HOOKSETT ZONING BOARD OF ADJUSTMENT
Tuesday, June 10, 2014
HOOKSETT MUNICIPAL BUILDING
35 Main Street
Minutes

CALL TO ORDER
The meeting was called to order at 6:30 pm.

PLEDGE OF ALLEGIANCE

PRESENT
Richard Bairam, Phil Denbow, Roger Duhaime, Gerald Hyde, Chris Pearson (Chair), Jackie Roy, Michael Simoneau and James Levesque (Council Rep)

ALSO PRESENT
Matthew Lavoie (Code Enforcement Officer), Jo Ann Duffy (Town Planner) and Atty. Paul Sanderson (New Hampshire Municipal Association)

EXCUSED
Don Pare

APPROVAL OF MINUTES
May 13, 2014 Minutes – ***G. Hyde moved to approve the minutes. Motion seconded by R. Bairam.*** **Motion carried unanimously.**

CONTINUED PUBLIC HEARING
KEVIN MOSCONE Case #14-04
1348 Hooksett Road Map 25, Lot 5
PZ
A Variance is requested from Article 19, Section D.9 of the Zoning Ordinance to permit a State Motor Vehicle Inspection Station within the Groundwater Resource Conservation District.

Chair C. Pearson: We've met with you last month. We received a letter from the Town Administrator. We also received some information from the Code Enforcement Officer going back to the past variance, change and use and history. What was his change of use approval?

M. Lavoie: Just car sales, no service.

Chair C. Pearson: The Town Administrator's letter gave a recommendation that the variance is not in the best interest of the Town and its future development.

The letter (e-mail) was read into the record (see attachment).

Kevin Moscone: My neighbor next door (Amati Auto) is so close. I know he was there before the zoning was changed. Is anyone concerned about that place? We're located in the same spot.

Chair C. Pearson read the second e-mail from the Town Administrator into the record.

"*I understand that there may be numerous "grandfathered" (non-conforming) uses in this district. Please remember that as the years go by and the character of the district changes, the non-conforming uses will disappear. A variance goes with the land forever. In planning, we should be thinking about what we want to happen during the next 50 years, not what has happened during the previous 50.*"

Chair C. Pearson: Bottom line is that you're in the groundwater protection area. Our hands are tied on this. The Town is clear on this. It should have never changed into car sales. It should have stayed what it was, which was agreed to by the owner, John Kelly. That was a mistake.

M. Lavoie clarified that car sales is allowed in the district but not service.

R. Duhaime: When the Special Exception was originally approved, it was never to be used for car sales.

J. Duffy: When you (ZBA) approved the Special Exception, the property was zoned Industrial and that use was allowed with a Special Exception. However, the property has since been rezoned to Performance Zone and car sales is allowed in the Performance Zone. Car sales is not prohibited in the groundwater district just the auto repair.

K. Moscone: Even though that building has been there before. It's still on the same location. You're not worried about the damages from them?

Chair C. Pearson: That's not up to us to decide.

K. Moscone: You're going to stop me from mechanic because of that fact but yet it's basically going on right next door to me.

R. Duhaime: The ZBA is made for relief from the rules. We're here for relief from the rules. What he has does not require relief from the new rules. He's not looking for relief, you are because it's a new shop. We don't make the rules, we just interpret them and make judgment.

Chair C. Pearson: I'm sure there's a lot like that. When they decide to make changes and come before us, they'll have to upgrade to the new rules.

J. Levesque: The building he's talking about (Amati Auto). If they leave, does the building have to conform to the new rules?

M. Lavoie: If the use changes, the property will be subject to the new rules. If they are a car sales now, they could be a car sales forever.

Chair C. Pearson: I don't want to get side-tracked. This is not an issue with Amati. Our hands are tied. It's unfortunate that you leased the property under this premise. It was very clear with the owner what could and could not be done.

The hearing was opened to the public.

M. Sorel, 54 Cross Road: I have a business address of 1345 Hooksett Rd. My wife and I are abutters to the property. I haven't attended the previous meeting. I bring to your attention that the applicant has no legal right to apply for the variance. The owner, his attorney/power of attorney must apply for the variance. I bring that to your attention and I challenge that procedure. The applicant does not have legal right to apply for this variance.

M. Lavoie: That is right. He is not the owner and he does not have the right to apply for a variance.

M. Sorel: That being said, this could be dismissed for this reason.

He added he has a letter of complaint he would like to read for the record.

