STATE OF NEW HAMPSHIRE

CARROLL SS. **SUPERIOR COURT**

DAVID CALDWELL, JR. & CHRISTINA CALDWELL

v.

TOWN OF JACKSON ZONING BOARD OF ADJUSTMENT

Case No. 212-2015-CV-00099

RESPONDENT TOWN OF JACKSON ZONING BOARD OF ADJUSTMENT'S MEMORANDUM OF LAW IN SUPPORT OF AFFIRMATION OF ZONING BOARD DECISION

NOW COMES the Respondent, Town of Jackson Zoning Board of Adjustment ("ZBA"), by and through its attorneys, Hastings Malia, P.A., and submits this Memorandum of Law in support of its position that the decision of the Jackson Zoning Board of Adjustment should be affirmed.

Introduction

This dispute arises out of a ZBA denial of a variance requested by Petitioners David Caldwell, Jr. and Christina Caldwell. After the Town of Jackson approved their plans to build a new house on land they had just purchased, the Caldwells deviated from the plans and began to construct a porch that encroached almost totally into the setback. After a building inspector instructed them to cease construction, they continued to build, forcing the inspector to issue a formal stop work order.

Facts

On April 19, 2013, about a week before the Caldwells bought the property, Frank Delbene and Gwyn Burdell, the then-present owners of 200 Tin Mine Road in Jackson, New Hampshire, applied for a building permit. (Certified Record (hereinafter "C.R.") at 7.) That application called for a 28 foot x 30 foot two-bedroom home with an 18 foot x 28 foot deck to be located on the northern side of the house. (C.R. at 11.) The parcel is approximately .36 acres. (C.R. at 5.) The application listed David Caldwell as the contractor. (C.R. at 7.) Tin Mine Road runs in a generally north-south direction along the eastern property line. (C.R. at 11.)

Pursuant to the Town of Jackson Zoning Ordinance § 4.3.1.2, "no building, structure, porch, or portion thereof" shall be located at least 50 feet from the side of a road. The application and attached documents indicated that the eastern wall of the house would be located precisely 50 feet from Tin Mine Road. (C.R. at 11.)

On April 24, 2013, finding that the application complied with all requirements, the Town of Jackson issued a building permit (No. 2013000012) in the name of Gwyn Burdell. (C.R. at 24.)

On April 26, 2013, Ms. Burdell and Mr. Delbene conveyed their ownership in 200 Tin Mine Road to Petitioners David Caldwell and Christina Caldwell. (C.R. at 53-54.)

On May 17, 2013, the Caldwells applied for an identical building permit to be issued in their names. (C.R. at 25.) Again, this permit called for an 18 foot x 28 foot deck on the northern side of the house and called for the eastern wall to be located precisely at the 50-foot setback line. (*Id.*) The application listed David Caldwell as both an owner and the contractor. (*Id.*) On May 24, 2013, the Town of Jackson issued that new building permit (No. 2013000024). (*See* C.R. at 165 ¶ 2.)

A year later, on May 28, 2014, David Caldwell applied to extend the May 17, 2013 permit. (C.R. at 69.) This application also called for the same 18 foot x 28 foot deck and the same location of the eastern edge of the house. (*Id*.) As before, the submitted plans and approved permit contained no mention of a deck along the eastern wall. (*Id*.) The application listed David Caldwell as the owner and Jeff Mallett as the contractor. (*Id*.) The next day, on May 29, 2014, the Town of Jackson issued that building permit. (See C.R. at 165 ¶ 3.) Sometime thereafter, work began on the project.

On October 24, 2014, during a routine inspection of the worksite, Town of Jackson Building Inspector Kevin Bennett noted that in addition to the permitted 18 foot x 28 foot deck on the northern side of the house, contractor Jeff Mallett had begun building an additional 19 foot x 6 foot deck with overhanging roof on the eastern side of house. (C.R. at 30, 165 ¶ 4, and 169.) Again, because the eastern side of the house was located 50 feet from the road, all of the unpermitted deck illegally encroached into the setback area. (*Id*.)

