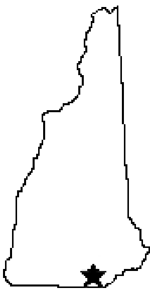


TOWN OF HUDSON

Zoning Board of Adjustment

Charlie Brackett, Chairman   Marilyn E. McGrath, Selectmen Liaison

12 School Street • Hudson, New Hampshire 03051 • Tel: 603-886-6008 • Fax: 603-594-1142

MEETING AGENDA – June 27, 2019

The Hudson Zoning Board of Adjustment will hold a meeting on June 27, 2019, in the Community Development Paul Buxton Meeting Room in the basement of Hudson Town Hall (please enter by ramp entrance at right side). The public hearings for applications will begin at 7:00 PM, with the applications normally being heard in the order listed below.

SUITABLE ACCOMMODATIONS FOR THE SENSORY IMPAIRED WILL BE PROVIDED UPON ADEQUATE ADVANCE NOTICE BY CALLING 886-6008 OR TDD 886-6011.The following items before the Board will be considered:

I. CALL TO ORDER

II. PLEDGE OF ALLEGIANCE

III. PUBLIC HEARINGS OF SCHEDULED APPLICATIONS BEFORE THE BOARD:

1. Case 168-107 (6-27-19): Richard Tassi, 20 Frenette Drive, Hudson, NH requests a Variance to construct an 18' x 22' carport which encroaches 11.1 ft. into the front yard setback, leaving 18.9 ft. where 30 feet is required. [Map 168, Lot 107-000, Zoned R-2; HZO Article VII, §334-27, Table of Minimum Dimensional Requirements].

IV. REVIEW OF MINUTES:

1. 05/23/19 Minutes

V. REQUEST FOR REHEARING: None

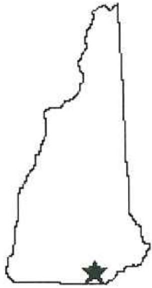
VI. OTHER:

1. Recap of recent 25th Annual Planning and Zoning Conference - Handouts
2. Continued discussion of possible ZBA Bylaws revisions.
3. Discussion of possible Zoning Ordinace Amendments, and prep for 7/11/19 ZBA workshop mtg.

____

Bruce Buttrick
Zoning Administrator

Posted: Town Hall, Library, and Post Office – 6/21/19



TOWN OF HUDSON

Land Use Division

12 School Street · Hudson, New Hampshire 03051 · Tel: 603-886-6008 · Fax: 603-594-1142

Zoning Administrator Staff Report
Meeting date: June 27, 2019 ~~3/13~~

Case: 168-107 (6-27-19): Richard Tassi, 20 Frenette Drive, Hudson, NH requests a Variance to construct an 18' x 22' carport which encroaches 11.1 ft into the front yard setback, leaving 18.9 ft where 30 feet is required. [Map 168, Lot 107-000, Zoned R-2; HZO Article VII, §334-27, Table of Minimum Dimensional Requirements].

Address: 20 Frenette Dr
Zoning district: Residential - Two (R-2)

Summary:
Applicant requests a Variance to build an 18' x 22' carport in the front setback with an encroachment of 18 ft into the front setback, leaving a setback of 12 ft where 30 ft is required. This parcel has no side yard setbacks, due to the configuration of the property and street layout.

Property description:
This as a developed lot of record with 0.424 Acres (18,469 sqft), where 1 Acre required; existing non-conforming lot and has 322.45 ft of frontage (200ft required). Dwelling unit structure does not satisfy the front setback; existing non-conforming structure.

Town Staff review/comments:
Town Planner: none Town Engineer: yes Fire Dept: none

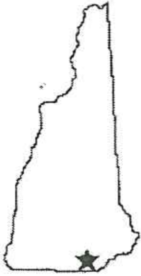
HISTORY:
Building Permits:
None found
Zoning determinations:
#19-049 dated 4/17/19
#19-062 dated 5/15/19

Attachments:
"A" Assessing record
"B" Zoning determinations #19-049 dated 4/17/19
"C" Zoning determinations #19-062 dated 5/15/19
"D" Plot plan of proposed carport.
"E" Proposed final site "layout".
"F" Town Engineer review comments

Previous Assessments

Year	Code	Building	Yard Items	Land Value	Acres	Special Land	Total
2019	101 - ONE FAMILY	162,500	1,000	78,600	0.42	0.00	242,100
2018	101 - ONE FAMILY	162,500	1,000	78,600	0.42	0.00	242,100
2018	101 - ONE FAMILY	162,500	1,000	78,600	0.42	0.00	242,100
2017	101 - ONE FAMILY	162,500	1,000	78,600	0.42	0.00	242,100
2017	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2017	101 - ONE FAMILY	162,500	1,000	78,600	0.42	0.00	242,100
2016	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2016	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2015	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2015	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2014	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2014	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2013	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2013	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2012	101 - ONE FAMILY	115,900	1,000	78,600	0.42	0.00	195,500
2012	101 - ONE FAMILY	136,000	1,200	115,800	0.42	0.00	253,000
2011	101 - ONE FAMILY	136,000	1,200	115,800	0.42	0.00	253,000
2011	101 - ONE FAMILY	136,000	1,200	115,800	0.42	0.00	253,000
2010	101 - ONE FAMILY	136,000	1,200	115,800	0.42	0.00	253,000
2010	101 - ONE FAMILY	146,800	900	115,800	0.42	0.00	263,500
2009	101 - ONE FAMILY	146,800	900	115,800	0.42	0.00	263,500
2008	101 - ONE FAMILY	146,800	900	115,800	0.42	0.00	263,500
2008	101 - ONE FAMILY	146,800	900	115,800	0.42	0.00	263,500
2007	101 - ONE FAMILY	146,800	900	115,800	0.42	0.00	263,500
2007	101 - ONE FAMILY	154,300	1,000	86,900	0.42	0.00	242,200
2006	101 - ONE FAMILY	154,300	1,000	86,900	0.42	0.00	242,200
2006	101 - ONE FAMILY	155,600	0	86,900	0.42	0.00	242,500
2005	101 - ONE FAMILY	155,600	0	86,900	0.42	0.00	242,500
2005	101 - ONE FAMILY	155,600	0	86,100	0.40	0.00	241,700
2004	101 - ONE FAMILY	155,600	0	86,100	0.40	0.00	241,700
2004	101 - ONE FAMILY	114,100	0	65,600	0.40	0.00	179,700
2003	101 - ONE FAMILY	114,100	0	65,600	0.40	0.00	179,700
2003	101 - ONE FAMILY	114,100	0	65,600	0.40	0.00	179,700
2002	101 - ONE FAMILY	114,100	0	65,600	0.40	0.00	179,700
2002	101 - ONE FAMILY	114,100	0	65,600	0.40	0.00	179,700
2001	101 - ONE FAMILY	68,600	0	43,300		0.00	111,900
2000	101 - ONE FAMILY	67,700	900	43,300	0.40	0.00	111,900
1999	101 - ONE FAMILY	67,700	900	43,300	0.40	0.00	111,900

A



TOWN OF HUDSON

Land Use Division

12 School Street · Hudson, New Hampshire 03051 · Tel: 603-886-6008 · Fax: 603-594-1142

Zoning Determination #19-049
Building Permit application 2019-00286 denial

April 17, 2019

Richard Tassi & Denise Duval
20 Frenette Dr
Hudson, NH 03051

Re: **20 Frenette Dr Map 168 Lot 107-000**
District: Residential Two (R-2)

Dear Richard and Denise,

Your building permit application: to construct/install a 20 x 20 carport has been denied.

Zoning Review / Determination:
The submitted plan indicates the location of the proposed carport as being within the front yard setback. You show 25 ft from the property line/ROW, where 30 ft is required per Table of Minimum Dimensional Requirements §334-27.

You would need to apply for a variance from the Zoning Board of Adjustment, to proceed with your building permit application as proposed, or revise your plan to satisfy the required front yard setback.

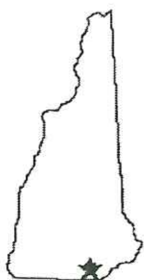
Sincerely,

Bruce Buttrick, MCP
Zoning Administrator/Code Enforcement Officer
(603) 816-1275
bbuttrick@hudsonnh.gov

cc: Public Folder
J. Kennedy, Permit Tech
Dep. O'Brien, Inspectional Services
B. Groth, Town Planner
File

NOTE: this determination may be appealed to the Hudson Zoning Board of Adjustment within 30 days of the receipt of this letter.

B



TOWN OF HUDSON

Land Use Division

12 School Street · Hudson, New Hampshire 03051 · Tel: 603-886-6008 · Fax: 603-594-1142

Zoning Determination #19-062
Building Permit application 2019-00286 denial

May 15, 2019

Richard Tassi & Denise Duval
20 Frenette Dr
Hudson, NH 03051

Re: **20 Frenette Dr Map 168 Lot 107-000**
District: Residential Two (R-2)

Dear Richard and Denise,

Your building permit application: to construct/install an 18 x 22 carport has been denied.

Zoning Review / Determination:
The submitted plot plan indicates the location of the proposed carport as being within the front yard setback. You show 18 ft from the property line/ROW, where 30 ft is required per Table of Minimum Dimensional Requirements §334-27.

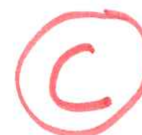
You would need to apply for a variance from the Zoning Board of Adjustment, to proceed with your building permit application as proposed, or revise your plan to satisfy the required front yard setback.
You should verify with the Town Engineer, Elvis Dhima 886-6008 if any restrictions for a second driveway for access to this carport.

Sincerely,

Bruce Buttrick, MCP
Zoning Administrator/Code Enforcement Officer
(603) 816-1275
bbuttrick@hudsonnh.gov

encl: proposed plot plan – May 2019
cc: Public Folder
J. Kennedy, Permit Tech
Dep. O'Brien, Inspectional Services
E. Dhima, Town Engineer
B. Groth, Town Planner
File

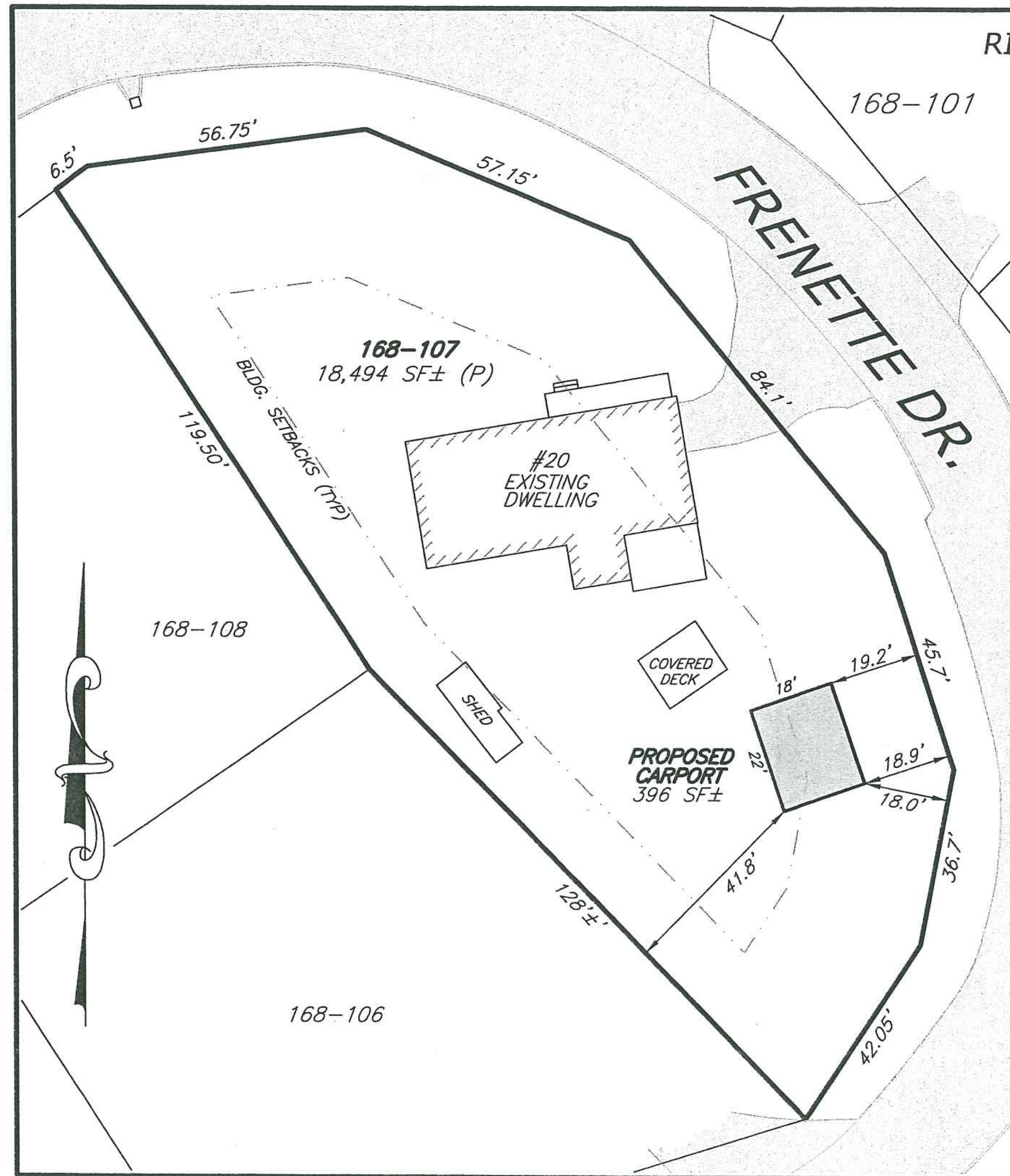
NOTE: this determination may be appealed to the Hudson Zoning Board of Adjustment within 30 days of the receipt of this letter.