Chair C. Pearson: I don't think we need to hear the complaint.

M. Sorel: I plead with you to read this into the record. There is legal issue with this. I want this on the record with the ZBA. The letter is addressed to the Code Enforcement Officer, Police Department and the ZBA Chair.

Chair C. Pearson: I don't think this is the right format. We are going to move to dismiss.

M. Sorel: I have the right to present documents and read my complaint into the record.

M. Lavoie: Mr. Sorel, your formal complaint will be filed with this property for the life of the property.

R. Duhaime: We're for relief from the rules not to hear complaints.

R. Bairam: I don't think we need to hear the letter of complaint. We are going to dismiss it.

M. Sorel: Let the record show that I've made several requests to put this into the record but was denied.

The hearing was closed.

R. Bairam moved to dismiss case # 14-04 for reason that the applicant is not the owner of the property. Motion seconded by M. Simoneau. **Motion carried unanimously.**

WORKSHOP

Atty. Paul Sanderson: I was asked by the Town Planner, Jo Ann Duffy to make a presentation to go over some of the basic regulations. What you do is very difficult. In some ways, ZBA is the hardest. You get to deal with the ordinance as it is. As imperfect it might be. As difficult to understand as it might be. You're trying to figure out criteria, including variance criteria. The variance is very difficult because that is saying at this property, the ordinance doesn't apply anymore. You try to figure out what conditions you may add to allow a particular use. You have the authority and the ability to tell the Code Enforcement Officer he is incorrect. You have the ability to deal with the Town Council. You are separate from the Town Council. The Town Council cannot tell you to approve or deny. Only the Town Council has the power to test your decision and appeal your decision directly to the Superior Court.

Atty. Sanderson went over other topics of discussion. (See attached workshop hand-out.)

ADJOURNMENT
The meeting adjourned at 8:15 pm.

Respectfully submitted by,

Evelyn F. Horn
Administrative Assistant

Evelyn Horn

From: Dean Shankle
Sent: Tuesday, June 10, 2014 2:35 PM
To: Matthew Lavoie; Evelyn Horn; James A. Levesque; Jo Ann Duffy
Subject: RE: Comments to ZBA 6-10-14

One further point: I understand that there may be numerous "grandfathered" (non-conforming) uses in this district. Please remember that as the years go by and the character of the district changes, the non-conforming uses will disappear. A variance goes with the land forever. In planning, we should be thinking about what *we want* to happen during the next 50 years, not what has happened during the previous 50.

Dean

Dean E. Shankle, Jr., Ph.D.
Hooksett Town Administrator

From: Dean Shankle
Sent: Tuesday, June 10, 2014 12:39 PM
To: Matthew Lavoie; Evelyn Horn; James A. Levesque; Jo Ann Duffy
Subject: RE: Comments to ZBA 6-10-14

I have reviewed the information that was attached to this email and reviewed Article 19 of the Hooksett Zoning Ordinance. According to Sec. A. of this article,

"The purpose of these regulations is, in the interest of public health, safety and general welfare, to protect, preserve and maintain existing and potential groundwater supply and groundwater recharge areas within known aquifers from adverse development, land use practice and to protect surface waters that are fed by groundwater.

This is to be accomplished by regulating land uses which would contribute polluted water to designated wellhead protection areas and/or aquifers identified as being needed for present and future public and private water supply. It is also the intent of these regulations to incorporate by reference and to encourage implementation of the recommendations and findings of the recently completed report by the Southern New Hampshire Planning Commission entitled Town of Hooksett Wellhead Protection Program. This report was accepted by the Town Council on June 27, 2007 to protect the existing and future viability of the Town of Hooksett's primary water supply located at Pinnacle Pond."

The list of prohibited uses within this district are found in Art. 19 Sec. D. The specific one under consideration at this time is D.9. "The development or operation of a petroleum bulk plant or terminal or automotive uses including: car washes, automotive service and repair shops, gas stations; filling stations; or motor vehicle dispensing stations or pumps; any container of gasoline greater than 100 gallons. *(Amended 5-14-02)"* Obviously, this type of activity is a direct threat to the purpose of this regulation. Therefore, I believe that it is certainly reasonable for the ZBA to find that this variance **will be** contrary to the public interest and is clearly not in conformity with the spirit of the ordinance.

