**E. BARTLETT v. CITY OF MANCHESTER, 164 NH 634 (2013) (No good deed goes unpunished).**

The background:

Brookside's property is a 10.04-acre parcel of land in a residential zoning district in the north end of Manchester. The property contains a sanctuary, chapel, cottage, residence building, carriage house, office space, parking lot, and green space. Formerly known as Franklin Street Congregational Church, Brookside has operated church facilities on its property since 1958 and operates such facilities as a nonconforming use. The petitioners are abutters to Brookside's property.

Note - several abutters were dismissed from the appeal by the trial court because they were too distant from the church property and had not asserted sufficient impact from the proposed use.

Among the activities the church engaged in on the property

- Church services
- Chapel services
- Community gardens
- Thrift shop
- Exercise classes
- AA meetings
- Refugee assistance
- Day care (previously in carriage house
- Pastoral counseling

The application:

In April 2010, Brookside applied to the City of Manchester for a permit to allow a "work-based, self-help organization" to occupy a portion of its carriage house. The next day an administrative official of the City of Manchester Planning and Community Development Department denied the application, stating that Brookside's proposed use was prohibited by "Section(s) 5.10(J) 8 Social service organization, District R-1 B, of the Zoning Ordinance of the City of Manchester." (Emphasis omitted.) The denial letter informed Brookside that "[f]urther proceedings contemplated pertaining to this application must be pursuant to NH Revised Statutes Annotated 674:33 or other statutory provisions relative to Zoning Boards of Adjustment, as may be appropriate."

The first point of departure is the difficulty fitting the proposed use into the list of uses afforded by the Manchester zoning ordinance and it's designation as a social service organization. As came out in the record, another allowed use - adult day care - could have been assigned to the project. The church's carriage house had also previously been used for a child day care. And various meetings, organizations and counseling already took place on church grounds.

Confronted with the church's request, the designation was made within the inexact options available. At this point, the church, being unrepresented, did not think to question the administrative decision, but rather went ahead and applied for a variance.

In response, Brookside applied to the ZBA for a variance to allow Granite Pathways, a non-profit corporation, to operate a work-based, self-help organization for adults with mental illness inside Brookside's carriage house. According to the variance application, the organization would be the first of its kind in New Hampshire and would help members "find support in achieving their goals for employment, education, wellness, housing, and personal fulfillment." Membership in the organization

would not be part of any clinical or mandated treatment program, but rather would be voluntary. Brookside's application stated that the organization "would be similar to other church activities that have benefitted many people and the neighborhood for 50 years," and would represent "the essence of what the church is."

Two weeks later the ZBA held a public hearing on Brookside's application. Representatives of Brookside and Granite Pathways attended the hearing, and Dawn Brockett, co-chair of Brookside's board of trustees, told the ZBA that the variance "application and supporting documents contain [ed] all of the necessary information." After a single parishioner spoke in favor of granting Brookside the variance, several members of the community expressed reservations and opposition. Counsel for petitioner Bartlett voiced concern that granting the variance would raise safety, security, and transportation issues, and further argued that Brookside had neither demonstrated unnecessary hardship nor that granting the variance would not diminish surrounding property values. The ZBA then tabled Brookside's application and scheduled a second public hearing to be held the following month.

Thinking they were in over their heads, Brookside sought counsel. Sue Manchester, from Sheehan Phinney Bass &Green, stepped up and represented the church pro-bono. She then enlisted me when it looked like litigation was imminent. Little did she or I know at that point, in 2010, that this case would take three years to resolve.

At the second public hearing, Brookside, now represented by counsel, informed the ZBA that, in response to concerns expressed at a recent neighborhood meeting, it would be willing to stipulate to the following variance conditions [having to do primarily with hours of operation and supervision and setting a five year duration for the use].

Query here, the viability of time limits. If a variance is granted based on the five part test, does the passage of time somehow dilute or transform the satisfaction of the criteria?

At the conclusion of the hearing, the ZBA granted Brookside its requested variance subject to the ... conditions. The written notice of decision states that Brookside met its burden of proof in showing that [the five criteria for a variance were met].

The first hearing was held May 13, 2010. The second hearing was held June 10, 2010.

After the ZBA granted timely motions for re- hearing and held a third public hearing on the matter, it again granted Brookside the variance with the same conditions. The petitioners again moved for rehearing, arguing, among other things, that Brookside had not satisfied the criteria set forth in RSA674:33, I(b) (Supp.2012), and [t]hroughout the hearing, a supporting member of the ZBA spoke in favor of the variance based on the belief that the proposed use was an accessory church use. The belief is not supported by the facts or the law. If the use were an accessory use, no variance would be required. Since [Brookside] did not dispute that a variance was required, the ZBA acted outside of its jurisdiction to the extent it considered the accessory use issue rather than [Brookside's] satisfaction of variance criteria.