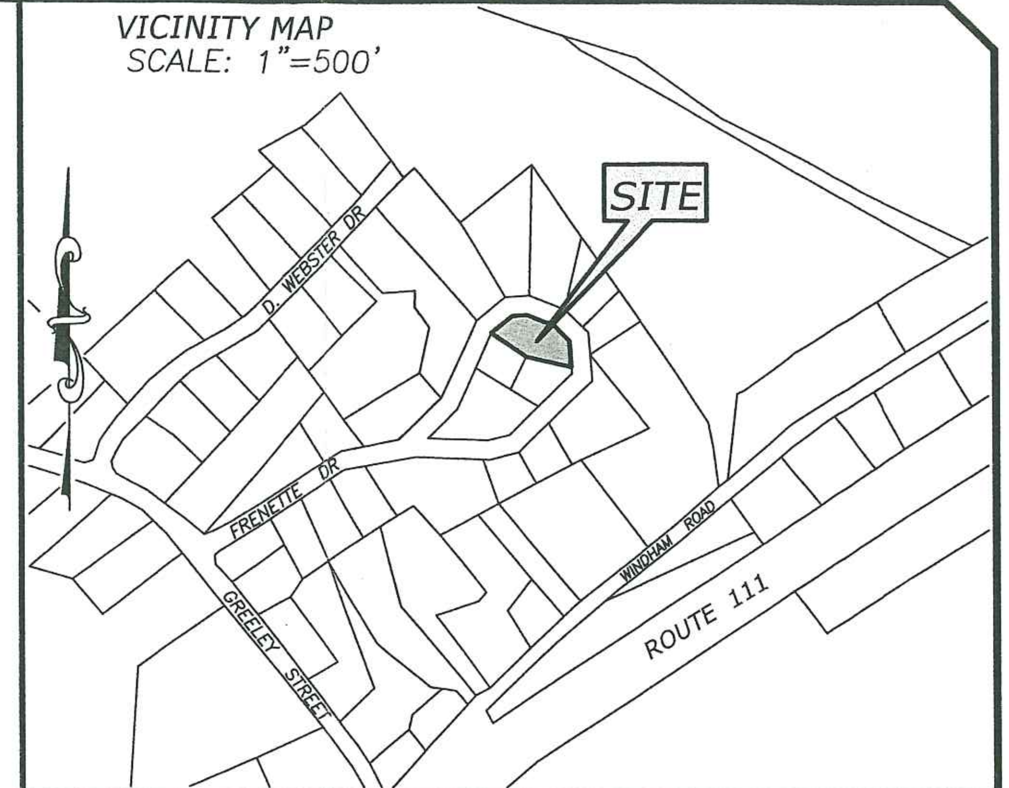
PLAN NOTES:
1.) PURPOSE OF THIS PLAN IS TO ILLUSTRATE THE LOCATION OF A PROPOSED CARPORT AT HUDSON TAX MAP 168 LOT 107.

PLAN OF LAND
20 FRENETTE DRIVE
HUDSON, NH
MAP 168 LOT 107

AS PREPARED FOR
RICHARD TASSI, OWNER



VICINITY MAP
SCALE: 1"=500'



REV. 2			BY:
REV. 1			BY:

ZONING DISTRICT: R-2
REQUIRED SETBACKS:

FRONT – 30 FEET
SIDE – 15 FEET
REAR – 15 FEET
DEED REF: BK. 5989 PG. 1000
PLAN REF.: HCRD PL. 1214
PLAN REF.: HCRD PL. 1595
PLAN SCALE: 1"=30'
DATE: MAY 2019
JOB REF.: 019-040-TASS

I HEREBY CERTIFY:

THAT THIS PLAN IS THE RESULT OF AN INSTRUMENT SURVEY AND THAT ALL MEASUREMENTS HEREON ARE TO BE CONSIDERED TRUE AND ACCURATE.

JEFFREY LAND SURVEY LLC
1 BURGESS DRIVE, LITCHFIELD, NH 03052
(603) 424-4089

D

PLAN OF LAND
20 FRENETTE DRIVE
HUDSON, NH
MAP 168 LOT 107

AS PREPARED FOR
RICHARD TASSI, OWNER

)F THIS PLAN IS TO ILLUSTRATE
'ON OF A PROPOSED CARPORT AT
\X MAP 168 LOT 107.

168–101

FRENETTE DR.

57.15'

168–107
18,494 SF± (P)

BLDG. SETBACKS (TYP)

#20
EXISTING
DWELLING

ABANDON DRIVEWAY UPON COMPLETION

EXISTING RETAINING WALL AND STEPS

EXISTING CONCRETE WALK

EXISTING CONCRETE APRON

COVERED DECK

SHED

19.2'

45.7'

18'

NEW DRIVEWAY

PROPOSED CARPORT
396 SF±

22'

18.9'

18.0'

41.8'

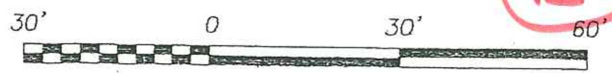
36.7'

128'±

Proposed
Final Site Plan

168–106

42.05'



ZONING ADMINISTRATOR REQUEST FOR INTER DEPARTMENT REVIEW
TOWN OF HUDSON, NEW HAMPSHIRE

REQUEST FOR REVIEW/COMMENTS:
Case 168-107 (06/27/19)
20 Frenette Drive

For Town Use

Plan Routing Date: 6/11/19 Reply requested by: 6/14/19 ZBA Hearing Date: 6/27/19

______ I have no comments ✓ I have comments (attach to form)

E2D Title: Town Engineer Date: 6/12/19
(Initials)

DEPT:
✓ Town Engineer ______ Fire/Health Department______ Town Planner ______

F

Buttrick, Bruce

From:	Dhima, Elvis
Sent:	Wednesday, June 12, 2019 8:59 AM
To:	Goodwyn, Tracy
Cc:	Buttrick, Bruce
Subject:	RE: Interoffice ZBA Variance Application Review
Attachments:	20190612074312246.pdf

Tracy

My only suggestion would be to send the review form separately and as a fillable form

With that said, I have the following comments:

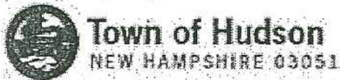
1. Plan and profile for the proposed driveway shall be submitted at the time of the new driveway permit
2. Existing driveway shall be removed prior to the proposed driveway final inspection

Thank you

E

Elvis Dhima, P.E.
Town Engineer

Town of Hudson, NH
12 School Street
Hudson, NH 03051
Phone: (603) 886-6008
Mobile: (603) 318-8286



From: Goodwyn, Tracy
Sent: Tuesday, June 11, 2019 4:00 PM
To: Groth, Brian <bgroth@hudsonnh.gov>; Dhima, Elvis <edhima@hudsonnh.gov>; Buxton, Robert <RBuxton@hudsonnh.gov>
Cc: Buttrick, Bruce <bbuttrick@hudsonnh.gov>
Subject: Interoffice ZBA Variance Application Review
Importance: High

Hello All,

We are following suit with the Planning Dept. and sending an electronic file for Interoffice review of our one Variance application to be heard at the upcoming 6/27/19 ZBA Meeting. Please review the attached. Your input/comments are greatly appreciated.

F2

Buttrick, Bruce

From: Dhima, Elvis
Sent: Thursday, May 16, 2019 9:07 AM
To: Buttrick, Bruce
Cc: Goodwyn, Tracy S; Stickney, Doreena
Subject: 20 Frenette Drive - Technical Review

Bruce

The proposed plan shows a second driveway

This will require a second driveway permit with Planning Board waiver for two driveways for a single family home.

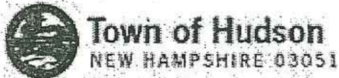
Second driveway permit will also require a plan and profile.

Thank you

E

Elvis Dhima, P.E.
Town Engineer

Town of Hudson, NH
12 School Street
Hudson, NH 03051
Phone: (603) 886-6008
Mobile: (603) 318-8286



F3

HUDSON ZONING BOARD OF ADJUSTMENT

Variance Decision Work Sheet (Rev 11-06-18)

On **06/27/19**, the Zoning Board of Adjustment heard Case **168-107**, being a case brought by **Richard Tassi, 20 Frenette Drive, Hudson, NH**, for a Variance **to construct an 18' x 22' carport which encroaches 11.1 ft. into the front yard setback, leaving 18.9 ft. where 30 feet is required.** [Map 168, Lot 107-000, Zoned R-2; HZO Article VII, §334-27, Table of Minimum Dimensional Requirements].

After reviewing the petition, hearing all of the evidence, and taking into consideration any personal knowledge of the property in question, the undersigned member of the Zoning Board of Adjustment sitting for this case made the following determination:

Y **N** **1.** Granting of the requested variance will not be contrary to the public interest, since the proposed use does not conflict with the explicit or implicit purpose of the ordinance and does not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."

____

____

____

Y **N** **2.** The proposed use will observe the spirit of the ordinance, since the proposed use does not conflict with the explicit or implicit purpose of the ordinance and does not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."

____

____

____

Y **N** **3.** Substantial justice would be done to the property-owner by granting the variance, and the benefits to the property owner are not outweighed by harm to the general public or to other individuals.

____

____

____

Y **N** **4.** The proposed use will not diminish the values of surrounding properties.

____

____

____

Y **N** **5.** Special conditions exist such that literal enforcement of the ordinance would result in **unnecessary hardship**, either because the restriction applied to the property by the ordinance does not serve the purpose of the restriction in a "fair and reasonable" way *and also* because the special conditions of the property cause the proposed use to be reasonable, or, alternatively, there is no reasonable use that can be made of the property that would be permitted under the ordinance, because of the special conditions of the property.

____

____

____

____

Member Decision: ______________________________

Signed: ______________________________ ____________________

Sitting member of the Hudson ZBA Date

Stipulations: ____________________

TOWN OF HUDSON
MAY 23 2019
Zoning Department

APPLICATION FOR A VARIANCE

To: Zoning Board of Adjustment
Town of Hudson

Entries in this box are to be filled out by Land Use Division personnel

Case No. 168-107

Date Filed 5-23-19

Name of Applicant Richard Tassi Map: 168 Lot: 107 Zoning District: R-2

Telephone Number (Home) 603 689-8822 603 882-1119 (Work)

Mailing Address 20 Frenette Drive Hudson, NH 03051

Owner Richard Tassi, Denise Duval Tassi, TR

Location of Property 20 Frenette Drive
(Street Address)

Signature of Applicant [signature] Date ~~5/20/2019~~ 5/22/2019

Signature of Property-Owner(s) Date

NOTE: Fill in all portions of the Application Form(s) as appropriate. This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if space provided is inadequate. If you are not the property owner, you must provide written documentation signed by the property owner(s) to confirm that the property owner(s) are allowing you to speak on his/her/their behalf or that you have permission to seek the described variance.