The plans Mr. Mallett was using included the portion of the deck that wrapped around onto the eastern side of the house with an overhanging roof. (C.R. at 169.) These plans were never submitted to the Town of Jackson during the building permit approval process. (C.R. at 30, 165 ¶ 4, and 169.) The Town of Jackson Zoning Ordinance provides for all land in its Village District:

> No building, structure, porch, or portion thereof shall be located on a lot nearer any lot line, year-round stream or body of water than the minimum setbacks set forth below:
>
> (1) From the sideline of any public or Private Road right-of-way that provides access to the lot, except Route 16A: Fifty (50) feet.

Jackson Zoning Ordinance § 4.3.2.3. (C.R. at 36.) Because this second deck was in violation of the Town of Jackson setback ordinances and not included in the building permit, Inspector

Bennett orally ordered Mr. Mallett to stop work and either remove the deck or submit a variance request to the Town of Jackson ZBA. (See C.R. at 165 ¶ 4.) He also gave Mr. Mallett an Inspection Report instructing him to call the ZBA to discuss the deck and roof that were encroaching into the setback. (C.R. at 1, 30 and 169.)

Instead of complying with the inspector's orders, Mr. Mallett ignored them and continued building the deck and overhanging roof. (See C.R. at 165 ¶ 5.)

On November 7, 2014, upon discovering that Mr. Mallett had continued to build the deck and roof in contravention of both the law and his instructions, Inspector Bennett issued a written Stop Work Order, citing that the work being done on the deck and roof was in the setback and beyond the scope of the building permit. (C.R. at 36.)

On January 14, 2015, the Caldwells applied to the ZBA for a variance to allow a "front porch 5 feet and 8 inches within the front setback of 50 feet." (C.R. at 43.) In that application, the Caldwells argued that a variance was proper under both RSA §§ 674:33, I(b) and 674:33, V. (See C.R. at 48.)

The ZBA "shall have the power to" authorize a variance from the terms of 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). The statute further provides:

> [The ZBA] may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when 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) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.
(b) 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.

RSA § 674:33, V. In their Application for a Variance, the Caldwells stated, "the Owners' mothers suffer from both late stage Parkinson's and substantial skin cancer, and severe rheumatoid arthritis, respectively." (C.R. at 48.)

On February 4, 2015, the ZBA held a public hearing. (C.R. at 112.) After consideration of the issues and preliminary voting that indicated that the ZBA was inclined to deny the variance, the ZBA continued the hearing to allow the Caldwells to provide additional information to establish an unnecessary hardship. (C.R. at 119.)

On March 25, 2015, the public hearing was resumed. After additional discussion and another round of preliminary voting that again indicated that the ZBA was inclined to deny the variance, the ZBA continued the hearing to provide an opportunity for them to consult with counsel and research the issue of granting the variance based on disability. (C.R. at 143.)

Before the next hearing, the Caldwells submitted revised plans that called for the eastern deck to be partially sloped so as to provide an access ramp. (C.R. at 148-59.)

On April 15, 2015, the public hearing was resumed. Upon further discussion and a vote, the ZBA denied the variance request. (C.R. at 161-64.)

On April 21, 2015, the ZBA published a Notice of Decision that confirmed the denial of the variance request. Fatal to the Caldwells' application, the Notice of Decision found that the Caldwells failed to establish two of the five factors necessary under RSA § 674:33, I. (C.R. at 165.)

First, the ZBA held that granting the requested variance would not result in substantial justice being done. (C.R. at 166-67.) *See* RSA § 674:33, I(b)(3). The ZBA reasoned that (1) the house already contained an 18 foot x 28 foot partially roofed deck, (2) the house had enough room to more than double the size of that deck without violating any ordinances, and (3) there was an "essentially equivalent option" for a ramp elsewhere on the house. (C.R. at 166 ¶ 2.) Accordingly, the ZBA found that there was only a *de minimus* loss to the Caldwells if they were unable to have the proposed 19 foot x 6 foot deck. (C.R. at 166 ¶ 2.)

