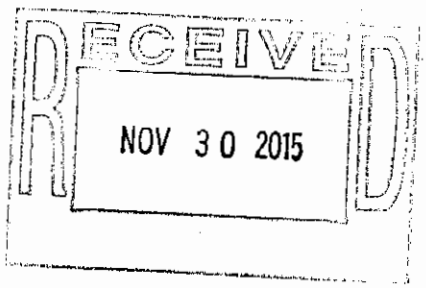
THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Peter J. Malia, ESQ
Hastings Malia PA
376 Main Street
PO Box 290
Fryeburg ME 04037-0290



Case Name: **David & Christina Caldwell, Jr. v Town of Jackson ZBA**
Case Number: **212-2015-CV-00099**

Enclosed please find a copy of the court's order of November 20, 2015 relative to:

Final Order

November 20, 2015

Abigail Albee
Clerk of Court

(406)

C: Christopher T. Meier, ESQ

STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

David Caldwell, Jr. & Christina Caldwell

v.

Town of Jackson Zoning Board of Adjustment

Docket No. 212-2015-CV-00099

ORDER

The Plaintiffs, David Caldwell and Christina Caldwell, appeal the decision of the Town of Jackson Zoning Board of Adjustment ("ZBA") denying their application for a variance. The Court held a hearing on October 9, 2015. The decision of the ZBA is REVERSED and REMANDED for further proceedings in compliance with this order.

The Plaintiffs own property located at 200 Tin Mine Road in Jackson, New Hampshire (the "Property"). On January 14, 2015, the Plaintiffs filed a variance application with the Town of Jackson, seeking approval for a front porch on the Property that encroached five feet eight inches into a fifty-foot front setback.[1]

The ZBA held its first public hearing in this matter on February 4, 2015. At the end of the Plaintiffs' presentation, the ZBA deliberated and determined that the Plaintiffs had not established the existence of an unnecessary hardship. Certified Record (hereinafter "CR") at 119. Instead of taking a final vote on the variance, however, the ZBA opted to continue the hearing in order to allow the Plaintiffs to prepare and present additional evidence. Id.

[1] The porch had, already been built at the time of the application.

The ZBA next met on March 25, 2015. At that hearing, the ZBA again voted that the Plaintiffs had failed to establish the existence of an unnecessary hardship. Id. at 141. Before the ZBA took a final vote, the Plaintiffs noted they had also sought a variance pursuant to RSA 674:33, V, which presents an alternate means of obtaining a variance for those with physical disabilities. Id. at 142. Plaintiff David Caldwell noted his mother has Parkinson's disease. Id. The potential need for a ramp was discussed, and Mr. Caldwell stated that they were not currently in need of a ramp, but if one became necessary it would meet the building code. Id. The ZBA again chose to continue the hearing to allow the Plaintiffs to present additional evidence on the disability issue. Id. at 142–43.

Before the next and final meeting took place, the Plaintiffs submitted an amended application, which included plans for a ramp to be attached to the front porch. The ZBA met on April 15, 2015. At that meeting, the board membership had changed, and a new individual, James Gleason, sat in as a voting member. Because Mr. Gleason had not attended either of the prior hearings, a question was raised as to his familiarity with the application. Mr. Gleason informed the Plaintiffs that "they've [the other board members] filled me in on all this." (Pl.'s Hr'g Mem., Ex. 1 at 06:35–07:06.)

The ZBA addressed the disability issue first. It unanimously found that Mr. Caldwell's mother had a recognized physical disability and that she would regularly use the premises. CR at 161. However, it concluded the proposed porch and ramp were not reasonably necessary accommodations under the statute because the ramp could be installed elsewhere on the property in a manner that would not encroach into the setback. Id. at 162.

The ZBA next unanimously determined the Plaintiffs failed to establish an unnecessary hardship, and voted 4-1 against a finding of substantial justice. Id. at 162–63. The ZBA found the Plaintiffs failed to meet the substantial justice prong because the Plaintiffs' loss of "not having a front porch [was] outweighed by the gain to the general public in keeping with the ordinance." Id. at 163. No abutters spoke at any of the hearings in opposition to the proposed front porch/ramp. Ultimately, the ZBA unanimously voted to deny the Plaintiffs' variance application. Id. at 163.

