standing to challenge the ZBA decision. They assert that this decision on standing conclusively established that there was a "detrimental impact" in violation of Town of Rye Zoning Ordinance § 304.6(H)(2). We disagree.

Collateral estoppel applies when, among other requirements, "the first action resolved the issue finally on the merits." Tyler v. Hannaford Bros., 161 N.H. 242, 246 (2010). A finding that a party has standing to appeal from a ZBA decision, however, is not a final resolution on the merits. See City of Hope Nat. Medical Ctr. V. Healthplus Inc., 156 F.3d 223, 228 (1st Cir. 1998) ("The standing inquiry does not focus on the merits of the dispute. It focuses only on 'whether the litigant is entitled to have the court decide the merits of the dispute.'" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))); see also Town of Londonderry v. Mesiti Dev., 168 N.H. 377, 381 (2015) (noting that "standing is a question of subject matter jurisdiction"). Rather, "[s]tanding is the determination of whether a specific person is the proper party to bring a particular matter to the Court for adjudication." Benjamin v. Aroostook Medical Center, Inc., 57 F.3d 101, 104 (1st Cir. 1995) (quotation omitted); see also Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 770 (2013) ("[W]hether an appealing party is a 'proper party' is a question 'separate from the merits of the appeal.'" (quoting Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 545 (1979))). The appellants' emphasis on the trial court's finding of a "cognizable injury" in its standing decision is misplaced. A cognizable injury is not necessarily an actual, existing injury. It is the court's determination that the alleged injury is "[c]apable of being known or recognized" or "capable of being judicially tried or examined before a designated tribunal." Black's Law Dictionary 327 (11th ed. 2019) (defining "cognizable"). Thus, the trial court's finding that the "visual impact" of the project is a cognizable injury to Karen Pelletier's "ability to use and enjoy her

property" is merely a finding that the appellants adequately alleged an injury sufficient to confer standing. It is not a final decision on the merits, and, therefore, collateral estoppel does not apply.

The appellants next argue that the superior court erred in upholding the planning board's decision because the granting of the special use permit was detrimental to their property, and thus violated Town of Rye Zoning Ordinance § 304.6(H)(2). The appellants first assert that the proposed development will produce detrimental storm water runoff, but fail to cite anything in the record that demonstrates such an impact. To the contrary, the record reflects that the planning board received evidence that the project will reduce runoff compared to current conditions on the site. The planning board received expert reports from Altus Engineering and Sebago Technics concluding that the project will produce less runoff than under existing conditions. Furthermore, the board received the Developer's application for an Alteration of Terrain permit from the New Hampshire Department of Environmental Services (DES), which included the Developer's drainage calculations. DES granted that permit application.

The appellants assert that the Developer's drainage calculations are flawed. They allege that the existing cottages stand on stilts over gravel foundations which permit water drainage, and, because the calculations assume the cottages are impermeable surfaces, the calculations "thereby significantly overstate the amount of stormwater runoff under existing conditions." The appellants do not, however, identify evidence in the record which contradicts the Developer's calculations. The only evidence that the appellants cite is photographs of the exterior of the cottages, included as part of the Developer's Alteration of Terrain permit application. Absent supporting evidence, neither the planning board nor the trial court was required to accept this theory. The expert reports concluding runoff would be reduced support the planning board's determination, and given this record support, the trial court did not err by upholding that determination.

The appellants further assert that the visual impact of the project will be detrimental to their ocean views. The planning board, however, received evidence that the project would not negatively impact the appellants' views of the ocean. The Developer submitted a report from Altus Engineering which concluded that the appellants' views would not be adversely impacted. That report included photographs of the appellants' sightline, which show the negligible impact of the development relative to existing obstructions like foliage and other buildings. The appellants provided no evidence that demonstrates a material visual impact detriment. Accordingly, there was sufficient evidence in the record for the trial court to uphold the planning board's finding that runoff and visual impact would not be detrimental to neighboring properties.

The appellants next argue that the granting of the special use permit violated Town of Rye Zoning Ordinance § 304.6(H)(5) because the project's architecture is not compatible with the architecture of nearby properties. They assert there is "no basis for the Planning Board's conclusion that the project was architecturally consistent." The record contradicts this assertion. At the April 2019 hearing, the project architect presented a slideshow with photos of surrounding buildings along with images of the proposed design, and told the planning board that "the project was developed with a strong focus on . . . the character of the community." The appellants argue that the development is "simply too big" and "not compatible with the scope of similar properties," but cite nothing in the record that shows relative incompatibility. Because the planning board considered the architecture of the development and received evidence that the project was designed to match the character of the community, the trial court had sufficient evidence to uphold the planning board's decision.