Second, the ZBA held that literal enforcement of the provisions of the ordinance would not result in an unnecessary hardship. (C.R. at 166-67.) *See* RSA § 674:33, I(b)(5). This was based on a finding that no special conditions existed that distinguish the property from other properties in the area. Specifically, the ZBA found that several nearly identical parcels are similarly burdened by the same 50-foot setback requirements. (C.R. at 166-67.)

With regards to the request based on physical disability, the ZBA found that the Caldwells failed to establish that the accommodation of the requested 19 foot x 6 foot ramp and roof within the proscribed setback would be "a reasonable accommodation that was necessary." (C.R. at 167.) See RSA § 674:33, V.

For these reasons, the ZBA denied the variance request. (*Id.*) On May 15, 2015, the Caldwells filed a Motion for Rehearing. (C.R. at 187.) On June 17, 2015, the ZBA held a hearing to consider the Motion for Rehearing. (C.R. at 218.) The ZBA denied the rehearing. (C.R. at 219.) On July 17, 2015, the Caldwells filed the Complaint in this lawsuit.

Standard of Review

Judicial review in zoning cases is limited. *Brandt Dev. Co. of N.H. v. City of Somersworth*, 162 N.H. 553, 555 (2011). 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 ZBA. RSA 677:6. Factual findings by the ZBA are deemed prima facie lawful and reasonable. RSA 677:6; *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 729 (2001). The Superior Court will not set aside the ZBA's decision absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the ZBA decision is unlawful or unreasonable. RSA 677:6; *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 729 (2001).

"The review by the superior court is not to determine whether it agrees with the zoning board of adjustment's [factual] findings, but to determine whether there is evidence upon which they could have been reasonably based." *Lone Pine Hunters' Club, Inc. v. Town of Hollis*, 149 N.H. 668, 670 (2003) (citations omitted).

The New Hampshire Supreme Court has stated that, "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA. This does not mean that either finding or decision is wrong per se. It merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme. Our standard of review is not whether we would have found as the fact finder did, but whether there was evidence on which he or she could reasonably base his or her findings. *Nestor v. Town of Meredith Zoning Bd. of Adjustment*, 138 N.H. 632 (1994) (citations omitted).

"A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 677:3, I. Further, "no ground not set forth in [the motion for rehearing] 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." RSA 677:3, I. Accordingly, this brief addresses only the issues raised in Petitioner's Motion for Rehearing.

Analysis

The ZBA denied the variance for the deck that encroached into the setback because the Caldwells failed to show (1) that granting it would result in substantial justice being done, and (2) that enforcing the zoning ordinance would result in an unnecessary hardship. The Caldwells also failed to show that granting the variance was a reasonable or necessary accommodation for a disability. We address each factor separately below.

I. The ZBA correctly found that granting the variance would not result in substantial justice being done.

To authorize a variance to the zoning ordinance, the ZBA must find, among other factors, that "substantial justice is done" by authorizing the variance. RSA § 674:33, I(b). "Perhaps the only guiding rule [as to the substantial justice test] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109 (2007) (citation omitted).

To determine this, the New Hampshire Supreme Court has considered whether the proposed use is consistent with the area's present use. *Id*. (holding that where "the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district" and "is appropriate for the area," "the general public will realize no appreciable gain from denying this variance" and so substantial justice would be done by authorizing the variance.) *See Farrar v. City of Keene*, 158 N.H. 684, 692 (2009) (upholding a ZBA decision finding substantial justice where "the ZBA reasonably concluded that the proposed use would not alter the character of the area, injure the rights of others, or otherwise undermine the public interest.")

a. There would be no loss to the Caldwells in enforcing the setback.

The Calwells argue that denying this variance would cause them to suffer significant losses in the form of not being able to complete their project and by having to remove the porch and the overhanging roof. (Motion p. 2, ¶ 1, C.R. at 188.) As the ZBA found, these are not losses.