On May 15, 2015, the Plaintiffs filed an application for rehearing. Id. at 187. On June 17, 2015, the ZBA held a public hearing and denied the Plaintiffs' motion for rehearing. Id. at 218–19. The Plaintiffs then appealed to this Court.

LEGAL STANDARD

"In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment . . . to show that the order or decision is unlawful or unreasonable." RSA 677:6. When reviewing a decision of the ZBA, "the trial court must treat all factual findings . . . as *prima facie* lawful and reasonable, and may not set them aside absent errors of law, unless it is persuaded by a balance of the probabilities on the evidence before it that the ZBA decision is unreasonable." 1808 Corp. v. Town of New Ipswich, 161 N.H. 772, 775 (2011); see RSA 677:6. The standard of review is not whether the court would find as the ZBA did, but whether the evidence reasonably supports the ZBA's findings. See Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). If any of the ZBA's reasons "support its decision, then [the Plaintiff's] appeal must fail." Bayson Props., Inc. v. City of Lebanon, 150 N.H. 167, 173 (2003). "The appealing party bears the burden of persuading the trial court

that, by the balance of probabilities, the board's decision was unreasonable." Summa Humma Enters., LLC v. Town of Tilton, 151 N.H. 75, 79 (2004).

ANALYSIS

The Plaintiffs appeal the ZBA's decision to deny its variance application. The ZBA has the authority to grant a variance from a 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. RSA 674:33, I(b)(1)–(5). The ZBA may grant a variance without finding an unnecessary hardship when reasonable accommodations are necessary to allow a person with a recognized physical disability to reside in or regularly use the premises. RSA 674:33, V. The applicant for a variance bears the burden of establishing these conditions. See Nine A, LLC v. Town of Chesterfield, 157 N.H. 361, 365 (2008). Here, the ZBA found the Plaintiffs failed to establish (1) granting the variance would result in substantial justice being done, (2) unnecessary hardship, and (3) reasonable accommodations are necessary to allow a person with a recognized physical disability to regularly use the premises.

I. Procedural Arguments

As an initial matter, the Plaintiffs raise several procedural deficiencies with the underlying conduct and decisions of the ZBA. First, the Plaintiffs argue the ZBA improperly conducted multiple contradictory votes. As noted above, the ZBA originally voted at the March 25, 2015 hearing that the Plaintiffs had met the substantial justice prong of the variance statute, then found the opposite at the April 15, 2015 hearing. The Court finds, as the Town argues, that the votes taken at the first two hearings held on

February 4, 2015 and March 25, 2015 were advisory in nature. On both prior occasions the ZBA explicitly noted it would continue the hearing before making a final vote in order to allow the Plaintiffs to present more evidence in an attempt to allow them to meet their burden. The Court finds no error with this voting process.

The Plaintiffs next argue the ZBA improperly allowed a new member to sit and vote on their application. Both the statute and the ZBA by-laws allow for such a scenario. See RSA 673:11; Jackson ZBA By-law 4.2. The Plaintiffs also argue Mr. Gleason was unlawfully informed of the details of the application and prior hearings. Specifically, the Plaintiffs argue Mr. Gleason's remark about the other board members filling him in suggests a nonpublic meeting by the board in violation of RSA 91-A. The Town denies any such meeting took place.

On review of the record, there is insufficient evidence to support the occurrence of a meeting that would "circumvent the spirit and purpose of" the Right-to-Know Law. See RSA 91-A:2-a, II. The Plaintiffs' allegation requires a significant amount of speculation based on the wording of a casual statement made during the hearing. Moreover, the certified record contains an email written by Mr. Gleason in which he states, "I've had a look at the drawings" and "I agree with the comment made that the building probably looks better with the deck roof wrapping around to the front."[2] CR at 153. These remarks suggest a review of the record by Mr. Gleason.