Items in this box are to be filled out by Land Use Division personnel

COST:

Application fee:		$130.00
10	Direct Abutters x $4.05 =	40.50
5	Indirect Abutters x $0.55 =	2.75
	Total amount due:	$ 173.25

Date received: 5/23/19

Amt. received: $ 173.25 ck# 406

Receipt No.: 551,526

Received by: [initials]

By determination of the Zoning Administrator or Building Inspector, the following Departmental review is required:

✓ Engineering ✓ Fire Department ___ Health Officer ✓ Planner

TOWN OF HUDSON, NH
NOTICE TO APPLICANTS

The following **requirements/checklist** pertain to the Town of Hudson, NH, Zoning Board of Adjustment applications, as applicable:

Applicant Initials		Staff Initials
RT	The applicant must provide 13 copies including the original of the filled-out application form, together with this checklist and any required attachments listed. (Paper clips, no staples)	TG.
RT	Before making the 13 copies, please review the application with the Zoning Administrator or staff.	TG.
RT	A separate application shall be submitted for each request, with a separate application fee for each request i.e. Variance, Special Exception, Home Occupation Special Exception, Wetland Special Exception, Appeal from an Administrative Decision, and Equitable Waiver but only one abutter notification fee will be charged for multiple requests. If paying by check, make the check payable to the Town of Hudson.	TG.
RT	If the applicant is not the property owner(s), the applicant must provide to the Town written authorization, signed and dated by the property owner(s), to allow the applicant or any representative to apply on the behalf of the property owner(s). (**NOTE**: if such an authorization is required, the Land Use Division will not process the application until this document has been supplied.)	TG.
RT	Provide two (2) sets of mailing labels from the abutter notification lists (Pages 4 & 5) prepared by applicant, with the proper mailing addresses, must be dated within (30) thirty days of submittal of the application. The abutter lists can be obtained from the assessor's office. (**NOTE**: the Land Use Division cannot process your application without the abutter lists. It is the applicant's responsibility to ensure that the abutter lists are complete and correct. If at the time of the hearing any applicable property owner is found not to have been notified because the lists are incomplete or incorrect, the Zoning Board will defer the hearing to a later date, following notification of such abutters.)	TG 5/22/19 ~~Add~~ abutters.
RT	A copy of both sides of the assessor's card shall be provided. (**NOTE**: these copies are available from the Assessor's Office)	TG.
RT	A copy of the Zoning Administrator's correspondence confirming either that the requested use is not permitted or that action by the Zoning Board of Adjustment is required must be attached to your application.	TG.
RT	For a Wetland Special Exception, a letter or a copy of the relevant decision from the Hudson Conservation Commission shall be attached to the application for existing single-family and duplex residential uses. All other Wetland Special Exceptions (multifamily, commercial, or industrial uses) must have letters both from the Conservation Commission and from the Planning Board.	N/A.

PLOT PLAN-

___RT___ Except for requests pertaining to above-ground pools, sheds, decks and use variances, the application must include a copy of a certified plot plan from a licensed land surveyor. The required plot plan shall include all of the items listed below. Pictures and construction plans will also be helpful. (**NOTE**: it is the responsibility of the applicant to make sure that all of the requirements are satisfied. The application may be deferred if all items are not satisfactorily submitted): ___TG.___

a) ___RT___ The plot plan shall be drawn to scale on an 8 ½" x 11" or 11" x 17" sheet with a North pointing arrow shown on the plan. ___TG.___

b) ___RT___ The plot plan shall be up-to date and dated, and shall be no more than three years old. ___TG.___

c) ___RT___ The plot plan shall have the signature and the name of the preparer, with his/her/their seal. ___TG.___

d) ___RT___ The plot plan shall include lot dimensions and bearings, with any bounding streets and with any rights-of-way and their widths as a minimum, and ~~shall be~~ accompanied by a copy of the GIS map of the property. (**NOTE**: copies of the GIS map can be obtained at the Land Use Division.) ___TG.___

e) ___RT___ The plot plan shall include the location and dimensions of existing or required services, the area (total square footage), all buffer zones, natural features, any landscaped areas, any recreation areas, any safety zones, all signs, streams or other wetland bodies, and any drainage easements. ___TG.___

f) ___RT___ The plot plan shall include all existing buildings or other structures, together with their dimensions and the distances from the lot lines, as well as any encroachments. ___TG.___

g) ___RT___ The plot plan shall include all proposed buildings, structures, or additions, marked as "PROPOSED," together with all applicable dimensions and encroachments. ___TG.___

h) ___RT___ The plot plan shall show the building envelope as defined from all the setbacks required by the zoning ordinance. ___TG.___

i) ___RT___ The plot plan shall indicate all parking spaces and lanes, with dimensions. ___TG.___

The applicant has signed and dated this form to show his/her awareness of these requirements.

[signature] 5/20/2019

Signature of Applicant(s) Date

The Land Use Division will schedule a public hearing at the next available meeting of the Hudson Zoning Board of Adjustment for your properly-completed application. Applications are scheduled on a first-come, first-served basis. Public notice of the hearing will be posted on public bulletin boards in the Town Hall, the Post Office, and the Rogers Library and also printed in a newspaper, and a notice will be mailed to the applicant, all abutters, and any other parties whom the Board may deem to have an interest.

After the public hearing, the Board will deliberate and then reach a decision either to grant the request (perhaps with stipulations to make it palatable) or to deny the request—or to defer final action to another meeting, or perhaps to accept a request for withdrawal. You will be sent a Notice of Decision during the following week.

If you believe that the Board's decision is wrong, you have the right to appeal. In addition, any third party/parties affected by the decision also has/have the right to appeal the decision of your case. To appeal, you must first ask the Board for a rehearing; this motion for rehearing may be in the form of a letter to the Board. The rehearing request must be made in writing within thirty (30) days following the Board's decision, and must set forth the grounds on which it is claimed the decision is unlawful or unreasonable.

The Board may grant such a rehearing if, in the Board's opinion, good reason is stated in the motion. In general, the Board will not allow a rehearing unless a majority of its sitting members conclude either that the protested decision was illegal or unreasonable or that the request for rehearing demonstrates the availability of new evidence that was not available at the original hearing. The Board will not reopen a case based on the same set of facts unless it is convinced that an injustice would be created by not doing so. Whether or not a rehearing is held, you must have requested one before you can appeal the decision to the Court(s). When a rehearing is held, the same procedure is followed as for the first hearing, including public notice and notice to abutters.

Please refer to NH RSA Chapter 677 for more detail on rehearing and appeal procedures.

ALL DIRECT ABUTTERS

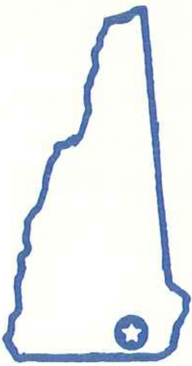
List name(s) and mailing addresses of the owner(s) of record of the property and all direct abutters as of the time of the last assessment of taxation made by the Town of Hudson, including persons whose property is either contiguous or separated from the subject tract of land by a street or stream. If at the time of your hearing any applicable property owner is found not to have been notified because your lists are incorrect or incomplete, the Zoning Board will defer your hearing to a later date, following notification of such abutters. (Use additional copies of this page if necessary)

MAP	LOT	NAME OF PROPERTY OWNER	MAILING ADDRESS
168	105	Meyer, David A.	10 Harrington Drive Merrimack, NH 03054
168	099	Donahue, Joseph	17 Frenette Drive Hudson, NH 03051
168	108	Gillen, Justin F. & Meghan C.	18 Frenette Drive Hudson, NH 03051
168	100	Bellefeuille, Brian C. & Denise	19 Frenette Drive Hudson, NH 03051
168	101	Mailloux, Bernard J. & Cheryl A.	21 Frenette Drive Hudson, NH 03051
168	102	Leblanc, Thomas J. & Kirsten L.	23 Frenette Drive Hudson, NH 03051
168	103	King, Mark A. & Diane E.	25 Frenette Drive Hudson, NH 03051
168	106	Bouley, Jason & Teresa A.	26 Frenette Drive Hudson, NH 03051
168	006	Sudbury, Robert L. & Nancy M.	18 Windham Road Hudson, NH 03051
168	107	Richard Tassi, Denise Duval-Tassi, TR (Owner/Applicant)	20 Frenette Drive Hudson, NH 03051

ALL INDIRECT ABUTTERS WITHIN 200 FEET

List name(s) and mailing addresses of all indirect abutters (those whose property is not contiguous but is within 200 feet from the property in question) as of the time of the last assessment of taxation made by the Town of Hudson. If at the time of your hearing any applicable property owner is found not to have been notified because your lists are incorrect or incomplete, the Zoning Board will defer your hearing to a later date, following notification of such abutters. (Use additional copies of this page if necessary)

MAP	LOT	NAME OF PROPERTY OWNER	MAILING ADDRESS
168	097	Millette, Michael L.	13 Frenette Drive Hudson, NH 03051
168	110	Spanos, Chris Raber, Amy	14 Frenette Drive Hudson, NH 03051
168	098	Stavro, Daniel W. & Meghan	15 Frenette Dr. Hudson, NH 03051
168	109	Fuller, Michael S. & Melenie A.	28 Frenette Drive Hudson, NH 03051
168		Village at Barretts Hill Condos c/o North Point Property Management Attn: Bob Libin	55 Lake Street 4th Flr, Ste 5 Nashua, NH 03060



TOWN OF HUDSON

ZONING BOARD OF ADJUSTMENT

ABUTTER NOTIFICATION

12 School Street Hudson, New Hampshire 03051 603/886-6008

You are hereby notified of a hearing that will be presented before the Zoning Board of Adjustment for review and/or action on Thursday, **06/27/19** starting at 7:00 P.M., Town Hall, 12 School Street, Hudson, NH, in the Community Development Paul Buxton Meeting Room.

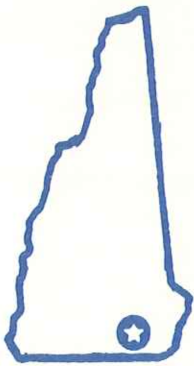
1. **Case 168-107 (6-27-19): Richard Tassi, 20 Frenette Drive, Hudson, NH requests a Variance to construct an 18' x 22' carport which encroaches 11.1 ft. into the front yard setback, leaving 18.9 ft. where 30 feet is required. [Map 168, Lot 107-000, Zoned R-2; HZO Article VII, §334-27, Table of Minimum Dimensional Requirements].**

Please be advised, this notice is for your information only. Your attendance is not required; however, you may attend this meeting for the purpose of providing information or comments on the proposal.

A full copy of this Application is available for your review on the Hudson Town Hall website: www.hudsonnh.gov or in the Land Use Department located at Hudson Town Hall.

Respectfully,

Bruce Buttrick
Zoning Administrator



TOWN OF HUDSON

ZONING BOARD OF ADJUSTMENT

APPLICANT NOTIFICATION

12 School Street Hudson, New Hampshire 03051 603/886-6008

You are hereby notified of a hearing that will be presented before the Zoning Board of Adjustment for review and/or action on Thursday, **06/27/19** starting at 7:00 P.M., Town Hall, 12 School Street, Hudson, NH, in the Community Development Paul Buxton Meeting Room.

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Please be advised, the above notice is being sent to all abutters listed on the application. You, or a representative, are expected to attend the hearing, and make a presentation.