As Town Administrator, one of my responsibilities is to encourage the protection of the resources of the Town and see that economic development activities move forward in an appropriate manner. This variance, in my opinion, is not in the best interest of the Town and its future development.

Please feel free to read this into the record for the ZBA.

Dean

Hooksett Zoning Board of Adjustment

June 10, 2014*

I. "Jurisdiction" and "Quasi-Judicial Decisions"

The Zoning Board of Adjustment has been given the authority to adjudicate the rights and liabilities of property owners with respect to administrative appeals, special exceptions, variances, disability variances, equitable waiver of dimensional requirements, and building code appeals. Their "jurisdiction" authorizes the board to conduct "quasi-judicial" proceedings that affects the property rights and liabilities of an applicant landowner and "interested parties" such as direct abutters to the land in question. The board does not go out to the community to develop their own cases; landowners come to the board seeking relief in accordance with the requirements of the local Zoning Ordinance.

There are several important points to take away from this statutory structure:

A. The idea of "separation of powers". Note that while a planning board may draft a zoning ordinance, it is the people acting through the "legislative body" of the municipality that adopts the ordinance and any future amendments. While the "governing body" (meaning the Board of Selectmen or City Council or Town Council) may propose a change in the ordinance, it is only the legislative body that decides whether or not the ordinance or amendment will be adopted. The executive authority resides with the governing body, the legislative authority resides with the legislative body, and the quasi-judicial authority over land use resides with the land use boards.

B. The idea of "checks and balances". The "governing body" has no authority to directly control the decisions of the land use boards, but it does have the authority to test their decisions, either by an appeal to the zoning board of adjustment, or to the Superior Court. The membership of land use boards is checked either by appointments made by the governing body or by direct election of the members by the legislative body. The planning board has an "ex-officio" member of the governing body as a voting member, which provides a check on the exercise of land use authority. The zoning board of adjustment has jurisdiction over "administrative appeals" which can directly affirm or overrule decisions made in the executive branch by a building inspector, or the selectmen themselves, subject only to a later appeal to the Superior Court.

C. Enforcement authority does not reside with the land use boards. While the planning board does have the authority to revoke a plan approval in accordance with RSA 676:4-a, the local land use enforcement process requires adoption of practices and procedures in accordance with RSA 674:51. Resort to the courts involves the expenditure of municipal funds, which must be approved by the governing body. Enforcement is often a team effort, involving the governing

body, the building inspector or zoning compliance officer, the health office, the fire chief and the police chief. These officials cooperate with, but do not report to, the land use boards. The governing body may decide that an enforcement action will not be brought in a court, even if a citizen or members of a land use board think that an action should be brought. Goldstein v. Town of Bedford, 154 N.H. 393 (2006)

II. Understanding "Conditional Approval" and "Final Approval"

A zoning board of adjustment has the ability to attach conditions to any relief that it within its jurisdiction in accordance with decisions of the New Hampshire Supreme Court. The conditions must be reasonable, and relate to the spirit of the ordinance in question and the actual use of the land, and not to the person who is to be using the land. See Wentworth Hotel v. Town of New Castle, 112 N.H. 21 (1972) and Peabody v. Town of Windham, 142 N.H. 488 (1997). The exception to this rule is found at RSA 674:33, V, relating to approving reasonable accommodations to persons with physical disabilities, which can be conditioned to expire only as long as the named person has a need to use the premises.

Since the land use boards clearly have the ability to add conditions to their decisions, what is the difference between a "conditional approval" and a "final approval"? The Supreme Court has indicated that the purpose of allowing conditional approvals is to avoid a requirement that any impediment to full approval must result in a formal disapproval of the application and the wasteful necessity of starting all over again. Sklar Realty v. Town of Merrimack, 125 N.H. 321 (1984).

Therefore, "conditional approval" is an interim step in the process of the board's consideration of the application. A "final approval" cannot be given to the applicant until all of the "conditions precedent" have been met by the applicant. Simpson Development Corp. v. City of Lebanon, 153 N.H. 506 (2006). To understand this concept, we need to know the difference between a "condition precedent" and a "condition subsequent".

The Court has defined it this way. A "condition precedent" is some action that has to be taken by the applicant in order to remove an impediment to "final approval". These are the things that need to be done before the town will take the additional step of granting "final approval". A "condition subsequent" defines an action or behavior that binds the applicant, but does not need to be accomplished before "final approval" is granted. Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006).