Even assuming Mr. Gleason was improperly informed of prior events in a nonpublic hearing, his participation in the final hearing had no substantive impact on the ultimate outcome. All other voting members had been present for prior hearings,

[2] While the minutes do not reflect this exact statement, there was some discussion of the aesthetics of the project during the first meeting of the board. See CR at 117, 119.

and the ZBA held a quorum without Mr. Gleason's presence. In addition, all votes against the Plaintiffs were either unanimous or 4-1. Because any impropriety by the ZBA regarding Mr. Gleason's participation had no impact on the outcome, the circumstances do no justify any action pursuant to RSA 91-A:8.

Finally, the Plaintiffs argue the ZBA erred in failing to respond to their motion for rehearing within thirty days pursuant to RSA 677:3. The ZBA denied the Plaintiffs' motion in thirty-three days. The Plaintiffs appear to suggest this failure requires automatic reversal of the board's decision. While the statute indicates the board must respond in thirty days, it does not articulate any remedy for its violation. Nor do the Plaintiffs cite any authority supporting their position. Considering the purpose of rehearing, the lack of prejudice to the Plaintiffs, and the minimal delay, the court finds that corrective action is not necessary. See Colla v. Town of Hanover, 153 N.H. 206, 208 (2006) ("The rehearing process is geared to the proposition that the board of adjustment shall have a first opportunity to correct any action it has taken . . . before an appeal to the court is filed.").

II. Substantial Justice

With respect to substantial justice, "[p]erhaps 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." Farrar v. City of Keene, 158 N.H. 684, 692 (2009). The Court also looks "at whether the proposed development [is] consistent with the area's present use." Harborside Assocs., L.P. v. Parade Residential Hotel, LLC., 162 N.H. 508, 515 (2011) (quoting Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007)). Here, the ZBA concluded that the variance would not result in substantial justice being done because the Plaintiffs' only "loss would be [that] they don't have a front porch," while

"the loss to the public is the violation of the setback." CR at 163. The Plaintiffs argue the ZBA erred on both findings.

The Plaintiffs first claim they will suffer a loss in the form of significant expense to remove the existing porch and roof. The Court disagrees. The Plaintiffs constructed the porch without permission, continuing even after being told to stop by the Jackson building inspector. Id. at 139. As such, the Plaintiffs cannot rely on the cost of removal in order to obtain a variance. To find otherwise would condone landowners building first and seeking a variance later. Accordingly, the court will, like the ZBA, assume no structure exists when evaluating this factor. In doing so, the court finds the ZBA correctly noted the Plaintiff's loss is limited to not having a front porch.

The Plaintiffs also argue the ZBA erred in finding their loss was outweighed by the gain to the general public. Specifically, the Plaintiffs argue there is no gain to the public from denial of the variance. The court agrees. When discussing the setback at issue, the ZBA had the following discussion:

> Jerry [Dougherty] noted the setback was changed from twenty-five feet to fifty feet in 1974. The Planning Board struggled with creating open space; the RSAs didn't provide for that. Chairman Banesh noted the setback is from the ROW not the traveled way. The stated purpose of the setback was for snow removal. The property has a driveway regardless of the porch so it won't impact snow removal; there's adequate road expansion and access for emergency vehicles. Chairman Banesh wondered, if the sole purpose of the setback was just parking and snow removal why then does Jackson has [sic] a fifty foot setback; it's excessive (suggesting there were additional purposes). Jerry noted the purpose of the setback is for snow removal . . . .

Id. at 140. At an earlier meeting, a board member noted the setback also served the purpose of allowing access for fire and safety equipment. Id. at 116.

The Plaintiffs' proposed deck and ramp intrude into the setback a mere five feet eight inches. This leaves over forty-four feet remaining to satisfy the stated purposes of

the setback. The gain to the public from preventing such a minor intrusion is so minimal as to be negligible. Moreover, the Plaintiffs' porch is "consistent with the area's present use," Harborside, 162 N.H. at 515, as abutters in the area also have front porches that intrude into the setback. Finally, no abutters spoke in opposition to the project. Therefore, on these facts, the ZBA's determination that prevention of the slight encroachment into the setback constituted a public gain that outweighed the Plaintiffs' loss was unreasonable. The record does not support this determination. Accordingly, the Court finds the ZBA erred in finding substantial justice would not be done by granting the variance.