The third hearing was held August 12, 2010 leading to a court appeal filed October 7, 2010.

After the ZBA denied the petitioners' motion for rehearing, they appealed to the superior court, which vacated the ZBA's decision. Focusing on unnecessary hardship, the court ruled that the ZBA had unlawfully found that literal enforcement of the provisions of the ordinance would cause Brookside unnecessary hardship. Notwithstanding this ruling, however, the court found that the Granite Pathways

Clubhouse and similar uses of Brookside's property are lawful accessory uses under the ordinance and the accessory use doctrine. Thus, the court vacated the ZBA's decision granting Brookside a variance because it found that Brookside did not need a variance.

Here is where it gets interesting. Brookside did not meet the hardship criteria because it did not need a variance! How'd that happen?

The appeal was simply about whether the application met the 5 criteria for a variance. But part of the appeal challenged the decision of the board based on what the Plaintiffs believed was a mistaken impression of the board that the proposed use was an accessory church use. Meanwhile, Brookside's arguments to the trial court focused on whether the five criteria were met. Brookside referenced other church activities to show that the proposed use was within the spirit of the ordinance which allowed for churches.

The Plaintiffs raised additional arguments that the church already made significant use of its property such that denying this use would not be a hardship and tried to distinguish the proposed nonprofit mental health clubhouse as a business. In response, the church noted instances in other communities where similar social service programs (teen drop in centers, unwed parent housing) were recognized as church activities.

Judge Abramson heard arguments on the certified record and took a view. She then wrote her opinion which jettisoned the variance on the lack of hardship because the clubhouse qualified as an accessory use.

Off to the Supreme Court:

On appeal, the petitioners contend that the superior court lacked subject matter jurisdiction to consider whether the Granite Pathways Clubhouse and other similar uses of Brookside's property are permitted as accessory uses under the ordinance. The petitioners assert that Brookside failed to appeal the denial of its permit application, elected to apply for a variance, and did not rely on the accessory use doctrine before the ZBA. More broadly, the petitioners argue that the statutory scheme governing judicial review of ZBA decisions contemplates that the superior court address only issues first considered and decided by the ZBA.

It was an interesting and persuasive argument. Don't we all recognize that the ZBA is supposed to have first crack at arguments made? Don't we all think arguments not made to the ZBA are waived? Haven't we all believed that if you don't challenge the administrative decision, you've forfeited the ability to do so?

For Brookside and the City, we were willing to forgo the get out of jail free card (the accessory use) and simply ask the Supremes to reverse the trial court and affirm the ZBA on the ample record. But that was not to be.

We first address the petitioners' argument that the superior court lacked jurisdiction to consider the accessory use issue. Subject matter jurisdiction refers to the court's statutory or constitutional power to adjudicate the case. State v. Ortiz, 162 N.H. 585, 589 (2011) (quotation omitted).

RSA chapter 677 vests the superior court with jurisdiction to hear appeals of ZBA decisions. To establish jurisdiction in the superior court, a party must both: (1) file a motion for rehearing with the ZBA within thirty days of its decision, see RSA 677:2 (Supp.2012),:3 (2008); and (2) appeal the

ZBA's decision to the court within thirty days of its denial of the motion for rehearing, see RSA 677:4 (Supp.2012). Failure to comply with either requirement divests the superior court of subject matter jurisdiction over the appeal. See Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. of Adjustment, 157 N.H. 710, 712, 958 A.2d 996 (2008) (construing RSA 677:3); Radziewicz v. Town of Hudson, 159 N.H. 313, 316, 982 A.2d 415 (2009) (construing RSA 677:4). Moreover, "no ground not setforth in [the motion for rehearing] shall be urged, relied on, or given any consideration by a court unless for good cause shown the court shall allow the appellant to specify additional grounds." RSA 677:3, I (emphasis added). The statutory scheme "is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal." Atwater v. Town of Plainfield, 160 N.H. 503, 511-12 (2010) (quotation omitted).

Against this statutory backdrop, we hold that the trial court had subject matter jurisdiction to consider whether the Granite Pathways Clubhouse and other similar uses of Brookside's property are permitted as a matter of right under the accessory use provision of the ordinance. In deciding whether Brookside's variance application satisfied the variance criterion of unnecessary hardship, the trial court correctly determined that it had to consider the permissible uses of Brookside's property under the ordinance, including the accessory use provision. See Manchester Zoning Ordinance, art. 3 (defining accessory use of property as "[a] use which exists on the same lot as the principal use of the property to which it is related, and which is customarily incidental and subordinate to the principal use"). We agree with the trial court that, without engaging in this analysis, it could not determine whether literal enforcement of the provisions of the ordinance would result in an unnecessary hardship for Brookside. See RSA 674:33, I(b)(5). Thus, the trial court had subject matter jurisdiction to consider the issue of accessory use in reviewing the ZBA's decision to grant Brookside a variance.