III. Improving the Quality of Motions and Decisions

The language of your decision is not being drafted for the benefit of those who are in the room making the decision, the language is drafted for those who will use the decision in the

future to implement the approved project, or to take enforcement action if the landowner or a successor owner fails to live up to the conditions imposed upon the project. The relief offered by land use boards runs with the land, and is not personal to the person who initially sought the relief, unless you are dealing with the special disability exception for variances contained in RSA 674:33, V.

A. The Special Situation of the ZBA Three Vote Rule

We do not recommend that Zoning Boards of Adjustment vote separately upon the legal elements of a variance. We realize that some boards have long followed this practice, but there is a potential for a problem. This arises from the requirement in RSA 674:33, III that the concurring vote of 3 members of the Board is required to decide in favor of an applicant

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminish Value	All 5 Elements
1	Y	N	Y	N	Y	N
2	Y	N	N	N	Y	N
3	Y	Y	N	Y	Y	N
4	N	Y	Y	Y	N	N
5	N	Y	Y	Y	N	N
# Members Favor this Element	3	3	3	3	3	0

"on any matter on which it is required to pass."

You can readily see that while none of the members appear to be in favor of granting the variance, each element has garnered three positive votes. Has this variance been granted or denied? We do not know the answer to this question based upon any reported New Hampshire court case. Please do not become the municipality where this issue is raised and tested. Instead, please make your motion to grant or deny the variance, and base your vote as a member on whether or not all five elements have been met.

B. Clarity is the Goal

As noted above, the key to creating language used in decisions is to strive for clarity, and remember that the language will be used by future municipal officials and board members to assure that the approved land use remains in compliance with the conditions imposed by the boards. Here are some thoughts:

1. A motion should be clearly stated, and a written copy should be provided to the person who is taking the minutes, when possible.

While it might seem unnecessary to state such a requirement, think about how many times each of you as board members has seen a situation where a discussion of an issue ends with a member stating, "Are we all agreed?", following by heads nodding in unison. How is the person taking the minutes to record that action? What are the chances that at least one member perceives the "agreement" differently from at least one other member? How are the parties and the public to understand the action that has been taken? Please stop, and assure that all motions are clearly and verbally stated. When possible, if a written copy can be provided to the person taking the minutes, the chances of error and misunderstanding are greatly reduced.

2. The motion should describe the plan set submitted by the applicant that is actually being used to craft the approval.

As projects become more complex, the number of submissions of different versions of the plans, in both paper and electronic formats steadily increases. Thus, for the benefit of future officials and board members, it is very helpful to describe the plan set used as the basis of the motion. Often the engineer or surveyor will include a project or file number, and a block with the date of the latest revisions. Refer to that information in your motion. Don't grant a final approval until the plan set that is to be recorded at the Registry of Deeds agrees in all respects with the motions and conditions of approval imposed along the way. That is, be sure that the "final approval" of the final plan set really does reflect completion of all of the "conditions precedent".

3. Be careful that the words you use accurately describe what you want to accomplish.

For example, don't say, "I move to approve the ten foot variance." While it may be clear to everyone in the room that night what the board is attempting to accomplish, how can a building official determine what that means five years later when a surveyor requests information to create a plot plan that will be used as part of the landowner's mortgage closing process?

Instead, say something like,

"I move to approve the applicant's request for a variance from section ___ of the zoning ordinance to permit the construction of a single family structure that is located twenty feet from the easterly sideline of the land shown on Tax Map ___ Lot ___ when thirty feet is required, in

accordance with a plan entitled, _____ as drawn by ____ dated _____, and submitted by the applicant as part of this hearing, with the following conditions: _____.

4. Don't expect the parties draft the language that you want.

If the parties are represented by lawyers, you can expect to receive a written proposed motion to support the view of the party being represented, and a written request for findings of fact. The lawyers are thinking about creating and protecting the "record" that would be presented to the Superior Court upon appeal, and about having the Board establish the "facts" that the Court will rely upon as it examines a certified record. That is, the lawyers are approaching the case as advocates for their client's position.

If the parties are primarily represented by an engineer or a surveyor, the Board is much less likely to receive such documents, and instead will receive a great deal of graphical evidence (plans), and perhaps written reports that describe the outcome of wetland studies, drainage calculations, or traffic counts or traffic movements during a study period.