Respectfully,

Bruce Buttrick
Zoning Administrator

SENDER:	TOWN OF HUDSON 12 SCHOOL STREET HUDSON, NH 03051	US POSTAL SERVICE - CERTIFIED MAIL 20	Case# 168-107 Variance 20 Frenette Drive Map 168/Lot 107-000 1 of 1
	ARTICLE NUMBER	**Name of Addressee, Street, and post office address**	**06/27/19 ZBA Meeting**
1	7016 2710 0000 0595 3312	RICHARD & DENISE TASSI	APPLICANT/OWNER-NOTICE SENT
		20 Frenette Drive, Hudson, NH 03051	
2	7016 2710 0000 0595 3329	DAVID A. MEYER	ABUTTER NOTICE SENT
		10 Harrington Drive, Merrimack, NH 03054	
3	7016 2710 0000 0595 3336	JOSEPH DONAHUE	ABUTTER NOTICE SENT
		17 Frenette Drive, Hudson, NH 03051	
4	7016 2710 0000 0595 3343	JUSTIN F. & MEGHAN C. GILLEN	ABUTTER NOTICE SENT
		18 Frenette Drive, Hudson, NH 03051	
5	7016 2710 0000 0595 3350	BRIAN C. & DENISE BELLEFEUILLE	ABUTTER NOTICE SENT
		19 Frenette Drive, Hudson, NH 03051	
6	7016 2710 0000 0595 3367	BERNARD J. & CHERYL A. MAILLOUX	ABUTTER NOTICE SENT
		21 Frenette Drive, Hudson, NH 03051	
7	7016 2710 0000 0595 3374	THOMAS J. & KRISTEN L. LEBLANC	ABUTTER NOTICE SENT
		23 Frenette Drive, Hudson, NH 03051	
8	7016 2710 0000 0595 3381	MARK A. & DIANE E. KING	ABUTTER NOTICE SENT
		25 Frenette Drive, Hudson, NH 03051	
9	7016 2710 0000 0595 3398	JASON & TERESA A. BOULEY	ABUTTER NOTICE SENT
		26 Frenette Drive, Hudson, NH 03051	
10	7016 2710 0000 0595 3404	ROBERT L. & NANCY M. SUDBURY	ABUTTER NOTICE SENT
		18 Windham Road, Hudson, NH 03051	
	Total Number of pieces listed by sender 10	**Total number of pieces rec'vd at Post Office** 10	**Postmaster (receiving Employee)**

SENDER:	TOWN OF HUDSON 12 SCHOOL STREET HUDSON, NH 03051	US POSTAL SERVICE - FIRST CLASS MAIL	Case# 168-107 Variance 20 Frenette Drive Map 168/Lot 107-000 1 of 1
	ARTICLE NUMBER	**Name of Addressee, Street, and post office address**	**06/27/19 ZBA Meeting**
1	N/A-mailed First Class	MICHAEL MILLETTE	ABUTTER NOTICE SENT
		13 Frenette Drive, Hudson, NH 03051	
2	N/A-mailed First Class	CHRIS SPANOS; AMY RABER	ABUTTER NOTICE SENT
		14 Frenette Drive, Hudson, NH 03051	
3	N/A-mailed First Class	DANIEL W. & MEGHAN STAVRO	ABUTTER NOTICE SENT
		15 Frenette Drive, Hudson, NH 03051	
4	N/A-mailed First Class	MICHAEL S. & MELENIE A. FULLER	ABUTTER NOTICE SENT
		28 Frenette Drive, Hudson, NH 03051	
5	N/A-mailed First Class	VILLAGE at BARRETTS HILL CONDOS; c/o North Point Property Management; Attn: Bob Libin	ABUTTER NOTICE SENT
		55 Lake Street, 4th Flr, Ste 5, Nashua, NH 03060	
6	N/A-mailed First Class		
7	N/A-mailed First Class		
8	N/A-mailed First Class		
9	N/A-mailed First Class		
10	N/A-mailed First Class		
11			
	Total Number of pieces listed by sender 5	**Total number of pieces rec'vd at Post Office** 5	**Postmaster (receiving Employee)**

APPLICATION FOR A VARIANCE

This form constitutes a request for a variance from the literal provisions of the Hudson Zoning Ordinance Article VII of HZO Section(s) 334-27 in order to permit the following change or use:

TO CONSTRUCT A CARPORT 18' FROM THE R.O.W. INSTEAD OF THE REQUIRED SETBACK OF 30'. THE EXISTENCE OF LEDGE INHIBITS MEETING THE 30' SETBACK. HOWEVER, THE CARPORT WILL BE 30' FROM THE EDGE OF THE STREET.

You must attach to this application a copy of some form of determination that the proposed change or use is not permitted without a variance, consisting of a denial in writing of a building permit or use authorization by the Zoning Administrator, with the reasons for the denial being cited thereon.

FACTS SUPPORTING THIS REQUEST:

The power to grant variances from the local zoning ordinances is established in NH RSA 674:33 I (b), as follows:

I. "The Zoning Board of Adjustment shall have the power to: ....

(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 of use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

New Hampshire case law has established, on the basis of the preceding statute and/or its precedent versions, that all of the following requirements must be satisfied in order for a Zoning Board of Adjustment to grant a variance. You must demonstrate by your answers in the following blanks that you do or will meet each and every requirement; do not presume or say that a requirement does not apply, or your request will be disqualified. Note that your answers here can be summary in nature, and you can provide additional testimony at the time of your hearing.

1. Granting of the requested variance will not be contrary to the public interest, because: (Explain why you feel this to be true—keeping in mind that the proposed use must not conflict with the explicit or implicit purpose of the ordinance and that it must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights.")

   THERE IS NO PHYSICAL OR VISUAL INFRINGEMENT ON ANY PRIVATE OR PUBLIC PROPERTY.

2. The proposed use will observe the spirit of the ordinance, because: (Explain why you feel this to be true—keeping in mind that, as detailed above, the proposed use must not conflict with the explicit or implicit purpose of the ordinance and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights.")

   THE PROPOSED WILL BLEND WITH AN EXISTING CONCRETE APRON WHICH APPEARS TO HAVE BEEN A DRIVEWAY AT SOMETIME IN THE PAST.
   THE PROPOSED CARPORT WILL WILL ALIGN WITH THE EXISTING HOUSE WHICH IS NOT RESTRICTED BY THE SETBACK.

3. Substantial justice would be done to the property-owner by granting the variance, because: (Explain why you believe this to be true—keeping in mind that the benefits to the applicant must not be outweighed by harm to the general public or to other individuals.)

   THE LENGTH OF THE EXISTING DRIVEWAY IS TOO SHORT. PARKED VEHICLES ARE TOO CLOSE TO THE EDGE OF THE STREET, WHICH CREATES DIFFICULT CONDITIONS FOR SNOW PLOWING. AS WE ARE BOTH SENIOR CITIZENS, GRANTING THIS REQUEST WOULD GREATLY IMPROVE ACCESS TO THE HOUSE, AT GRADE LEVEL INSTEAD FROM THE EXISTING DRIVEWAY BELOW.

4. The proposed use will not diminish the values of surrounding properties, because: (Explain why you believe this to be true—keeping in mind that the Board will consider expert testimony but also may consider other evidence of the effect on property values, including personal knowledge of the members themselves.)

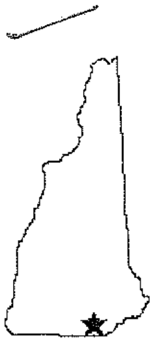
   THE PROPOSED CARPORT WOULD BLEND WITH THE NEIGHBORHOOD STRUCTURES AND WILL BE PARTIALLY CONCEALED BY A ROW OF BUSHES

5. Special conditions exist such that literal enforcement of the ordinance results in **unnecessary hardship**, because:
(Explain why you believe this to be true—keeping in mind that you must establish that, because of the special conditions of the property in question, the restriction applied to the property by the ordinance does not serve the purpose of the restriction in a "fair and reasonable" way *and also* that you must establish that the special conditions of the property cause the proposed use to be reasonable. Alternatively, you can establish that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance.)

DUE TO THE LOCATION OF THE EXISTING HOUSE, THE SETBACK RESTRICTIONS AND THE EXISTENCE OF LEDGE, THERE IS NO OTHER FEASIBLE LOCATION FOR THE PROPOSED CARPORT.

Requests before the Zoning Board of Adjustment may require connection to the municipal sewer system. Please contact the Town Engineer's Office prior to submittal of this application to determine if connection is required or will be allowed, together with the procedure for such application.

5/18/2019



TOWN OF HUDSON

Land Use Division

12 School Street · Hudson, New Hampshire 03051 · Tel: 603-886-6008 · Fax: 603-594-1142

Zoning Determination #19-062
Building Permit application 2019-00286 denial

May 15, 2019

Richard Tassi & Denise Duval
20 Frenette Dr
Hudson, NH 03051

Re: **20 Frenette Dr Map 168 Lot 107-000**
District: Residential Two (R-2)

Dear Richard and Denise,

Your building permit application: to construct/install an 18 x 22 carport has been denied.

Zoning Review / Determination:
The submitted plot plan indicates the location of the proposed carport as being within the front yard setback. You show 18 ft from the property line/ROW, where 30 ft is required per Table of Minimum Dimensional Requirements §334-27.

You would need to apply for a variance from the Zoning Board of Adjustment, to proceed with your building permit application as proposed, or revise your plan to satisfy the required front yard setback.
You should verify with the Town Engineer, Elvis Dhima 886-6008 if any restrictions for a second driveway for access to this carport.

Sincerely,

Bruce Buttrick, MCP
Zoning Administrator/Code Enforcement Officer
(603) 816-1275
bbuttrick@hudsonnh.gov

encl: proposed plot plan – May 2019
cc: Public Folder
J. Kennedy, Permit Tech
Dep. O'Brien, Inspectional Services
E. Dhima, Town Engineer
B. Groth, Town Planner
File

NOTE: this determination may be appealed to the Hudson Zoning Board of Adjustment within 30 days of the receipt of this letter.

Tassi

Daniel Webster Dr

Pheasant Run

Frenette Dr

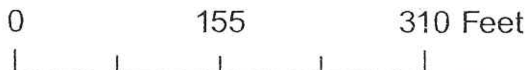
Windham Rd

April 9, 2019

-------- Easement_Lines

Parcels

1 inch = 144 feet



168 MAP | 107 LOT | 000 SUB

1 of 1 CARD — RESIDENTIAL — **Hudson**

	Total Card /	Total Parcel
APPRAISED:	242,100/	242,100
USE VALUE:	242,100/	242,100
ASSESSED:	242,100/	242,100

PROPERTY LOCATION

No	Alt No	Direction/Street/City
20		FRENETTE DR, HUDSON

OWNERSHIP

Unit #:

Owner 1:	TASSI, RICHARD F., TR
Owner 2:	DUVAL, DENISE C., TR.
Owner 3:	FAMILY TRUST
Street 1:	20 FRENETTE DRIVE
Street 2:	
Twn/City:	HUDSON
St/Prov:	NH — Cntry: — Own Occ:
Postal:	03051 — Type:

PREVIOUS OWNER

Owner 1:	-
Owner 2:	-
Street 1:	
Twn/City:	
St/Prov:	Cntry:
Postal:	

NARRATIVE DESCRIPTION

This parcel contains .424 ACRES of land mainly classified as ONE FAMILY with a CAPE Building built about 1960, having primarily VINYL Exterior and 1872 Square Feet, with 1 Unit, 1 Bath, 0 3/4 Bath, 0 HalfBath, 7 Rooms, and 3 Bdrms.

OTHER ASSESSMENTS

Code	Descrip/No	Amount	Com. Int

PROPERTY FACTORS

Item	Code	Description	%	Item	Code	Description
Z	R2	RESD TWO		water	3	TOWN WATE
o				Sewer	2	TOWN SEWE
n				Electri		
Census:				Exmpt	V1	VET CREDIT
Flood Haz:	C					
D				Topo	4	ROLLING
s				Street		
t				Gas:		

IN PROCESS APPRAISAL SUMMARY

Use Code	Land Size	Building Value	Yard Items	Land Value	Total Value
101	0.424	162,500	1,000	78,600	242,100
Total Card	0.424	162,500	1,000	78,600	242,100
Total Parcel	0.424	162,500	1,000	78,600	242,100

Source: Market Adj Cost — Total Value per SQ unit /Card: 129.33 — /Parcel: 129.33

Legal Description

Entered Lot Size	
Total Land:	0.424
Land Unit Type:	AC

User Acct
2761
GIS Ref
GIS Ref
Insp Date
05/18/01

PREVIOUS ASSESSMENT

Parcel ID 168-107-000

!3281!