So, a part of determining unnecessary hardship involved analysis of the permitted and non-permitted uses.

We disagree with the premise of the petitioners' argument that the trial court lacked jurisdiction to consider the accessory use issue because Brookside failed to appeal the denial of its permit application. The last sentence of the letter denying Brookside's application states merely that any "[f]urther proceedings contemplated pertaining to this application must be pursuant to NH Revised Statutes Annotated 674:33," without specifying a subsection of the statute. Thereafter, Brookside sought a variance under RSA 674:33, I(b). In this circumstance, and given the interconnectedness between the issues of permitted use and hardship, we are not persuaded that Brookside needed to file a separate appeal pursuant to RSA 674:33, I(a) (2008).

So, the City directs Brookside to seek relief under 674:33. Brookside chooses to apply for a variance rather than challenge the decision of the City. But that's ok because deciding the variance necessarily involves deciding the administrative appeal. Hmmm. Does this mean an applicant should always file both? Should municipalities collapse the current separate appeal forms into one? Should the ZBA conduct this threshold analysis in every application?

Probably so. Both the court and the legislature have taken note of the growing complexity of zoning as evidenced by recent efforts to clarify procedural issues rather than leaving traps for the unwary. A procedure has been established for site plan approval which allows for consolidation of related zoning appeals. Time standards for filing appeals have been clarified. While the burden continues to appropriately be on the applicant or appellant to identify and articulate the issues, given the importance of the rights at stake, the ZBA is no longer a passive review board, but must take active responsibility for proper administration of regulations affecting important rights.

But didn't Brookside waive the right to challenge the administrative decision? Guess not.

Next, we reject the petitioners' argument that, by applying for a variance, "Brookside effectively waived any claim that its proposed use was permitted under the accessory use doctrine from the outset of the ZBA proceedings." We have found nothing in RSA 674:33, I(b) or our common law that compels this conclusion. In the absence of contrary legislative intent, we conclude that contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because, for the reasons discussed above, the ZBA will invariably consider this issue in deciding whether unnecessary hardship exists. Given the complexity of zoning regulation, the obligation of municipalities "to provide assistance to all their citizens seeking approval under zoning ordinances," Richmond Co. v. City of Concord, 149 N.H. 312, 314, 821 A.2d 1059 (2003) (quotation omitted), and the importance of the constitutional right to enjoy property, see Simplex Technologies v. Town of Newington, 145 N.H. 727, 731,766 A.2d 713 (2001), we cannot accept that the mere filing of a variance application limits the ZBA or superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place. Cf. In re Keeper of Records (XYZ Corp.), 348 F.3d 16, 23 (1st Cir.2003) ("Claims of implied waiver must be evaluated in light of principles of logic and fairness.").

Similarly misplaced is the petitioners' reliance on Town of Windham v. Alfond, 129 N.H. 24, 523 A.2d 42 (1986), for the proposition that Brookside waived its right to benefit from the accessory use doctrine because it failed to plead the doctrine before the ZBA. Alfond is inapposite. In Alfond we held that a defendant in a private nuisance suit has the burden to plead the doctrine and produce evidence sufficient to permit a prima facie inference that the disputed use is an accessory one. Alfond, 129 N.H. at 29,523 A.2d 42; see also Treisman v. Kamen, 126 N.H. 372, 377,493 A.2d 466 (1985) ("We therefore hold that when the legality of a defendant's conduct is to be judged under a zoning ordinance, the defendant who claims the benefit of the accessory use doctrine has the burden to raise it by his pleading." (emphasis added)). We did not hold that a variance applicant must alternatively plead the accessory use doctrine. To the extent the petitioners argue that the pleading requirement of Alfond must apply in the present case, we disagree. In Treisman, which we relied upon in Alfond, we explained that considerations of fairness, convenience, and policy require a defendant in a private nuisance suit to plead reliance on the accessory use doctrine. See Treisman, 126 N.H. at 377, 493 A.2d 466. We conclude, however, that these considerations do not warrant the imposition of an affirmative pleading requirement in the variance context where the ZBA must consider what uses of a property are allowed before it can decide whether unnecessary hardship exists.

More proof that ZBAs hold powers and responsibilities unlike private parties engaged in civil disputes.