That is, don't expect the lawyers to create graphical plans, and don't expect the engineers to craft a motion and request for findings of fact that would satisfy a judge. Each profession has a different set of skills, and a different way of presenting information. As board members, you must sift through all of this and reach your own conclusions as to whether or not the requested relief should be granted.

It is not realistic for the members to simply attend a Board meeting and hope that one member will be able to immediately craft a clear motion for approval with accurate, complete and meaningful conditions that capture all of the thoughts of the Board. A well-crafted decision takes time, and advance preparation. It need not be completed in a single meeting if the Board needs to consider drafts of the decision, or to obtain legal advice regarding aspects of the decision. Please do not say to the person taking the minutes or the chairperson, "You know what I mean, just clean it up for the minutes and notice of decision."

It is perfectly lawful to request a party to file proposed documents, or to request staff for the board to prepare a proposal in advance, or for a board member to craft and bring a proposal to a meeting to use as a basis for discussion. See Webster v. Town of Candia, 146 N.H. 430 (2001). What is not lawful is to deliberate as a board on such proposals outside of a public meeting, either by holding an unnoticed meeting of the members, or through e-mail. See RSA 91-A:2, and 2-a. Your discussions on the proposed documents must take place only within a duly noticed and convened public meeting, and not otherwise.

5. Be very careful before incorporating any codes or other requirements by reference if the Board does not have a clear understanding of the implications of the action.

For example, Boards will often require an applicant to "meet the requirements of the Police and Fire Departments." This can have unexpected consequences. See Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62 (2012), where that type of requirement was added as a condition of approval. Once the applicant met with the Fire Chief, the unusually steep nature of the lot and its driveway caused the chief to require the installation of residential sprinklers in a house, since the fire equipment could not get close enough to the house itself to provide service. The landowner balked at the requirement, altered the structure and took residence without an occupancy permit. In an enforcement action, the landowner defended by citing to a state statute that prohibited a planning board from imposing such a condition. The Supreme Court found that the requirements of the State Fire Code controlled the situation, and not the planning board statute. In the end, the landowner was required to pay $55,000.00 in fines plus the case for remanded for a finding as to the payment of attorney's fees.

C. Clarity in the Written Notice of Decision Assists in a Later Enforcement Action

All decisions of land use boards must be reduced to writing, and along with the minutes of the meeting, must be available to the public within five business days of date the vote was taken. RSA 676:3. The written notice of decision must, if a request was not approved, also contain the reasons for the disapproval. If approved, any conditions of approval must be detailed in writing. While the requirement of a written notice of decision is a basic component of the idea of procedural due process, and thus has a constitutional basis, there are other reasons why a Board will want to have a complete and accurate Notice of Decision.

Whether the application is approved, approved with conditions, or disapproved, there is likely to be someone who is unhappy with the decision that is made. The written decision is an opportunity to both record and communicate exactly what relief was granted, or detailed reasons why relief was denied. This will create a record for use in any current appeals of the decision, or a record that can be used by future officials or board members to determine whether the use of the land complies with the relief that was granted.

This can be very important when the matter comes up to the Superior Court on appeal. As the Supreme Court recently explained in Limited Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488 (2011), when the Court reviews a matter, the basis for the board decision may be found in the notice of decision, or in the board minutes, or both. The Court is looking to understand whether or not the Board properly applied the ordinance, and what were the reasons behind the votes taken by the Board. If these items are absent, the Supreme Court has warned us that those are the cases that are likely to be remanded.

The exact scope of relief granted by a board can be a very important issue in a later enforcement action. See, for example, the decision in Bennett v. Hampstead, 157 N.H. 477 (2008). The town's zoning board of adjustment (ZBA) granted Bennett a special exception "to permit a home occupation— use of premises in connection with landscaping and property

maintenance business." When applying for the special exception, Bennett informed " the ZBA that fertilizer and other materials would be stored in the garage, that there would be one full-time employee plus two college students working during the summer, that the proposed business would not be injurious or obnoxious, and that the lot was screened from view." Years later, an inspection showed (1) " that trees had been cleared in the rear of the Bennett property, eliminating visual screening of the operations" ; (2) " [l]arge piles of mulch, loam and compost were stored outside, as well as pallets with pavers and bricks, concrete partitions filled with different types of stone, and other landscaping materials" ; and (3) that there was " a large dump truck, a large front-end loader, a large tractor, a bulldozer, a Bobcat, a skid steer, three large trailers to transport tractors, two pickup trucks, and a backhoe all parked outside" in the yard. She also learned that Bennett had two to three full-time employees, three to four part-time employees, and six to eight part-time summer employees.