First, there is absolutely nothing stopping the Caldwells from completing the entire project that they requested in their permit application. Their problem is not that the ZBA will reject their building plans. Their problem is that after the ZBA accepted their plans, they decided to build this porch and its overhanging roof illegally into the setback. And then, after the building inspector noticed they were deviating from the plans and told them to stop, they ignored him and kept building. The Caldwells chose to build a deck that they knew was not permitted. The cost of undoing what they knowingly should never have done is not a recognizable cost factored into this balancing test. Requiring them to remove that deck to comply with their building permit does not somehow make enforcing the zoning ordinance an injustice.

The Caldwells seek forgiveness, not permission. Knowingly violating the law does not somehow make the action permissible. At the very least, when the Caldwells built things not included in the building plans and permit, they risked the possibility of having to remove them. Enforcing the setback will not result in any actual losses.

b. There would be no loss to the public in enforcing the setback.

As for the gain to the general public, the Caldwells correctly state that many parts of their house benefit the public. It is LEED certified. It is the first net zero home in town. It serves as a

model for future Zero Energy Ready Homes. Further, the house is placed at an optimal direction for its solar roof shingles.

But none of this has anything to do with the extra porch. When the Town approved the design, it already included these environmental benefits. None of them are at all dependent on a six-foot deck that was later added onto the house during construction. Therefore, enforcing the setback has no impact on the house's environmental certifications, so any consideration of them would be an error of law.

c. There is a gain to the public in enforcing the setback.

In determining the gain to the public, the New Hampshire Supreme Court considers a number of factors, such as whether abutters have opposed the variance, whether the variance is otherwise permitted or appropriate in the area, whether it would alter the character of the area, and whether it would otherwise undermine public interest. *See Malachy*, 155 N.H. at 109; s*ee Farrar* 158 N.H. at 692.

The Caldwells are correct to assert that no abutters have opposed their request. (C.R. at 188-89.) But the analysis does not end there. The Court must also consider that this porch would not be permitted anywhere in the area. With the exception of a single street, Jackson enforces a 50-foot setback on every road in town. Jackson Zoning Ordinance §§ 4.3.1.2 and 4.3.2.3. The Town passed the Zoning Ordinance for good reason, and the general public is served by its enforcement. Though there may be some grandfathered houses and porches that are allowed to encroach into the setback, their existence does not make an additional one any more appropriate. Moreover, the context of this request should not be lost on the Court. The Caldwells knowingly deviated from the building permit and continued construction even after the inspector ordered them to stop. If the Court considers the costs to the Caldwells in removing

the illegal porch, it would reward their behavior and encourage future projects to similarly subvert the permitting process to gain an edge in their variance request (and that variance would be requested only if a building inspector happened to notice the illegal construction).

Further, despite the Caldwells' arguments to the contrary, it is inconsequential that a Board member once commented that the house looks better with the porch. (*See* C.R. at 189 ¶ 4.) Even if such an off-hand comment could somehow bind the ZBA, that member also acknowledged in the same breath, that "he has a hard time granting a variance to have a more pleasingly designed home." (C.R. at 119.) Meanwhile, another member commented that "he thought the house looks better without the porch but that is neither here nor there." (C.R. at 119.)

II. The ZBA correctly found that enforcing the zoning ordinance and denying the variance would not result in an unnecessary hardship.

To authorize a variance to the zoning ordinance, the ZBA must find, among other factors, that "[l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." RSA § 674:33, I(b).

An "unnecessary hardship" can exist in one of two ways. First, an unnecessary hardship exists if "owing to special conditions of the property that distinguish it from other properties in the area: (i) [n]o 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).

Second, an unnecessary hardship exists 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).

Accordingly, unless the property has special conditions that cause the ordinance to result in unnecessary hardship, a variance cannot be granted. RSA § 674:33.

a. The Caldwells' property has no special conditions that distinguish it from other properties in the area.

The ZBA correctly found that no special conditions existed that distinguish the property from other properties in the area. Specifically, the ZBA found that several nearly identical parcels are similarly burdened by the same 50-foot setback requirements. (C.R. at 166-67.)