Next, the appellants argue that the "Planning Board unreasonably approved the Intervenor's site plan based on the provisions of Rye Zoning Ordinance § 304.6[D]." That section of the ordinance states

that the "planning board may require lower densities if necessary to make a proposed redevelopment compatible with its environs based on consideration of such factors such as wetlands . . . septic capability . . . or other characteristics of the site which affect sound land planning." Rye, N.H., Zoning Ordinance § 304.6(D) (emphasis added). The appellants assert that "there is no justification for the Planning Board simply approving a project at maximal septic density that creates substantial developmental impacts on the delicate ecology of the wetland." This challenge is belied by the record and, particularly in light of the reduction from the original eight units to six units, we conclude that the trial court properly determined that the board did not act unreasonably or unlawfully.

Finally, the appellants argue that the planning board's site plan approval was unlawful because the Developer's variances were invalid. The variances at 6 issue were conditioned on "Planning Board approval of the proposed project without plan modifications affecting these variances." The final plan approved by the planning board differed from the plan approved by the ZBA, and the appellants assert that the changes "clearly invalidated the prior zoning relief." However, the appellants failed to explain to the superior court how the changes affect the variances, and they have failed to do so on appeal. After reviewing the final plan, the Rye Building Inspector concluded that the revised plan still complied with the existing variances. Moreover, a member of the planning board expressly asked the appellants' counsel if the variances had been violated with the changes, and counsel answered "no."

Based upon our review of the record, we conclude that the superior court's decision is neither unsupported by the record nor legally erroneous, and that the court did not err when it determined that the appellants failed to carry their burden to demonstrate that the planning board's decision to grant final approval to the Developer was unreasonable. See Trustees of Dartmouth Coll., 171 N.H. at 504.

Affirmed.

Rochester Agricultural & Mechanical Association v. City of Rochester, N.H. Supreme Ct. Case No. 2022-0538 (2023)

(In its entirety)

The plaintiff, Rochester Agricultural & Mechanical Association (RAMA), appeals a decision of the Superior Court (Howard, J.) granting the motion to dismiss filed by the defendant, City of Rochester (City). We reverse and remand.

RAMA's pleadings allege the following facts. RAMA is a non-profit organization with a stated purpose to improve and stimulate agricultural and mechanical skill. In 1879, RAMA purchased a 68-acre parcel in Rochester (the property) on which a fair has been held every year thereafter except "one year during the World War, in 2017 due to financial reasons, and in 2020 due to the pandemic." Although the fair is "conducted during a limited period of time during the year, the . . . Property has been used by and for the benefit of the fair, RAMA's purpose, and for other organizations during the year." Activities that have been conducted on the property include: "circuses, motorcycle and automobile races and shows, Fourth of July celebrations, flea markets, bull riding, motor vehicle crash derbies, organizational outings, antique shows, Easter egg drops, plant sales, and concerts."

This "non-fair use of the property has been essential in meeting RAMA's financial obligations" because the fair's proceeds do not cover its expenses. Moreover, such non-fair, "'special events' [use] has been consistent, continuous and uninterrupted for as many years as the directors, shareholders and citizens of Rochester can recall."

Beginning in 2021, the City denied RAMA event permits for events that had been conducted on the property in the past, including "a monster truck show, rally cross, and a Christmas light show." One such permit, for which RAMA applied in December 2021, was for a motor vehicle event called Twisted Metal, which RAMA had previously hosted in 2019, 2020, and 2021.

The City's zoning administrator denied the permit in January 2022, stating that "this use is not part of the Annual Fair that this property is grandfathered for. This is an expansion of use and is not permitted." RAMA appealed that decision to the ZBA, which denied the appeal, stating, "The allowed use on the property is grandfathered non-conforming fairground which may not be expanded, enlarged, extended, or intensified without the appropriate land use board approval." RAMA filed a motion for rehearing, which the ZBA denied on April 13, 2022.

Thereafter, RAMA filed this declaratory judgment action in superior court. See RSA 491:22 (Supp. 2022). In addition to the foregoing allegations, RAMA alleged that it has "vested rights to continue the non-fair activities which have been conducted with the City's knowledge and approval for well over 50 years and the City's sudden reversal of its approval is a violation of established constitutional, statutory and common law." It further alleged that this "sudden reversal . . . and resulting deprivation of necessary income is due in part to the failure of discussions in which the City sought to acquire RAMA's property at a discounted price." RAMA sought a declaration that it "has vested rights to continue to hold non-fair events on its property similar to those events conducted in the past" and an injunction prohibiting the City "from denying permits for non-fair events that are similar to past non-fair events."