The trial court granted the town's request for a preliminary injunction, and enjoined Bennett from operating a construction business on the property, causing noise by the screening of loam, and engaging in the commercial composting of any materials on the property. The court further directed Bennett to remove any piles of commercial compost stored on the property, and cease operation of noisy and heavy equipment at the back of the property except during business hours. The trial court did not, however, prevent Bennett from operating its landscaping business. That is, the Court directed him to return the scope of the business to the scope that had been approved by the ZBA when the special exception was granted.

This successful result would not have been possible without adequate records from the action of the ZBA when it granted the special exception. Because the scope of the special exception was clear, there was sufficient information to support the land use enforcement action. This is the goal for all of the boards, to make decisions that are sufficiently detailed and clear that a future municipal official will be able to taken enforcement action in reliance upon them.

IV. Special Exceptions

Pursuant to RSA 674:33, IV, the ZBA has the power to make special exceptions to the terms of the zoning ordinance in accordance with the general or specific rules contained in the ordinance. A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5000 square feet is permitted in the zone so long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone, or to construct the new building partially within the side set-back line.

A "special exception" is also distinguishable from a "pre-existing non-conforming use". A special exception is a permitted use provided that the petitioner demonstrates to the ZBA compliance with the special exception criteria set forth in the ordinance. By contrast, a pre-

existing non-conforming use is the continuation of an existing on the land that was lawful when the ordinance prohibiting that use was adopted. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011) (Supreme Court held that ZBA did not err in ruling that office building permitted by special exception is not entitled to expand per doctrine of expansion of nonconforming use).

When considering a request for special exception, the ZBA may not vary or waive any of the requirements set forth in the ordinance. See, Tidd v. Town of Alton, 148 N.H. 424 (2002). The applicant may ask for additional relief in the form of a variance from one or more of the requirements. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011)(Court noted that petitioner was allowed to use its building for office space because it had a special exception and was allowed to devote 3,700 of its building's square footage for such a use because it obtained a variance from the special exception requirement that the building's foundation not exceed 1,500 square feet).

The applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003). Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004). Special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958).

Note that effective September 22, 2013, the provisions of RSA 674:33, IV were amended to provide that Special Exceptions "shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception." A similar provision was inserted concerning variances. See, RSA 674:33, I-a.

V. Variances

a. The "New" Standard:

The 2009 Legislature substantially revised RSA 674:33, I (b) as follows:

1 Powers of Zoning Board of Adjustment; Variance. RSA 674:33, I (b) is repealed and reenacted to read as follows:

> (b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
>
> (1) The variance will not be contrary to the public interest;
>
> (2) The spirit of the ordinance is observed;
>
> (3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and

(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

RSA 674:33, I (b).

This new language has applied to all variance applications/appeals filed on or after January 1, 2010. The Supreme Court reviewed this "new" standard in Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). The case dealt with sign variances for Parade's new Marriot hotel in Portsmouth (down the street from Harborside's existing Sheraton hotel). Parade sought variances for 2 parapet signs (which were not allowed in the district) and 2 marquee signs of 35 sq. ft. when only 20 sq. ft. are allowed in the district. ZBA voted to grant the requests with express statements of reasons including: placement of parapet signs did not "feel like visual clutter"; signs will not be contrary to public interest, result in no change to the neighborhood nor harm health, safety or welfare; sheer mass of the building and occupancy by a hotel create a special condition; proposal is reasonable and not overly aggressive; marquee signs will not disrupt visual landscape and will enhance streetscape; no benefit to public via denial; "no evidence that this well thought out design would negatively impact surrounding property values." Id., at 511-512. The Trial Court reversed the grant of the parapet sign variance but affirmed the grant of the marquee sign variance. Accordingly, both sides appealed.