Tax Yr	Use	Cat	Bldg Value	Yrd Items	Land Size	Land Value	Total Value	Asses'd Value	Notes	Date
2019	101	JB	162,500	1000	.424	78,600	242,100	242,100	Year End Roll	5/8/2019
2018	101	FV	162,500	1000	.424	78,600	242,100	242,100	Year End Roll	8/27/2018
2018	101	JB	162,500	1000	.424	78,600	242,100	242,100	Year End Roll	5/9/2018
2017	101	FV	162,500	1000	.424	78,600	242,100	242,100	Year End Roll	10/26/2017
2017	101	PV	162,500	1000	.424	78,600	242,100	242,100	Year End Roll	8/28/2017
2017	101	JB	115,900	1000	.424	78,600	195,500	195,500	Year End Roll	5/10/2017
2016	101	FV	115,900	1000	.424	78,600	195,500	195,500	Year End Roll	8/30/2016
2016	101	JB	115,900	1000	.424	78,600	195,500		Year End Roll	5/11/2016

PRINT

Date	Time
05/16/19	15:39:46

LAST REV

Date	Time
05/15/19	10:54:50

amym

USER DEFINED

Prior Id # 1:	0025
Prior Id # 2:	0177
Prior Id # 3:	0000
Prior Id # 1:	
Prior Id # 2:	
Prior Id # 3:	
Prior Id # 1:	
Prior Id # 2:	
Prior Id # 3:	
ASR Map:	
Fact Dist:	
Reval Dist:	
Year:	
LandReason:	
BldReason:	
CivilDistrict:	
Ratio:	

SALES INFORMATION

TAX DISTRICT — PAT ACCT. 3281

Grantor	Legal Ref	Type	Date	Sale Code	Sale Price	V	Tst	Verif	Notes
TASSI, R. / DUV	5989-1001		8/26/1998	UNCLASSIFIED		No	No		
TASSI, RICHARD	5892-1690		1/15/1998	UNCLASSIFIED		No	No		
KAREN TASSI	5635-520		6/23/1995	COURT SALE		No	No		
	2608-0242		5/18/1978			No	No		

BUILDING PERMITS

Date	Number	Descrip	Amount	C/O	Last Visit	Fed Code	F. Descrip	Comment
4/22/2019	2019-00286	FOUNDATI	5,000	O				

ACTIVITY INFORMATION

Date	Result	By	Name
7/7/2010	Measured	14	APPR TECH 4
5/8/2006	Measured	8	ASMNT TECH I
7/20/2005	New Maps	1	CHIEF ASSESS
5/18/2001	Inspected	0	PATRIOT
5/3/2001	Left Notice	0	PATRIOT
8/5/1991	Inspected	2	AVITAR

Sign: VERIFICATION OF VISIT NOT DATA __/__/__

LAND SECTION (First 7 lines only)

Use Code	Description	LUC Fact	No of Units	Depth / PriceUnits	Unit Type	Land Type	LT Factor	Base Value	Unit Price	Adj	Neigh	Neigh Influ	Neigh Mod	Infl 1	%	Infl 2	%	Infl 3	%	Appraised Value	Alt Class	%	Spec Land	J Code	Fact	Use Value	Notes
101	ONE FAMILY		0.424		SITE ACRE	SITE		0	95,000	1.95	RD									78,584						78,600	

Total AC/HA:	0.42400	Total SF/SM:	18469	Parcel LUC:	101	ONE FAMILY	Prime NB Desc	RES AV/FR	

Total: 78,584 — Spl Credit — Total: 78,600

Disclaimer: This Information is believed to be correct but is subject to change and is not warranteed Database: Assesspro - HudsonNH amym 2019

EXTERIOR INFORMATION

Field	Value
Type:	05 - CAPE
Sty Ht:	1H - 1.5 STY
(Liv) Units:	1 Total: 1
Foundation:	2 - CONC BLOCK
Frame:	1 - WOOD
Prime Wall:	04 - VINYL
Sec Wall:	%
Roof Struct:	1 - GABLE
Roof Cover:	1 - ASPH SHING
Color:	TAN
View / Desir:	

GENERAL INFORMATION

Field	Value	Field	Value
Grade:	C - AVERAGE		
Year Blt:	1960	Eff Yr Blt:	
Alt LUC:		Alt %:	
Jurisdict:		Fact:	
Const Mod:			
Lump Sum Adj:			

INTERIOR INFORMATION

Field	Value	Field	Value
Avg Ht/FL:	STD		
Prim Int Wal	1 - DRYWALL		
Sec Int Wall:	%		
Partition:	T - TYPICAL		
Prim Floors:	04 - CARPET		
Sec Floors:	03 - HARDWOO 50 %		
Bsmnt Flr:	12 - CONCRETE		
Subfloor:			
Bsmnt Gar:			
Electric:	3 - TYPICAL		
Insulation:	2 - TYPICAL		
Int vs Ext:	S -		
Heat Fuel:	1 - OIL		
Heat Type:	3 - FORCED HW		
# Heat Sys:	1		
% Heated:	100	% AC:	0
Solar HW:	NO	Central Vac:	NO
% Com Wal		% Sprinkled	

BATH FEATURES

Field	Value	Rating
Full Bath	1	Rating: GOOD
A Bath:		Rating:
3/4 Bath:		Rating:
A 3QBth		Rating:
1/2 Bath:		Rating:
A HBth:		Rating:
OthrFix:		Rating:

OTHER FEATURES

Field	Value	Rating
Kits:	1	Rating: AVERAGE
A Kits:		Rating:
Frpl:		Rating:
WSFlue:		Rating:

CONDO INFORMATION

Field	Value
Location:	
Total Units:	
Floor:	
% Own:	
Name:	

DEPRECIATION

Field	Value	%
Phys Cond:	GD - Good	27. %
Functional:		%
Economic:		%
Special:		%
Override:		%
Total:		27.2 %

CALC SUMMARY

Field	Value
Basic $ / SQ:	106.00
Size Adj.:	0.98076922
Const Adj.:	0.97000408
Adj $ / SQ:	100.843
Other Features:	2000
Grade Factor:	1.00
NBHD Inf:	1.00000000
NBHD Mod:	
LUC Factor:	1.00
Adj Total:	223221
Depreciation:	60716
Depreciated Total:	162505

COMMENTS

ESTIMATED SIZE OF PATIO. VERY IRREGULAR DESIGN..

RESIDENTIAL GRID

1st Res Grid | Desc: CONV | # Units 1

Level	FY	LR	DR	D	K	FR	RR	BR	FB	HB	L	O
Other												
Upper												
Lvl 2												
Lvl 1												
Lower												

Totals RMs: 7 BRs: 3 Baths: 1 HB

REMODELING

Field	Value
Exterior:	
Interior:	
Additions:	
Kitchen:	
Baths:	
Plumbing:	
Electric:	
Heating:	
General:	

RES BREAKDOWN

No Unit	RMS	BRS	FL
1	7	3	M
Totals			
1	7	3	

COMPARABLE SALES

Rate	Parcel ID	Typ	Date	Sale Price

Field	Value	Field	Value	Field	Value
WtAv$/SQ:		AvRate:		Ind.Val	
Juris. Factor:		Before Depr:	100.84		
Special Features:	0	Val/Su Net:	53.75		
Final Total:	162500	Val/Su SzAd	86.81		

SKETCH

WDK 16 × 6; OFP 16 × 6; EFP 12 × 8; HST FFL BMT 26 × 26; FFL 30 × 26; OFP 27 × 5

SUB AREA

Code	Description	Area - SQ	Rate - AV	Undepr Value
FFL	FIRST FLOOR	1,508	100.840	152,071
BMT	BASEMENT	728	20.170	14,683
HST	HALF STORY	364	100.840	36,707
OFP	OPEN PCH	231	31.230	7,215
EFP	ENC PORCH	96	87.820	8,431
WDK	WOOD DECK	96	22.020	2,114

Net Sketched Area: 3,023 | Total: 221,221

Size Ad 1872 | Gross Area 3387 | FinArea 1872

SUB AREA DETAIL

Sub Area	% Usbl	Descrip	% Type	Qu	# Ten

MOBILE HOME

Make: | Model: | Serial #: | Year: | Color:

SPEC FEATURES/YARD ITEMS

PARCEL ID 168-107-000

Code	Description	A	Y/S	Qty	Size/Dim	Qual	Con	Year	Unit Price	D/S	Dep	LUC	Fact	NB Fa	Appr Value	JCod	JFact	Juris. Value
02	SHED-NV	D	Y	1	96	AV	AV	1975	0.00	T	40	101						
22	DECK-WOOD	D	Y	1	12X12	AV	AV	1960	18.27	T	75	101			700			700
02	SHED-NV	D	Y	1	8x7	AV	AV	1960	0.00	T	40	101						
19	PATIO	D	Y	1	144	AV	AV	1960	9.28	T	75	101			300			300

More: N | Total Yard Items: 1,000 | Total Special Featues: | Total: 1,000

IMAGE

AssessPro Patriot Properties, Inc

OF THIS PLAN IS TO ILLUSTRATE
TION OF A PROPOSED CARPORT AT
AX MAP 168 LOT 107.

PLAN OF LAND
20 FRENETTE DRIVE
HUDSON, NH
MAP 168 LOT 107

AS PREPARED FOR
RICHARD TASSI, OWNER

168–101

FRENETTE DR.

75'

57.15'

168–107
18,494 SF± (P)

BLDG. SETBACKS (TYP)

#20
EXISTING
DWELLING

ABANDON DRIVEWAY
UPON COMPLETION

EXISTING RETAINING
WALL AND STEPS

EXISTING CONCRETE WALK

EXISTING CONCRETE APRON

COVERED
DECK

SHED

19.2'

45.7'

18'

NEW DRIVEWAY

PROPOSED
CARPORT
396 SF±

22'

18.9'

18.0'

41.8'

36.7'