III. Unnecessary Hardship

RSA 674:33, I(b)(5)(A) and (B) set forth what constitutes an unnecessary hardship. First, "'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) [t]he proposed use is a reasonable one." RSA 674:33, I(b)(5)(A). However, "[i]f 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." RSA 674:33, I(b)(5)(B).

As set forth in the statute, the first requirement of an unnecessary hardship is that it be "owing to special conditions of the property that distinguish it from other properties in the area." RSA 674:33, I(b)(5)(A). "This factor requires that the property

be burdened by the zoning restriction in a manner that is distinct from other similarly situated property." Harrington v. Town of Warner, 152 N.H. 74, 81 (2005). While the Plaintiffs need not show they are the *only* such burdened property in the area, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." Id.

The Plaintiffs argue the ZBA erred in finding no hardship, as their property has several special conditions that distinguish it from surrounding properties. The Plaintiffs primarily focus on the fact that a majority of lots in the area, including both abutters, have front porches or other structures that encroach into the setback. However, these other structures were built prior to the existence of the current ordinance, and are therefore grandfathered non-conforming uses. The Plaintiffs cite no support for the proposition that this creates a special condition. Additionally, the court is unpersuaded by the argument that a landowner may ignore current regulations as long as his neighbors have old houses that predate them. Moreover, all properties in the area are equally burdened by the fifty-foot setback. Any new construction on the Plaintiffs' neighbors' lots would require a variance if the project encroached into the setback.

The Plaintiffs also argue they are not equally impacted by the setback because Tin Mine Road does not travel uniformly through the right of way from which the setback is measured, resulting in different properties having different distances between their setback and the road. However, because the setback is measured from the edge of the right of way, which does take a uniform path, the setback on each property is an evenly applied fifty feet. While the variation in distance from the setback to the road itself might highlight the seemingly excessive nature of the setback on some properties more

than others, because all properties have the same setback, this does not create a special condition.

In sum, on review of the certified record, the court finds the ZBA's determination regarding unnecessary hardship was reasonable. However, this does not end the analysis.

IV. Reasonable Accommodations for a Recognized Physical Disability

RSA 674:33 permits the grant of a variance in lieu of a finding of hardship where "reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that . . . [a]ny variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance." RSA 674:33, V. "In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises." Id. In the instant case, the ZBA unanimously found the Plaintiff's mother had a recognized physical disability and would regularly use the premises. CR at 161. However, the ZBA found the proposed variance was not a reasonable and necessary accommodation because "[the Plaintiffs] could build a ramp on the other side so as to not violate the ordinance." Id. at 162.

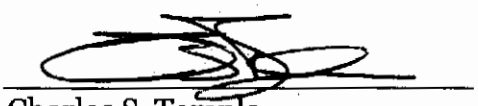
The Court finds the ZBA erred in its interpretation and application of the statute. The statute requires the Plaintiffs to show that reasonable accommodations are necessary in a general sense, not that a specific accommodation is necessary. Moreover, "necessary" relates to the individual's ability to use the premises, not the ability of the accommodation to satisfy the zoning ordinance. In other words, the Plaintiffs had to show that *a* ramp was necessary to allow a person with a recognized physical disability

to regularly use the premises, not that the proposed ramp was the only possible means of installing a ramp on site. Accordingly, the Court finds the ZBA erred in finding reasonable accommodations were not necessary for the Plaintiffs' mother to regularly use the premises. The ZBA's decision represents an unlawful and unreasonable application of RSA 674:33, V.

Because the ZBA found the Plaintiff's application did not meet the definition of a necessary reasonable accommodation, it never completed the statutory analysis for a disability variance. Therefore, the Court remands this matter to the ZBA to perform a full analysis of the Plaintiff's application pursuant to RSA 674:33, V.

SO ORDERED.

Date: 11-20-15



Charles S. Temple
Presiding Justice