The Supreme Court noted that the two definitions of "hardship" contained in RSA 674:33, I (b)(5)(A) and (B) are "similar, but not identical, to" the definitions the Court provided in the Simplex and Governor's Island cases decided prior to the legislative change. Here is a quick restatement of the important information from the case:

Elements 1 and 2:

"Not be contrary to the public interest"

Examined together with Element 2, "spirit of the ordinance"

> Step 1: Examine the ordinance itself to learn the "basic zoning objectives", mere conflict with the terms is not enough to deny relief
>
> Step 2: Is there a violation of the basic objectives?
>
> > Test 1: Would granting the variance "alter the essential character of the neighborhood"?
> >
> > Test 2: Would granting the variance "threaten the public health, safety or welfare"

Element 3

"Substantial justice is done"

"...any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assoc. v. Chichester, 155 NH 102 (2007)

> Argument is often that the board must uphold the integrity of the ordinance, but the court has noted that every variance is by definition an insult to the ordinance.
>
> Be sure to focus on the individual property rights affected, and not on the language of the ordinance.

Element 4

"Values of surrounding properties are not diminished"

> Expert opinion is not required if the board finds the evidence to be credible.
>
> A specific function of the board is to resolve conflicts in evidence and assess credibility.
>
> However, if an expert provides an opinion and it is uncontroverted, board should accept the opinion. Continental Paving v. Litchfield, 158 NH 570 (2009)

Element 5 A, Hardship

This is the Simplex test:

> Owing to "special conditions of the property that distinguish it from other properties in the area";
>
> No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
>
> The proposed use is a reasonable one

"Special conditions" can include the size of a building in its environment.

The proposed use need only be reasonable, it need not be necessary.

Element 5 B, Hardship

If Simplex is not met, use Governor's Island test:

> Owing to special conditions of the property that distinguish it from other properties in the area;
>
> The property cannot be reasonably used in strict conformance with the ordinance; and
>
> A variance is therefore necessary to enable a reasonable use.
>
> Financial impact is not a hardship under this test, it must be some unique aspect of the property that distinguishes it from others.

b. Disability Variances

An additional authority granted to the ZBA by RSA 674:33, V, is the ability to grant variances without a finding of unnecessary hardship "when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises." This statutory provision requires that the variance "shall be in harmony with the general purpose and intent" of the ordinance. RSA 674:33, V(a). Furthermore, the ZBA is allowed to include a finding in the variance such that the variances shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

VI. Requests for Rehearing

RSA 677:2 requires a motion or request of rehearing must be filed with the ZBA within 30 days after any order or decision of the ZBA by "the selectmen, any party to the action or proceedings, or any person directly affected thereby…". See, e.g., Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013). The 30 day period is calculated in

calendar days "beginning with the date following *the date upon which the board voted to approve or disapprove the application.*" This avoids the "30 means 29" trap that has caught more than one applicant (and attorney) unawares. See, Trefethen v. Town of Derry, 164 N.H. 754 (2013) (Deadline under 30 day rule of RSA 677:4 extended to following business day if deadline falls on a Saturday, Sunday or legal holiday per RSA 21:35, II.) If the minutes of the meeting, including the written decision, were not filed within 5 business day of the vote, then the applicant shall have the right to amend the motion/request and the grounds therefore within 30 days after the date the decision is filed; but this still requires that the original time line must have been met.

The motion or request for rehearing is required to set forth fully every ground upon which it is claimed that the decision or order is unlawful or unreasonable. RSA 677:3. This statute further provides that:

> No appeal from any order or decision...shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

Thus, the motion/request for rehearing is a jurisdictional prerequisite to an appellant's right to bring suit in Superior Court and a jurisdictional limitation on what claims the Court can consider. See, Kalil v. Town of Dummer, 159 N.H. 725 (2010) (appeal brought in guise of inverse condemnation claim six months after ZBA's denial of variance application was barred); Cardinal Development Corporation v. Town of Winchester ZBA, 157 N.H. 710 (2008) (request for rehearing faxed to ZBA office after close of business on Monday following 30th day not timely filed where ZBA did not have procedural rule allowing faxed or after-hours filings).

Once a motion or request for rehearing has been filed, the ZBA is obligated to either grant or deny the application (or suspend the order or decision complained of pending further consideration) within 30 days. The purpose of a request for rehearing is to afford the ZBA the opportunity to correct its own mistakes; and a board is entitled to reconsider its prior ruling and upon reconsideration make the same decision for the same or different reasons. See, Fisher v. Town of Boscawen, 121 N.H. 438 (1981) (decided under former statute). The board's decision must be entered upon its records and should be communicated to the applicant in writing, but the board is not required by statute to state its reasons or to hold a public hearing on the subject (although the decision must be made at a public meeting). See, Loughlin, §21.16, page 334.. If the board takes no action within the 30 day period and does not request an extension of time, it may be assumed that the motion has been denied and that the applicant should proceed to Superior Court. Id., citing, Lawlor v. Salem, 116 N.H. 61 (1976) (town ordinance provided that if motion for rehearing was not acted upon within 10 days it was automatically considered to have been denied).