The Caldwells argue that their lot has a small building envelope on a significant slope. (C.R. at 189 ¶ 8(1) and (2)). Critically, however, they concede that there are "other sub-standard lots with the same slope and configuration." (C.R. at 190 ¶ 8(4).) Undeterred, they claim that their lot is "unique and has a "special condition" because it was not grandfathered or given a variance." (C.R. at 190 ¶ 8(4), (5), (7) and (8)). This argument obfuscates the issue.

The grandfathering of nonconforming uses are protected by statute as well as by the New Hampshire Constitution. N.H. Const. pt. I, arts. 2 and 12. *Town of Hampton v. Brust*, 446 A.2d 458, 122 N.H. 463 (N.H. 1982). That neighboring lots may enjoy such protection from unlawful takings does not create a unique condition of the Caldwells' lot. It would be an error of law to find that the existence of old construction in the area renders this (and every other unbuilt) property unique. Unlike their neighbors who lawfully built their houses under all existing regulations at the time, the Caldwells did not follow the existing rules at the time they built their house. Obviously, forcing owners of existing structures to rebuild whenever the zoning ordinance changes would be prohibitively costly and extremely unfair. But the Caldwells fully knew their porch was illegal when they built it. Requiring new construction to comply with new laws is absolutely reasonable. Enforcing the zoning ordinance does not harm the Caldwells or

deny them their expected use of their property. In fact, they bought the property a week *after* the first building permit was requested. They fully knew what the zoning ordinance was.

Next, the Caldwells argue that their property is unique in that the azimuth angle of the sun requires the house to be configured in a certain way for the solar panels. (C.R. at 190 ¶ 8(3).) This is a red herring. The solar shingles have nothing to do with this porch. The building plans as originally submitted and approved allow for the Caldwells to optimize the efficiency of their house. That they now seek to add a porch onto the side of the house has no bearing whatsoever on the solar shingles.

Finally, the Caldwells fail to present evidence to establish that the way the road is built somehow distinguishes the property from the others on the road. (*See* C.R. at 190 ¶ 8(6).) This property is no different than any new construction on any property anywhere: It must comply with the rules.

b. The Caldwells' property can still be reasonably used in strict conformance with the ordinance.

As the ZBA ruled, the issue is not whether the neighboring lots are grandfathered. The issue is whether the Caldwells' property is particularly and unreasonably harmed by enforcing the 50-foot setback requirement. It is not. Even with the setback, there is more than a sufficient usable building envelope. This proposed ramped deck could very easily be relocated elsewhere on the house without sacrificing its usefulness and without need for a variance.

The Caldwells did not request this variance out of necessity. The Caldwells requested this variance out of convenience. Where the variance involved is "only a mere convenience, other alternatives were available that did not pose a prohibitive cost and there was nothing unique about [the subject] property to distinguish it from other [area properties] that were affected by the same zoning ordinance," the Supreme Court has held that there was no

substantial hardship. *Bacon v. Town of Enfield*, 150 N.H. 468, 480 (2004) (Duggan, J. Concurring). Here, the Caldwells are fully able to build their LEED certified, net zero house while fully adhering to the zoning ordinance. Their ramped deck can easily be attached elsewhere to the house. Enforcing the ordinance does not disturb, much less prohibit, the lot's usefulness in any way. Accordingly, there is no unnecessary hardship, and the Court should affirm the ZBA's decision.

III. The proposed ramped deck is not a reasonable and necessary accommodation for a physical disability.

Alternatively, the ZBA "may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when 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) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.
(b) 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.

RSA § 674:33, V. Here, the ZBA found that the Owner's mother, Virginia Caldwell, has a recognized physical disability, late-stage Parkinson's disease. (C.R. at 167 ¶ 5(a).) The ZBA also found that she would regularly use the premises. (C.R. at 167 ¶ 5(b).) However, the ZBA unanimously found that the proposed deck/ramp and roof was not a reasonable and necessary accommodation. Rather, the ZBA found that the Caldwells have the ability to construct an equivalent ramp onto the existing (and permitted) main deck. (C.R. at 167 ¶5(c).) This opinion of the ZBA is bolstered by the expertise of its membership. One of their members is a registered architect, and another holds a graduate degree in architecture. (C.R. at 166 ¶ 8.)