128'±

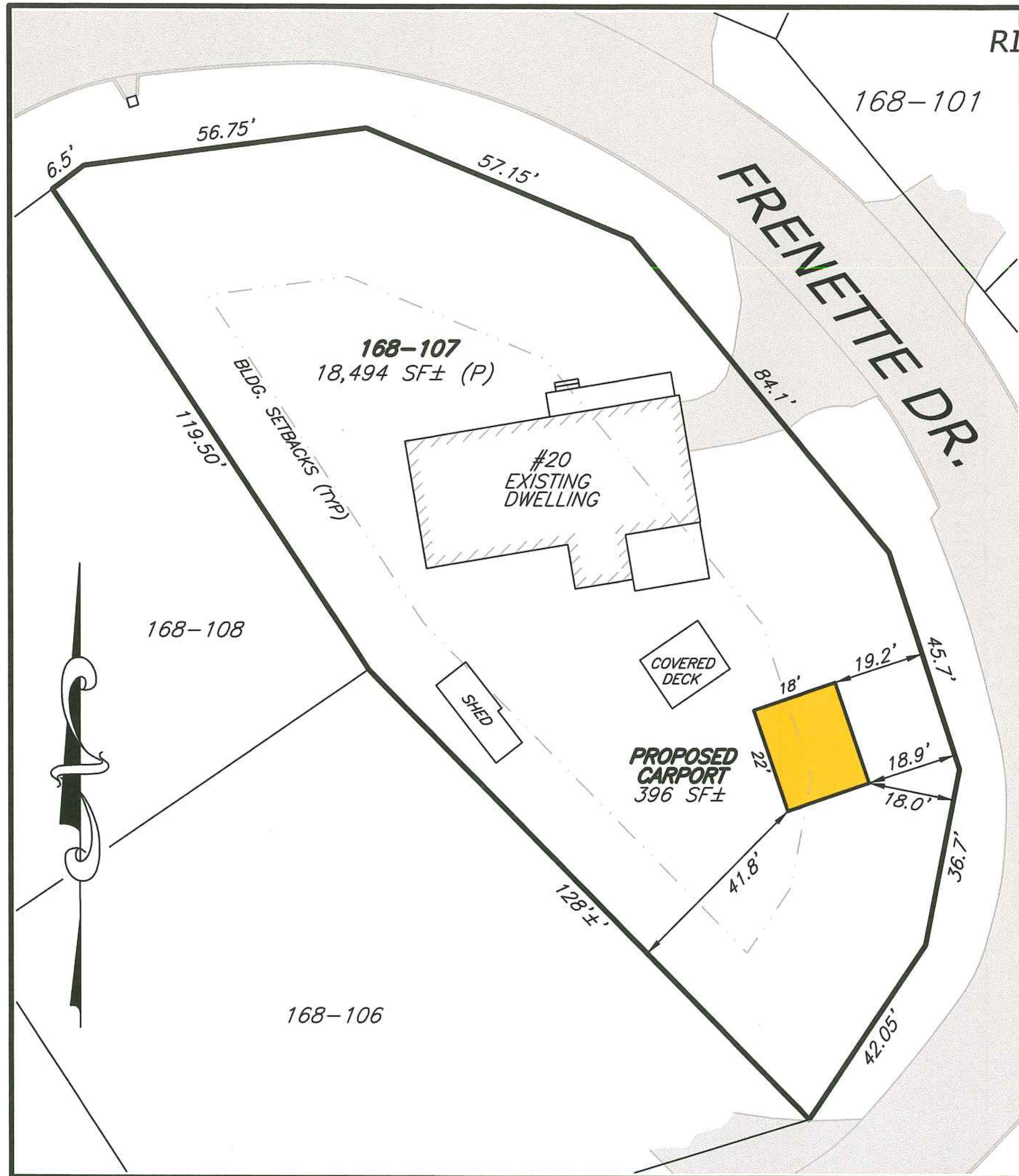
168–106

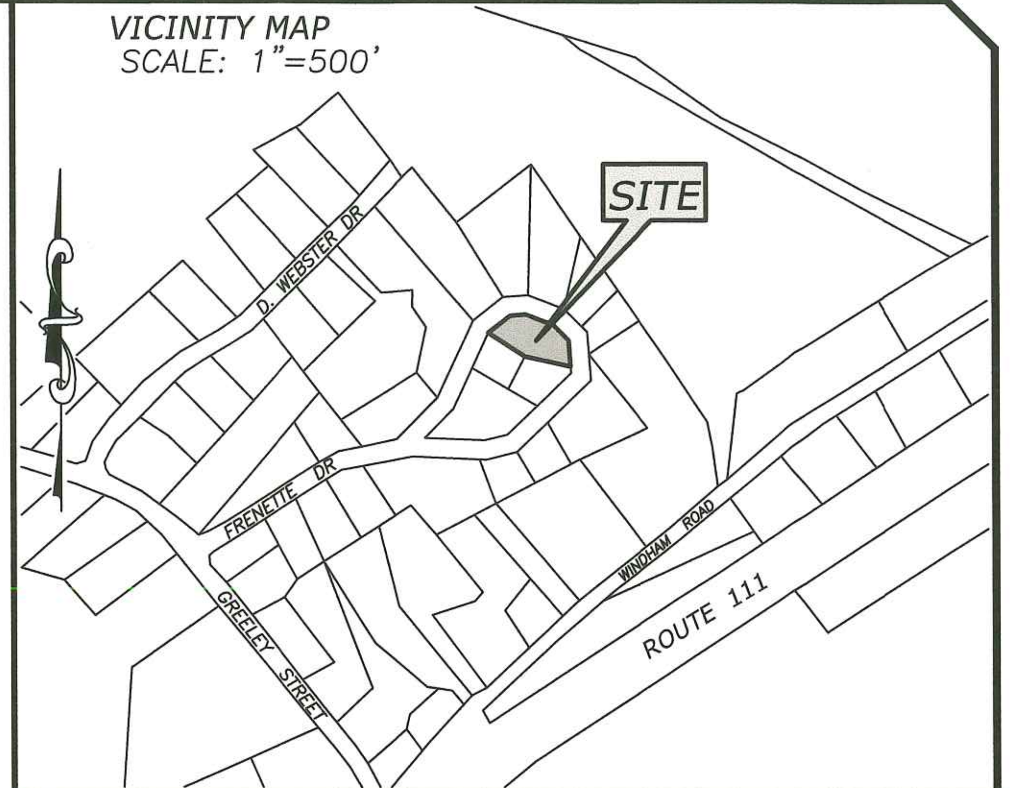
42.05'

PLAN NOTES:
1.) PURPOSE OF THIS PLAN IS TO ILLUSTRATE THE LOCATION OF A PROPOSED CARPORT AT HUDSON TAX MAP 168 LOT 107.

PLAN OF LAND
20 FRENETTE DRIVE
HUDSON, NH
MAP 168 LOT 107

AS PREPARED FOR
RICHARD TASSI, OWNER

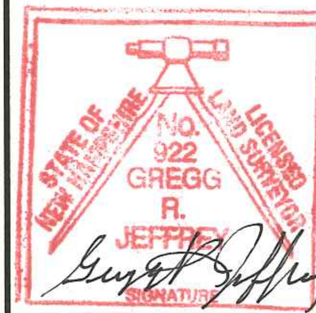




REV. 2			BY:
REV. 1			BY:

ZONING DISTRICT: R-2
REQUIRED SETBACKS:

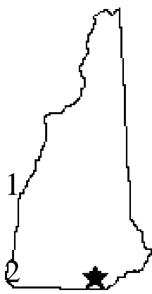
FRONT – 30 FEET
SIDE – 15 FEET
REAR – 15 FEET
DEED REF: BK. 5989 PG. 1000
PLAN REF.: HCRD PL. 1214
PLAN REF.: HCRD PL. 1595
PLAN SCALE: 1"=30'
DATE: MAY 2019
JOB REF.: 019-040-TASS



I HEREBY CERTIFY:

THAT THIS PLAN IS THE RESULT OF AN INSTRUMENT SURVEY AND THAT ALL MEASUREMENTS HEREON ARE TO BE CONSIDERED TRUE AND ACCURATE.

JEFFREY LAND SURVEY LLC
1 BURGESS DRIVE, LITCHFIELD, NH 03052
(603) 424-4089



TOWN OF HUDSON

Zoning Board of Adjustment

Charlie Brackett, Chairman   Marilyn E. McGrath, Selectmen Liaison

12 School Street • Hudson, New Hampshire 03051 • Tel: 603-886-6008 • Fax: 603-594-1142

MEETING MINUTES – May 23, 2019 – as edited

The Hudson Zoning Board of Adjustment met on May 23, 2019, in the Community Development Paul Buxton Meeting Room in the lower level of Hudson Town Hall.

I. CALL TO ORDER
II. PLEDGE OF ALLEGIANCE

Chairman Brackett called the meeting to order at 7:00 PM and invited everyone to stand for the Pledge of Allegiance.

Mr. Brackett stated that the ZBA hears requests for relief from the State Law and Local Ordinances and noted that there is only one (1) Case before the Board. Mr. Brackett outlined the meeting procedure where the applicant will present their request to the Board followed by receipt of public testimony and if negative testimony received, the applicant can address and a second round of public testimony would be opened and invited everyone addressing the Board to come either to the table or the lectern and provide their name and address, with spelling; noted that copies of the Agenda and copies of the Process for Appeal are on the shelf by the door; and announced housekeeping matters that included silencing cells phones, no talking in the audience and no smoking.

Members present were Charlie Brackett (Regular/Chair), Gary Daddario (Regular), Maryellen Davis (Regular/Clerk), Gary Dearborn (Regular/Vice Chair), Brian Etienne (Alternate) and Jim Pacocha (Regular). Also present were Bruce Buttrick, Zoning Administrator, and Louise Knee, Recorder. Excused was Marilyn McGrath, Selectmen Liaison. For the record, all Regular Members voted.

III. PUBLIC HEARINGS OF SCHEDULED APPLICATIONS BEFORE THE BOARD:

1. Case 209-001 (5-23-19): Mark Pilotte of Dakota Partners, Inc. 1264 Main St., Waltham, MA 02451, requests a Wetland Special Exception on behalf of 5 Way Realty Trust for 161 Lowell Rd., Hudson, NH to allow Wetland Conservation District buffer work relating to roadway improvements to the existing Friars Drive. The wetland buffer area

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impacted is 19,200 sq ft. [Map 209, Lot 001-000, Split ~~districts~~Districts: Zones General (G), Business (B), and Industrial (I); HZO Article IX, §334-35.B, Uses within Wetland Conservation District and §334-38, Special Provisions].

Clerk Davis read the Case into the record. Mr. Buttrick referenced his Staff Report dated 5/23/2019, noted that the lot has 88.8 undeveloped acres with 758' of frontage along Lowell Road, that after conferring with Town personnel is now proposing to subdivide the land into two (2) lots with the new rear lot to be accessed via Friars Drive which needs to be extended to provide sufficient frontage and added that the Wetlands Special Exception is for the work that is needed in the wetland buffer to extend Friars Drive. Mr. Buttrick stated that both the Conservation Commission and the Planning Board reviewed and recommended approval and that Brian Groth, Town Planner, also submitted comments and proceeded to read each of his nine (9) points into the record:

1. The special exception is required for the extension of a Town road, Friars Drive. It is not needed for the multi-family site plan application.
2. The extension of Friars Drive requires development within the 50-foot buffer but not within the wetland itself.
3. The extension was previously planned for by the Planning Board in 1997 as part of a subdivision application made by Presstek, Inc.
4. The extension involves improving an existing, paved driveway to Town standards.
5. The extension is a benefit to Access Management & Traffic Mitigation on Lowell Road as it essentially takes the Friary property off of Lowell Road and puts it on Friars Drive.
6. The extension is consistent with planning principles of connectivity for purposes of traffic management, efficient public utility layout, emergency response and general wayfinding.
7. The alternative is a series of dead-end streets and multiple curb cuts along Lowell Road that would have a more detrimental impact to traffic and safety.
8. The extension facilitates the ability to limit left-turning traffic onto Lowell Road, which was a safety concern raised by the Engineering Dept.
9. The extension came about during the Design Review Phase in response to feedback from the Planning Board, Engineering and Fire Departments as well as investigation into past strategic Planning efforts.

Mr. Brackett noted that the ZBA approved two (2) previous wetland special exceptions for this property, in 2001 & 2002, and added that neither were implemented

Atty. Thomas J. Leonard of Welts, White & Fontaine, P.C. in Nashua, NH, introduced himself as representing Mark Pilotte and Dakota Partners, noted that Mr. Pilotte was present along with Karl Dubay, PE, of The Dubay Group,

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90 and Luke Hurley, CWS, of Gove Environmental Services. Atty. Leonard stated
91 that he appreciates Mr. Buttrick's introduction to the Case and noted that the
92 points raised by the Town Planner are important.
93
94 Atty. Leonard stated that the project is a rental multi-family proposal on/at
95 161 Lowell Road and that this particular improvement is the result of the
96 Town's Planning Staff and the Town's Engineering Staff making a request to
97 the Developer that is not really required for the development. It is not a benefit
98 to the Developer but does facilitate better Master Planning for the Town with
99 regard to the back parcel, should that ever come about. Atty. Leonard stated
100 that they are not involving the jurisdictional wetlands, that there is no filling of
101 wetlands, no crossing of wetlands, no crossing of poorly drained soils and no
102 crossing of water, that all they are asking to do is work in the wetland buffer to
103 extend Friars Drive to provide sufficient frontage to the site.
104
105 Atty. Leonard noted Luke Hurley, CWS (Certified Wetland Scientist), has taken
106 a look at the functions and values of the wetland and determined that there is
107 no impact to the wetland and referenced his report signed/sealed/dated
108 4/29/2019 in the packet. Atty. Leonard stated that they are before the Board
109 for the work that is needed in the wetland buffer to extend Friars Drive.
110
111 Atty. Leonard referenced the pictures, noted that Friars Drive, even though still
112 drive-able, is in disrepair with vegetation growing in the cracks, has been
113 overgrown and needs paving. Currently, the paved areas ranges from 18' to 22'
114 and their intent is to upgrade Friars Drive to Town standards and add
115 approximately one foot (1') to either side to meet the standard Town road-width
116 of twenty-four feet (24'). The grades of the road will be re-established and the
117 swale to the northwest will also be re-established. The sediment basin is new
118 to further protect the wetland.
119
120 Atty. Leonard referenced the plan that shows the work detail for the extension
121 of Friars Drive and the 19,200 SF wetland buffer impact. It was noted that
122 Friars Drive is paved to the Matrix building at 22 Friars Drive where the
123 pavement abruptly ends. Atty. Leonard stated that the actual wetland is
124 between Friars Drive and Lowell Road and noted that portions of the existing
125 paved Friars Drive is in the wetland buffer. Atty. Leonard stated that is no
126 seeding plan as their intent is to let it reseed itself naturally.
127
128 With regard to the wetlands on site, Atty. Leonard stated that even though they
129 are not near Friars Drive but closer to Lowell Road, they engaged the services
130 of a Wetland Scientist, Luke Hurley, to review the functions and values and
131 noted that there are no rare species and that the proposed buffer impact to
132 Friars Road would not change or impact the wetland function.
133
134 Atty. Leonard stated that both the Planning Board and the Conservation
135 Commission have reviewed, walked the site and made recommendations to the

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ZBA to grant this Special Exception. Atty. Leonard stated that the Conservation Commission expressed concern regarding seeding and he assured the Board that they will follow BMP (Best Management Practice) and NH DES (Department of Environmental Services) requirements for AOT (Alteration of Terrain).

Atty. Leonard next addressed the Zoning Ordinance Section 334-35 Uses within Wetland Conservation District (WCD) subsections B (1) & B (2). The information shared regarding B (1) included:

(1) Conditions:

(a) Proposed use is essential to the reasonable use outside the WCD

- The proposed rental multi-family residential development is a reasonable and permitted use
- Town would like to avoid additional curb cut and traffic on Lowell Road

(b) No reasonable alternative

- Use of Friars Drive is the reasonable alternative to Lowell Road
- Friars Drive already exists, the proposed change is to elongate it to provide~~d~~ the needed frontage
- Portions of Friars Drive is in the wetland buffer

(c) PE prepared plans, including restoration

- Plans have been prepared by Karl Dubay, PE, of The Dubay Group, Inc., titled Roadway Construction Plan dated 4/29/2019
- Wetland has also been reviewed and evaluated by Luke Hurley, CWS, of Gove Environmental Services, Inc., and his assessment and seal dated 4/29/2019 is in the packet.