But weren't the abutters unfairly ambushed by the accessory use ruling? Not in this case, since they had touched on it in their pleadings.

We note that the record refutes the petitioners' other objection-that they lacked notice that the trial court might apply the accessory use doctrine. The petitioners' motion for rehearing of the ZBA's decision, petition of appeal to the superior court, and subsequent requests for findings of fact and rulings of law all reference the issue of accessory use.

So, the trial court was right to call the clubhouse an accessory use and reject the variance? Not so fast.

Our rejection of the petitioners' jurisdictional argument does not end our analysis. We must still determine whether the trial court correctly ruled that the Granite Pathways Clubhouse and other similar

uses of Brookside's property are lawful accessory uses.

We conclude that the trial court lacked a sufficient factual record to decide the accessory use issue, and that it should have remanded the case to the ZBA to consider the issue in the first instance. See RSA 677:11 (2008) (when vacating ZBA decision trial court may remand to the ZBA or local legislative body for further proceedings); Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 311, 922 A.2d 672 (2007) (trial court may remand to the ZBA for clarification). While there were isolated references before the ZBA regarding the uses of Brookside's property that are reasonably allowed, the evidence and arguments submitted to the ZBA focused almost exclusively on whether Brookside had satisfied the variance criteria of RSA 674:33, I(b), not whether the Granite Pathways Clubhouse and other similar uses of the property are lawful accessory uses under the ordinance.

But isn't the determination of accessory use a question of law? Brookside argued desperately on appeal? Not this time.

Although we have held that whether a particular use is an accessory use is a question of law, see KSC Realty Trust v. Town of Freedom, 146 N.H. 271,273, 772 A.2d 321 (2001), resolution of the inquiry still requires a sufficiently developed factual record. See Alfond, 129 N.H. at 30, 523 A.2d 42 (prevailing on claim of accessory use "requires evidence of substantial customary association of the principal and subordinate uses, whereas evidence of the peculiar character of the property in question does not address this issue"); 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 9.03, at 174 (4th ed. 2010) ("Whether a particular use is an accessory use is generally a question of both law and fact."). Accordingly, remand is appropriate because the ZBA is the proper forum for the development of such a record. See Chester Rod and Gun Club v. Town of Chester, 152 N.H. 577, 583, 883 A.2d 1034 (2005) ("When reviewing a decision of a zoning board of adjustment, the superior court acts as an appellate body, not as a fact finder."). Of course, in cases where the record demonstrates, as a matter of law, that the variance applicant's proposed use is a lawful accessory use, remand is unnecessary and the trial court may decide the issue in the first instance. Cf. Lawrence v. Philip Morris USA, 164 N.H. 93,101 (2012) (no need to remand if reasonable fact finder would necessarily reach certain conclusion). But that is not the situation here.

On remand, the ZBA should thoroughly explore the accessory use issue, giving all interested parties, including the City's Planning and Community Development Department, an opportunity to present evidence and arguments as to whether the Granite Pathways Clubhouse is a lawful accessory use of Brookside's property and, if not, whether Brookside should receive a variance.

So, after three public hearings, during which the proposed use was bisected, dissected, analyzed, explained, disclaimed, critiqued and denounced. And, during which the church's current and past operations were detailed. And despite the trial court's on site view of the property, and substantial available case law detailing church based accessory uses, the case was to go back to the ZBA for another hearing not only on the accessory use issue but also whether a variance should be granted if the use is not accessory.

But, asks the church, can't we just skip the accessory use and get our variance? Shouldn't the courts defer to the ZBA? No.

The foregoing discussion also disposes of Brookside's cross-appeal. Given that, on remand, the ZBA must determine whether the Granite Pathways Clubhouse is a lawful accessory use of Brookside's property under the ordinance, we reject Brookside's claim that sufficient evidence in the record establishes its entitlement to a variance.

So what happened? Weary of the fight, and three years into the five year agreed duration for the variance, the abutters and the church settled the case on the terms of the original variance rather than pursue a fourth hearing and further appeals.

Lessons for the ZBA from Bartlett v Manchester

- Try to think of everything
- When making zoning determinations advise applicants they can appeal the decision, seek a variance or both and clarify forms for applications accordingly
- Conduct preliminary staff or board review of each application to determine whether there may be a threshold issue needing resolution

Interesting questions left for another day

- What uses are accessory to churches?
- What is the appropriate geographic area to look to for examples of accessory uses for churches?
- Was there basis for an ADA accommodation challenge if the variance were denied because of the status of the clubhouse users?
- Was there basis for a religious liberty challenge if the variance were denied because the church considered supporting the clubhouse part of its ministry and mission?

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