In MacDonald v. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171 (2005), the Supreme Court addressed the issue of whether a second motion for rehearing is required when the ZBA ruled on a new issue in its denial of the motion for rehearing. The Court concluded that the statutory scheme does not anticipate that a zoning board will render new findings or rulings in the denial of a rehearing motion, and, accordingly, held that when a ZBA denies a motion for rehearing, the aggrieved party need not file a second motion for rehearing to preserve for appeal any new issues, findings or rulings first raised by the ZBA in that denial order. Id., at 174-175. The Court did note that "a better practice for the ZBA to take when it identifies new grounds for its initial decision and intends to make new findings and rulings on them in response to a motion for rehearing would be for it to grant the rehearing motion without adding new grounds for denying the variance application." Id., at 176. In that way, after the rehearing and new order citing new grounds for denial, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon, at that time, to preserve them for appellate review. The Court also noted that the Superior Court may consider on appeal an issue not first set forth in a motion for rehearing under the "good cause" exception in RSA 677:3, I. Id

Additionally, the Supreme Court has recognized that a ZBA and other municipal boards have the authority to reconsider decisions *based upon a request from one of their own members* to deny a rehearing within the thirty-day limit. 74 Cox Street, LLC v. City of Nashua, 156 N.H. 228 (2007).

APPENDIX A

REQUIREMENTS FOR VARIANCE APPLICATIONS

by

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

As before, the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005) and its progeny continues to control this issue after January 1, 2010 – namely that the criteria of whether the variance is "contrary to the public interest" should be construed together with whether the variance "is consistent with the spirit of the ordinance". Id., at 580; see also, Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the

variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. Chester Rod & Gun Club, at 581; and Harborside at 514. "Mere conflict with the terms of the ordinance is insufficient." Harborside at 514. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

2. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

See, Criteria 1, above.

3. SUBSTANTIAL JUSTICE IS DONE.

The Supreme Court reference in Malachy Glen, 155 N.H. at 109 to the Peter J. Loughlin, Esq., treatise will continue to apply. See, Loughlin, Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 3d ed., and its reference to the Office of State Planning Handbook, which indicates as follows:

"It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Id. at § 24.11.

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

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

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

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

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

(i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY; AND

(ii) THE PROPOSED USE IS A REASONABLE ONE.

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

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

This is the crux of the legislative change effective January 1, 2010. This removes the "use" vs. "area" distinction created by the Boccia decision but ostensibly leaves in place the post-Simplex court interpretations of the various criteria. Also, as listed in the statement of intent attached to the statute, Criteria 5(B) is meant to clarify that the pre-Simplex standard for unnecessary hardship remains as an alternative; however, the Supreme Court has noted that the language used "is similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island cases. See, Harborside at 513.

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

This statutory revision does contain a fair amount of uncertainty – most particularly with the issue of who is the fact finder (ZBA or applicant) of what is reasonable under either (A) or (B), above. The Court's prior opinions containing the phrases that a use is "presumed reasonable" if it is allowed in the district and that the ZBA's desires for an alternate use are "not material" were all in the context of "area" variances and made with respect to the "public interest" and "spirit of the ordinance" criteria, above. See, Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 753 (2005); and Malachy Glen, 155 N.H. at 107; but see, Harborside at 518-519 (applicant did not need to show signs were "necessary" rather only had to show signs were a "reasonable use").

Thus the determination of "reasonableness" is likely within the ZBA's purview so that the ZBA must have both the evidentiary basis and the clear findings to support its decision on this issue. Boards should expect to see a variety of arguments and evidentiary presentations, including economic arguments, by both applicants and abutters as to what is or is not reasonable concerning a given site. Be on the lookout for more Supreme Court opinions interpreting this criterion.

* *Some of the material has been adapted from presentations provided by Christopher Boldt, Esq. of Donahue, Tucker, and Ciandella, PLLC, at Office of Energy and Planning Conferences.* The original and complete text of his most recent presentation is available here, http://www.nh.gov/oep/planning/resources/conferences/spring-2014/documents/boldt-handouts.pdf