(d) Use not based primarily on economic considerations

- Quite the contrary, it is costing the Developer more money to utilize Friars Drive

(e) Provisions made for wildlife access corridors

- Not applicable, there are no corridors involved

With regard to Section 334-35 subsection B (2), drainage ways, swales, culverts, settling basins and detention basins to manage storm water runoff are all permitted. For the record and even though not part of this Wetland Special Exception application, the provisions of Section 334-38, Special Provisions, allows rebuilding/repairing of the existing paved portion of Friars Drive.

Public testimony opened at 7:25 PM.

(1) Denise Hulse, 16 Hickory Street, stated that she has lived there for twenty four (24) years, that she and her husband hike this land in all seasons, supports the widening of Friars Drive but questions

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181 the stream on the right, by the old Presstek building, and noted
182 that in the spring the water flows pretty fast, feeds a pond and
183 eventually ends up in the river and asked what protections there
184 will be from road salt and runoff from traffic and wonders about
185 the future development of the back parcel of this lot as it is zoned
186 Commercial and Industrial.
187
188 Mr. Brackett stated that the back parcel is not yet being developed but when it
189 does, studies will be performed that will address these concerns and added
190 that what is before the Board tonight is the extension of Friars Drive to provide
191 frontage and the impact of the road extension into the wetland buffer. Mr.
192 Etienne added that if the wetland itself was being affected, a full environmental
193 assessment and mediation plan would be required.
194
195 Being no one else to address the Board, Public Testimony closed at 7:31 PM.
196
197 Atty. Leonard stated that, as a practical matter, they are not adding any runoff
198 and what additional runoff might occur with the addition of approximately one
199 foot (1') to each side of the road will be handled and the water will be treated by
200 the mechanism already in place that will be reestablished. Atty. Leonard
201 stated that the pond referenced by the abutter is substantially away from
202 where they will be extending Friars Drive.
203
204 Luke Hurley, CWS, Gove Environmental Services, pointed to the wetland on the
205 site, identified its course, noted the stream that goes through the culvert and
206 travels its way to the pond and outlined the path it takes to the Merrimack
207 River. Mr. Hurley noted that there are no changes proposed to this existing
208 culvert even with the widening of Friars Drive and proceeded to identify the
209 swale and retention basin on the other side of Friars Drive that will be
210 reestablished to treat water runoff from the road.
211
212 Mr. Dearborn stated that the material in the packet noted that the wetlands
213 are seasonal yet it has been presented at this meeting that there is running
214 water flowing throughout the year on this property. Atty. Leonard responded
215 that the wetland on the bottom side of the road is seasonal in the sense that
216 there is no standing-water and the brook is to the north.
217
218 Mr. Dearborn asked and received confirmation from Atty. Leonard that today
219 Friars Drive connects to Executive Drive and that both Mr. Dhima, Town
220 Engineer, and Mr. Groth, Town Planner, have asked that traffic use the
221 connection to Executive Drive for certain movements.
222
223 Mr. Dearborn noted that the Conservation Commission approved and asked if
224 they also did a Site Walk. Atty. Leonard stated that they did hold a Site Walk
225 with the Planning Board but he did not attend the Site Walk and thinks that
226 their concern regarding Best Management Practices (-BMPs) arose because his

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227 team was not clear that following BMPs was their intent. Mr. Brackett stated
228 that he did attend the Site Walk as part of the Planning Board and noted that it
229 was well attended by the Conservation Commission, the Planning Board, the
230 Town Engineer and three (3) Selectmen.
231
232 Mr. Pacocha asked if the improvements to Friars Road will extend to Executive
233 Drive. Atty. Leonard confirmed that they will reestablish all areas needing
234 improvement on Friars Drive, beyond their property line to Executive Drive
235 even though the connection is outside their project and added that they will
236 dedicate the new road to the Town when the Town wants it and is why it is
237 being built to Town standard with a twenty four foot (24') width and a ROW
238 (Right-of-Way) of fifty feet (50'). Atty. Leonard noted that the Dakota property
239 is the front lot along Lowell Road in the B (Business) Zone. In response to Mr.
240 Dearborn's question, Atty. Leonard responded that the distance between the
241 Dakota property and Friars Drive is approximately twelve hundred feet (1,200').
242
243 Ms. Davis made the motion to approve the Wetland Special Exception with one
244 (1) stipulation: that the applicant shall use industry recognized and acceptable
245 design mitigation and restoration Best Management Practices during all Phases
246 of the Project. Mr. Dearborn seconded the motion. Ms. Davis spoke to her
247 motion noting that ~~that~~ it meets the criteria, that there is no other reasonable
248 alternative to use/access the property, the applicant has testified they will~~to~~
249 utilize BMPs and that it seems like the buffer has naturally extended itself over
250 time. Mr. Dearborn agreed that it meets the criteria, that the work will be done
251 in accordance with the State of NH and the Town of Hudson and that both the
252 Conservation Commission and the Planning Board recommended. Vote was
253 5:0 to grant with one stipulation. Special Exception granted.
254
255 Discussion arose on the Site Walk. Mr. Brackett stated that it was held two (2)
256 Mondays ago. Concerns expressed why the ZBA was not invited/included.
257
258 **IV. REVIEW OF MINUTES:**
259
260 1. 04/25/19 Minutes
261
262 Board reviewed the edited version distributed with the meeting packet. Mr.
263 Buttrick noted that a supplemental edited version was issued after the meeting
264 packet was mailed because additional edits were received and a third set of
265 edits was received but a third edition was not created.
266
267 Mr. Dearborn stated that his last two (2) edits were not included – Page 1 Line
268 28 and Page 4 Line 148. It was noted that the Minutes reflect what was
269 spoken in the meeting. It was also noted that the meeting recording can also
270 be found on the Town's website for everyone to access. Agreement reached
271 that "Appeal for Rehearing" would be added in parenthesis after "Appeal" on

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Line 28 and the word "gate" would be added in parenthesis before "lock" on Line 148.

After some discussion, it was agreed that any additional edits needed to the Edited Minutes distributed in ~~received after~~ the meeting packet ~~is mailed~~ would need to be made at the meeting as only one Edited version will be produced.

Motion made by Mr. Dearborn and seconded by Ms. Davis to approve the 4/25/2019 as edited and amended. Vote was 5:0.

V. REQUEST FOR REHEARING:

No requests were presented for Board consideration.

VI. OTHER:

1. Recap of the recent Right to Know S~~s~~eminar.

Mr. Buttrick stated that ZBA was well represented and that the seminar was well attended and noted that the ZBA adheres to many of the protocols. Mr. Brackett added that there was a handout and Mr. Buttrick stated that he could provide a copy.

Mr. Brackett stated that the suggestion was made that every Member have a Town email address to satisfy the Right-to-Know (RTK) and it was discussed and agreed to at the last Planning Board meeting and offered the same to the ZBA Members. Mr. Buttrick to investigate the possibility. Ms. Davis asked if an individual's Town email address could automatically be forwarded to the individual's personal email address to avoid having to track a separate email account or send a notification email to check your government email account.

Mr. Brackett stated that he also heard that all Town employees, staff and volunteers will have badges. Mr. Buttrick stated that the Board of Selectmen on 5/14/2019 voted to issue identification badges all employees, volunteers and elected officials and others deemed by the Town Administrator and is to become effective July 1, 2019. Mr. Brackett commented that it would have been beneficial at the Site Walk held for the Case heard at this meeting.

2. Discussion of possible ZBA Bylaws revisions.

Mr. Buttrick referenced the draft work copy and identified the changes proposed based on the Board's last discussion that included:

Section 143.5 Officers

- Clerk duties redefined

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317 • Recorder – position added – change needed to clarify that draft
318 Minutes are distributed to the Board Members and Notices of
319 Decision are distributed to the Chair and Zoning Administrator
320
321 Section 143.6 Members and Alternates
322 • Sentence added for three consecutive unexcused absences
323
324 Section 143.7 Meetings
325 • Added Pledge of Allegiance to #4 Order of Business
326
327 Section 143.9 Decision Process
328 • Added the 30-day appeal period after the Chairman announces the
329 vote. Discussed. It was noted that the RSA is specific in that the
330 days are counted in calendar days. It was also noted that the date
331 of decision is the actual meeting date the decision was made and
332 not the date the Notice of Decision was signed or received by the
333 Applicant. Consensus that the 30-day appeal period should be in
334 the meeting introduction as it applies to all decisions
335
336 Mr. Buttrick to update the draft with the changes discussed for review at the
337 next meeting and if okay will then schedule the first of the two required Public
338 Hearings.
339
340 2.A Correspondence
341
342 Email dated 5/23/2019 received from Town Counsel David Lefevre advising
343 that the Court has dismissed the Appeal filed by Moozit, LLC, against the Town
344 on the same grounds that the ZBA denied a Rehearing – untimely filing. Mr.
345 Buttrick noted that he will need to start code enforcement action for the
346 apartment within the business.
347
348 3. Discussion of possible Zoning Ordinance Amendments.
349
350 Board reviewed and discussed the Prioritized List dated 5/10/2019 and
351 changed the following: Trailers and Ocean Containers from Priority 2 to Priority
352 1; Tiny Homes from Priority 3 to Priority 2; and noted that a distinction is
353 needed between Backyard Farming and Backyard Animals and Backyard
354 Gardening. A workshop meeting was set for July 11, 2019.
355
356 4. New Hampshire Municipal Association- References Articles.
357
358 Two Articles were distributed – crafting Rules of Procedure and Conduct of
359 Public Hearings. Mr. Buttrick also distributed a revision to the Right-to-Know
360 Law for inclusion into the Land Use Regulation aka RSA Book.
361
362 Motion made by Ms. Davis, seconded by Mr. Pac~~h~~ocha and unanimously voted
363 to adjourn the meeting. The 5/23/2019 ZBA meeting adjourned at 8:41 PM.
364

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365 Respectfully submitted,
366 Louise Knee, Recorder

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DrummondWoodsum
ATTORNEYS AT LAW

ZBA Decision Making Process

Presented by:
Atty. C. Christine Fillmore
Atty. Matthew Serge

June 1, 2019
OSI Spring Conference

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OVERVIEW

- Foundational legal concepts
- Laying the groundwork
- The hearing
- Deliberation and decision
- After the decision

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Foundational Legal Concepts

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What is the purpose of the ZBA?

Failure to include provision for a ZBA renders a zoning ordinance invalid. RSA 673:1, IV; *Jaffrey v. Heffernan*, 104 N.H. 249 (1962)

- Why? It's the Constitutional "safety valve" to prevent indirect taking of private property for public use without just compensation (inverse condemnation).
  - U.S. Constitution, 5th Amendment; N.H. Constitution, Part 1, Arts 2 & 12
- Mechanism for relief via administrative appeal, special exception, variance and equitable waiver, RSA 674:33

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Judicial Function

- ZBA is not legislative (does not create or amend land use ordinances or regulations - although variances allow someone to *work around* them when constitutionally required).
- ZBA is not executive (does not enforce its decisions).
- ZBA is judicial (quasi-judicial) - it *interprets* the ordinance and regulations and applies that interpretation to the application before it.
- Someone's property is at stake, so procedural concerns are elevated.

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If you remember nothing else...

- Read and follow statutory requirements.
- Read and follow requirements of your ordinance and rules.
- Be fair and reasonable.

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Authority to Act

- Fundamental rule of municipal authority in New Hampshire (*Girard v. Allenstown*, 121 N.H. 268 (1981)):
  - All authority to act comes from the legislature
  - Must find a statute that authorizes the action or necessarily implies it
  - May not rely on the absence of a statute that prohibits it
- Municipality/board may not have an ordinance, rule or procedure that isn't authorized or necessarily implied by a statute.

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Relationship to the Public

- Procedural due process: citizens have right to notice and the opportunity to be heard.
  - *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- Municipalities have a constitutional obligation to provide assistance to all citizens with the **process**.
- The test is a "reasonable" obligation, not a duty to educate or inform beyond notices legally required.
  - *Kelsey v. Town of Hanover*, 157 N.H. 632 (2008)

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ZBA Meetings

- Meetings "held at the call of the chairperson and at such other times as the board may determine," RSA 673:10, I.
  - No requirement for a monthly meeting
- A majority of the membership = a quorum necessary to transact business.
- 3 votes needed for ZBA to take any action (regardless of how many are sitting), RSA 674:33, III.
- Chair designates which alternate sits for a member who is absent or who has recused herself.