The City moved to dismiss, arguing that the superior court lacked subject matter jurisdiction because RAMA "failed to properly file an appeal under RSA 677:4 within 30 days" of the ZBA's denial of the motion for rehearing on the Twisted Metal permit decision. The trial court granted the motion, ruling that "RAMA cannot pursue its claims under RSA 491:22 for failure to exhaust available remedies under RSA 677:4." This appeal followed.

"Generally, in ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted." Stergiou v. City of Dover, 175 N.H. 315, 317 (2022) (quotation omitted). "In making this determination, the court would normally accept all facts pleaded by the plaintiff as true and view those facts in the light most favorable to the plaintiff." Id. (quotation omitted). "When, however, the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." Id. At 317-18 (quotation omitted). "An assertion that a claim should be dismissed because the trial court lacks jurisdiction to hear the claim is one such defense. We will uphold a trial court's ruling in such a case unless its decision is not supported by the evidence or is legally erroneous." Id. At 318 (quotation and ellipsis omitted).

RAMA argues that the trial court "erroneously and narrowly construed . . . [RAMA's declaratory judgment action] to be a simple appeal of a ZBA denial of one license," while RAMA's pleadings actually allege "much broader facts" and request much broader relief. We agree. As detailed above, RAMA's pleadings allege that RAMA has "vested rights to continue [its] non-fair activities" which, reasonably construed, refers to all such activities, not just Twisted Metal. Citing denials of permits for other events in addition to Twisted Metal, the pleadings allege a sudden reversal in the City's treatment of RAMA's non-fair activities in general and intimate that this abrupt change of course was motivated by the collapse in negotiations for the City's purchase of the property. Thus, as RAMA correctly

asserts, this action "is not an RSA 677:4 appeal" but, rather, is a claim "for equitable relief from the City's concerted interference, since the breakdown in talks over the sale of RAMA's land to the City, with RAMA's vested rights and unconstitutional limiting of . . . RAMA's vested uses to just the fair."

Reversed and remanded.

Keeping Excess Profit from Sale of Tax-Deeded Property Violates the Takings Clause of the Fifth Amendment; a 10% Assessed Penalty Imposed under RSA 80:90, I (f), May be an Excessive Fine under the Eighth Amendment of the US Constitution

***Tyler v. Hennepin County, Minnesota et al.*, U.S. Supreme Ct. Docket No. 22-166 (2023)**

Minnesota resident Geraldine Tyler moved into a senior facility in 2010 and did not pay taxes on her condominium after she left; by 2015 the property had accrued approximately $15,000 in unpaid real estate taxes, interest, and penalties. In accordance with Minnesota law regarding forfeitures, Hennepin County took possession of the condominium and sold it for $40,000. This satisfied Tyler's $15,000 debt and made an excess profit of $25,000, which Hennepin County retained Following this, Tyler filed suit claiming the county's actions violated the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. This action was initially dismissed by the District Court for failure to state a claim; and the Eighth Circuit affirmed the dismissal arguing that Tyler had forfeited her property interest in the condominium and thus it was not a taking and that the seizure and sale of her home was executed to remedy her unpaid taxes, not to penalize her for failure to pay. The US Supreme Court reversed.

In his opinion for a unanimous Court, Chief Justice Roberts argued that property taxes and associated late fees and interests, along with seizure and sale of delinquent properties, are not takings inherently under the Takings Clause. However, a tax forfeiture process that results in a taxpayer losing her $40,000 home to the State to fulfill a $15,000 tax debt, with the State retaining the $25,000 surplus is a taking of private property without compensation in violation of the Fifth Amendment. This decision aligns with the NH Supreme Court's ruling in *Polonsky v. Town of Bedford,* 173 N.H. 226 (2020) that under the New Hampshire Constitution municipalities are not entitled to keep any of the "excess proceeds" from the sale of tax deeded property.

However, another question posed in the *Hennepin County* decision but not answered is whether the retention of excess proceeds from sale of tax deeded property also constitutes a violation of the Excessive Fines clause of the Eighth Amendment. As noted by Justice Gorsuch in a concurring opinion, the retention of excess proceeds from a tax sale might also be considered a violation of the Excessive Fines clause, citing to *Austin v. United States*, 509 U.S. 602 (1993). In that regard NH municipalities should consult with their regular legal counsel and decide whether to impose the 10% assessed value penalty under RSA 80:90, I (f). That provision states that when a property owner redeems property from tax deed the owner (except if the property was the principal residence of the owner) shall pay "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." In those circumstances where the amount of that penalty is grossly disproportionate to the outstanding tax debt and other interest and fees due, that penalty might be construed to be an Excessive Fine contrary to the Eight Amendment.

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