IV. None of the Caldwells' procedural arguments have any merit.

In addition to challenging the substance of the ZBA's decision, the Caldwells argue that their variance should be granted because the ZBA allegedly failed to follow proper procedure in handling the request. Each of these arguments fail.

a. The voting in the April meeting controlled the outcome of this case.

The Caldwells argue that it is an error of law for the ZBA to have voted against them on the issue of substantial justice on April 15, 2015 after voting in their favor in a preliminary vote on March 25. (C.R. 189 ¶ 5.) This is a novel claim for which the Caldwells cite to no authority. Nevertheless, there are a number of responses.

First, between March 25 and April 15, the Caldwells submitted revised plans for the consideration of the ZBA. (C.R. 153-54 and 158.) Those revised plans modified the proposed deck to include a ramp. (C.R. 166 ¶ 7(c).) Accordingly, the only vote held on the application as it existed was at the April 15 meeting.

Second, there is no error in continuing the hearing and voting at its conclusion. The By-Laws provide simply that the ZBA "may vote to continue the Public Hearing at a later date if it decides that additional deliberation, information or evidence is necessary, or for any other good cause." (Jackson ZBA By-Laws 6.5.)[1] Further, to transact business and vote, the ZBA simply needs a quorum, which is any combination of three regular or alternate members. (Jackson ZBA By-Laws 4. See RSA 673:10, III.) It is the Board's procedure to hold a preliminary vote on each of the elements of the request before determining whether to continue the hearing to allow for additional information.

[1] The by-Laws of the Jackson ZBA are not contained in the Certified Record and therefore they are attached hereto as Exhibit A.

There is no question that the ZBA had the authority to consider additional evidence on both March 25 and April 15 and render a decision. As such, its final vote on April 15 – after consideration of all evidence – is valid and enforceable.

Assuming, *arguendo*, that the Court holds that once the ZBA voted on an issue, it cannot change its vote later, then this argument still fails. On February 4, the ZBA voted unanimously against them on the issue of substantial justice, finding that "the loss to the individual does not outweigh the gain to the general public." (C.R. at 117.) That night, rather than simply deny the variance and have the Caldwells move for a rehearing, the ZBA chairman noted that he would rather continue the hearing to give the Caldwells a chance to present more information. (*Id*.) Had these original votes somehow been binding, then the Caldwells would have never been able to present further evidence in March and April. Accordingly, it was proper for the ZBA to vote on all issues at the April 15, 2015 meeting.

b. The Caldwells were not entitled to the same five members at each meeting.

The Caldwells argue that the ZBA erred as a matter of law because it was comprised of different voting members on different nights. (C.R. at 189 ¶ 6.) Again, they make a procedural argument without citing any authority. There is nothing in the law that prohibits this situation. Rather, the statute allows for it:

> Whenever a regular member of a local land use board is absent or whenever a regular member disqualifies himself or herself, the chairperson shall designate an alternate, if one is present, to act in the absent member's place;

(RSA 673:11.) Similarly, the By-Laws allow for different voting members at each meeting.

> In the absence of a regular member, or the disqualification of a member to sit on a particular matter, the Chairman shall designate an alternate member in order to reach the maximum number of permitted votes, which is five (5). An alternate who is activated to fill the seat of an absent or recused member becomes a full member of the Board for as long as they are activated and can participate in all aspects of the process.

(Jackson ZBA By-Laws 4.2.) Meanwhile, there is no evidence to support that the result would have been different with the same board members at each meeting. Over the course of the three meetings, only two members ever voted in the Caldwells' favor on the unnecessary hardship prong. (See C.R. 117-19, 141, and 162-63.) At the April meeting, where the ZBA voted unanimously against this prong, one of those members was absent and the other changed his vote. Therefore, even if those two members had voted in their favor, the Caldwells still would have lost 2-3. The changes in voting members was proper, did not affect the resulting denial, and did not otherwise harm the Caldwells.

c. The ZBA did not erroneously discuss this case outside of a meeting.

The Caldwells argue that it was an error of law for the member of the ZBA who joined the board for the April meeting to have been provided with information and an explanation of the application outside of a noticed meeting. (C.R. at 189 ¶ 7.) This is incorrect for several reasons.

First, the record does not reflect that any such outside communication occurred. Rather, the minutes of the meeting stated that after the chairman called the meeting to order, "[a]s James [Gleason] is new to the Board there was a review of the progress of this application." (C.R. at 161.) Further, it stated that James "did determine at the time the voting began that he was comfortable voting on this matter." (C.R. at 161.)

Further, even if it did occur, New Hampshire's Right to Know Law does not prohibit communications outside of a meeting so long as it is not used "to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1." RSA 91-A:2-a, II. Because the Caldwells are unable to point to any such evidence, there was no such error of law.

Moreover, as the Caldwells amended their application and revised their plans between the March 25 and April 15 meeting, that new member who joined for the April meeting was present for the entire consideration of the application as it was presented for that meeting.

d. Delay in determination of motion for rehearing

In their Complaint, the Caldwells now allege that they were somehow prejudiced because where they moved for a rehearing on May 15, 2015, the ZBA did not decide whether to grant that rehearing until June 17. When a Motion for Rehearing is filed, the ZBA "shall within 30 days either grant or deny the application." RSA 677:3, II.

That the ZBA denied the motion for rehearing 33 days later does not estop the ZBA from denying it at all. "[N]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." *Patenaude v. Town of Meredith*, 118 N.H. 616, 621 (1978). *See Mansur v. Muskopf*, 159 N.H. 216, 226-27 (2009) (finding no reversible error where there was "no allegation that some lapse occurred in the proceeding below that interfered with any necessary party's ability to fully litigate the scope [of the claim]"). Similarly, here, the Caldwells have failed to show that they were somehow injured by the ZBA deciding this matter on June 17 rather than a few days before. In fact, the Caldwells' attorney was informed of the date of the meeting on June 1. (C.R. at 215.) He failed to raise a concern about this issue any time before the meeting or during it. (C.R. at 215 and 218-19.)

Moreover, if the ZBA acted untimely, it acted untimely in granting or denying the motion for rehearing. As such, any reversible error would be to remand the matter back to the ZBA for rehearing. Thus, the ZBA would simply make a decision after holding another hearing that the Caldwells would then appeal.

Conclusion

The Caldwells are fully able to build their LEED certified, net zero house while fully adhering to the zoning ordinance. Their proposed ramped deck can easily be attached elsewhere to the house without sacrificing any function or benefit. Enforcing the zoning ordinance will neither result in an unnecessary hardship nor cause a substantial injustice. Meanwhile, as an identical ramped deck can very easily be attached elsewhere to the house without requiring a variance, their proposal is not a necessary or reasonable accommodation. For the foregoing reasons, the Court should affirm the decision of the Town of Jackson Zoning Board of Adjustment.

WHEREFORE, the Town of Jackson Zoning Board of Adjustment respectfully requests that this Honorable Court:

A. Deny David and Christina Caldwell's appeal of the Town of Jackson Zoning Board of Adjustment's decision, and

B. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

THE TOWN OF JACKSON ZONING BOARD OF ADJUSTMENT
By its Attorneys,
HASTINGS MALIA P.A.

Dated: _____

_____
Peter J. Malia, Jr., Esq.
N.H. Bar ID #12507
P.O. Box 290
Fryeburg, Maine 04037
207-935-2061
pmalia@hastingsmalia.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was hand delivered to Christopher T. Meier, Esq. on the above date.

_____
Peter J. Malia, Jr., Esq.

PJM.Municipalities.TOJ.Caldwell.Memo.100615