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Laying the Groundwork for a Strong Decision

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ZBA as a Quasi-Judicial Board

- In a public meeting/hearing, the ZBA:
  - Collects evidence, hears testimony, receives documents
  - From these, it finds facts (may use member knowledge, too, but within limits)
- Decisions based on the facts, applying the law
  - Presence/absence of opposition does not matter
  - Apply legal tests to reach a decision
  - Approve, deny, modify, or impose conditions

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ZBA as a Quasi-Judicial Board

- Burden of proof is on the applicant
- ZBA interprets the ordinance and has the final *local* say on what it means – but a court may review it further
- ZBA develops a record for possible court review

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Constitutional Procedural Due Process

- To protect against the unfair loss of a property right, state and federal constitutions require at least:
  - *Notice* to affected persons of a proposed action
  - An opportunity to *be heard* at a public hearing
  - Ability to *appear and speak* through counsel
  - Decision by an *impartial* tribunal
  - Deliberation *based upon evidence and facts*
  - A *written decision* with reasons
  - *Appeal* to seek correction of error

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NH Statutory Due Process

- Notice to affected persons – RSA 676:7, I(a)
- Opportunity to be heard at a public hearing, to appear and speak through counsel, RSA 676:7, I and III
- Decision by an impartial tribunal, RSA 673:14
- Deliberation based on evidence and facts, RSA 674:33
- A written decision with reasons, RSA 676:3

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The Road to Decision

- Application submitted to ZBA
  - Check rules of procedure (RSA 676:1) and RSA 676:7
  - Appropriate notice to parties and public
- Public meetings and public hearings
  - Consider whether any member is disqualified
  - Think about Right to Know Law and site visits
- Hearing and decision that provides procedural due process
  - Clarity and ability to review
  - Rehearing and the correction of errors

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Working with Other Boards

- When a proposal requires both ZBA and PB approval
  - Which board hears the case first?
  - Whose conditions prevail?
- Joint Meetings, RSA 676:2
  - Any land use boards may hold joint meetings to decide cases involving jurisdiction of both boards
  - Each board must comply with all legal requirements (notice, minutes, votes)
  - Can be very efficient for everyone (time, money and effort for applicant, abutters, boards and public)

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One Bite at the Apple

- Apply for the same thing over and over?
  - Generally – no.
  - 2nd application must be materially different in nature and degree from the 1st. *Fisher v. Dover*, 120 N.H. 187 (1980); *Kulick's Inc. v. Winchester*, No. 2016-0054 (9/6/2016) (unpublished)
  - What counts?
    - A change in applicable legal standards
    - Application changed to address reasons first was denied

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Preparing for Success - Application

- Application can provide a road map for the board
  - Who, where, what, why, when, how are all in there (and if they aren't, you know what to ask about)
  - Description of the proposal and why applicant believes it should be granted
  - Note what they are requesting and the legal standards they must meet to help you make sense of the evidence at the hearing.

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Preparing for Success - Notice

- Notice to the public per RSA 91-A is required (24 hours, 2 public places, one of which may be website)
- More notice required under RSA 676:7:
  - Certified/verified mail to all parties at least 5 days before hearing
  - Newspaper publication at least 5 days before hearing
  - You can always provide **more** notice.
  - Failure to notice can be fatal to the process.

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The Public Hearing

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Timing of the Hearing

- Timing of hearing and decision:
  - ZBA hearing within 45 days** of receipt of application, RSA 676:7, II.
    - **Was 30 days, as of July 9, 2019, increased to 45 by HB 136.
    - Applicant is not entitled to the relief they seek merely because the time requirement isn't met.
  - HOWEVER – although state law doesn't require the **decision** within a particular time, federal law may (e.g., telecom facilities).

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Right to a Full Board?

- Not entitled to a hearing and decision by a full board, *Auger v. Strafford*, 156 N.H. 64 (2007)
  - Board may have a policy of offering to wait until a full board is available – apply the policy evenly!
- Can you substitute someone after the process starts?
- Can a member vote if he/she missed one or more sessions of the hearing?
  - On both: If they can catch up by reviewing the record, yes, but it is better to avoid that situation if possible.

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Participation in the Public Hearing

- Board members may ask questions of parties
- Alternates (those not sitting for someone else) may participate in the hearing process if allowed by ZBA's rules, RSA 673:6, V.
- Disqualified members may participate in the hearing as parties (i.e., abutters) or as member of the public.
- Board must hear all parties, and may hear "such other persons as it deems appropriate," RSA 676:7, I(a).

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Board's Independent Expert

- All land use boards may hire consultants and experts if there are funds available, RSA 673:13.
- ZBA may also require applicant to reimburse board for cost of third party review, RSA 676:5, V.
- ZBA and Planning Board may not require substantially the same review – applicant pays once.
- Applicant is protected by the ability to review invoices and have board assure services were fairly rendered.

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Application form
acknowledge
"Right to a site visit"

Multiple Hearings

- May continue a hearing to a different day.
  - RSA 676:7, V: state time, date and place of continued session before end of first session and no additional notice is required for continued session.
- Do not allow any parties to contact board members or alternates in the interim days.

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Closing the Public Hearing

- Don't close public hearing too soon
  - Has everyone had a meaningful opportunity to be heard?
  - What if board members want to ask additional questions during the deliberations?
  - Fairness to those who may have left after the public hearing closed?

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Deliberation and Decision

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Deliberation – When?

- No set time.
- May deliberate immediately, or at the end of the meeting after other hearings, or on a different day, and may continue deliberation over more than one session.
- No ex-parte contact with board members.
- Deliberate only in public, RSA 673:17.
- Good form to notify parties when deliberation will occur, but no formal notice required.

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Obtaining Legal Advice: RSA 91-A

- Consultation with legal counsel is not a "meeting"
  - No posting, no notice, no minutes.
  - Attorney must be actively participating
- Review of written or oral legal advice without active participation of attorney is *not* "consultation with legal counsel," so must either:
  - Review in public session (thus waiving attorney-client privilege), or
  - Review in nonpublic session (RSA 91-A:3, I(l)).

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Deliberating

- Begin with the application (what is being asked for or appealed from?)
- Before making a decision, review everything
  - Relief sought
  - Legal standards
  - Evidence that was presented
  - How the evidence fits with the legal standards
- Deliberation is only among board members – no comments from parties or public

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Weighing Expert Evidence

- Board has considerable discretion to choose between competing expert opinions
  - *Richmond Co. v. Concord*, 149 N.H. 312 (2003).
- General studies and articles may not be enough to contradict specific expert opinion:
  - Yes: articles about hazards of shooting ranges, *Star Vector Corp. v. Windham*, 146 N.H. 490 (2001)
  - No: General Audubon fact sheet re: vernal pools, *Continental Paving, Inc. v. Litchfield*, 158 N.H. 570 (2009)
- Uncontroverted expert evidence:
  - Lay opinions and anecdotes don't outweigh it, *Trustees of Dartmouth College v. Hanover*, No. 2017-0595 (11/6/18)

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Weighing Expert Evidence

- Board may rely on specific personal knowledge.
  - Note a member's specific expertise during the hearing so all sides have the opportunity for rebuttal.
  - Members should demonstrate their knowledge and experience by intelligent questioning of experts during the hearing.
- However, uncontradicted expert testimony overcomes general member knowledge
  - *Condos East Corp. v. Conway*, 132 N.H. 341 (1989).
- In all cases, board must have a reason for rejecting expert opinion (what's lacking in their qualifications, methodology, data, conclusions?).
- Minutes and decision should reflect board's reasons for not accepting expert opinion.
- Personal feelings of board is not sufficient.

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Drafting a Motion

- Don't expect parties to draft a motion for the board.
- Do have someone write it out, and reread the motion again just before the vote.
- May a member draft a motion ahead of time?
- If the motion needs to change, it can be amended; however, someone must keep track.
- Only ONE motion before the board at a time.

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Drafting a Motion

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- Be careful before incorporating codes by reference into your motion/decision, because it may incorporate things you don't expect.
  - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)

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Drafting a Motion

- Begin with what the applicant has asked for, but you don't have to stick to that.
- Board is not required to grant exactly what the applicant seeks; craft the relief you find appropriate.
- Include conditions in the motion (this may be where the motion gets amended over the course of the deliberations).

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Drafting a Motion

- Text of the motion (also who made and seconded it) and what happens to it should end up in the minutes.
- Give a written copy to the person taking the minutes.
- If meeting is being audio recorded, be careful to create an adequate record:
  - Read motion out loud, and
  - Require verbal vote from every member

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Drafting a Motion

- The motion, once passed, is the essence of the decision.
- It is difficult for the enforcement authority to enforce conditions that are not clear, and if they aren't aware of them!
- Include conditions in the notice of decision.
- Distribute notice of decision to appropriate officials.
- If there are deadlines or milestones, do the appropriate people know about them?

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Conditions of Approval

- Conditions "precedent"
  - Must be fulfilled before approval can become final
  - Consider placing a time limit on satisfying them
- Conditions "subsequent"
  - Restrict use of the property going forward
  - Example: hours of operation
- May not delegate or assign duties to other boards or agencies, only to the applicant.
  - ZBA approval that was subject to off-site improvements to be completed by the State. Held, special exception was unlawful. *Tidd v. Alton*, 148 N.H. 424 (2002)

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Conditions of Approval

- Variances run with the land, not the owner.
  - *Batchelder v. Plymouth ZBA*, 160 N.H. 253 (2010)
  - Exception: variances for the disabled, RSA 674:33, V: ZBA may find that variance shall survive only so long as the particular person has a continuing need to use the premises.
- Waiver from building and site requirements for agricultural uses
  - RSA 674:32-c
  - ZBA shall grant waiver to the extent necessary to reasonably permit the agricultural use.

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Voting on Motions (Generally)

- Must have at least 3 concurring votes to take any action (regardless of how many members are seated). RSA 674:33, III.
- Failed motion: if you don't get 3 votes in favor of the motion, is that a denial of the appeal or application, or is this a non-decision? Your rules of procedure should answer this question.

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Voting on Variances

- Applicant must satisfy all of 5 criteria in RSA 674:33 to obtain a variance, and must receive at least 3 votes in favor.
- If the board votes separately on each of the 5 criteria, it is possible for every factor to have at least 3 votes in favor even if no single member voted that all 5 criteria were met.
- Board should discuss all 5, but there are varying opinions on whether to vote separately on each one.

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Voting on Variances

- RSA 674:33, I(c):
  - ZBA must use one voting method for all variances until it formally votes to change the method.
  - Change in voting method does not take effect until 60 days after the vote to change, does not apply to any application that was filed and remains pending at the time of the change.

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Must be in Written Decision

Written Decision with Reasons

- Required by RSA 676:3.
- Purpose: to document the motion that was passed.
- Include the findings of fact that the board made.
- If the appeal/application is denied, written decision must include the reasons, RSA 676:3, I.
- ZBA relief runs with the land, so be precise.
  - Don't say: "Move to approve a 10 foot variance."
  - Do say: "Move to grant a variance from section 7(B) of the ordinance to allow a side setback of 10 feet where 20 feet is required..."
  - Refer in decision to the number and date of the plan set you are using.

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Written Decision with Reasons

- Include all conditions, stated clearly so that they are easy to understand.
- Helps make a record for future enforcement actions.
- Complete written decision is also necessary for meaningful court review:
  - Communicates what was granted or why it was denied, clarifies how expert opinions were used and relied upon (or rejected).
  - Although a one-line written decision combined with meeting minutes has been found acceptable in the past, NH courts strongly recommend specific findings of fact be stated in written decision to avoid a remand.

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Written Decision with Reasons

- Written decision and meeting minutes must be on file for public inspection within 5 business days after the vote, RSA 676:3, II and RSA 91-A.
- If they are not, it is not only a violation of the Right to Know Law, it creates a longer period within which someone who appeals the decision to superior court can amend their appeal (see more below).
- Does your board mail or e-mail a copy to the applicant? Be consistent.

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After the Decision

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Motion for Rehearing

- Motion for rehearing must be filed with ZBA w/in 30 days after order or decision. RSA 677:2
  - Count calendar days from the date on which the board took the vote (not when written decision was issued).
  - If it is filed late, deny the motion on that basis.
- Who can file? Select board, any party, or any "person directly affected" by the decision or order.
- Even if no one files a motion, ZBA may reconsider its decision within that 30 day period to correct error(s).
  - *74 Cox Street, LLC v. Nashua*, 156 N.H. 228 (2007)

BIZ →

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Motion for Rehearing

- Motion must state every reason the decision was unlawful or unreasonable. RSA 677:3.
  - Anything not raised in the motion for rehearing can't be raised later if the case goes to court.
- ZBA must grant or deny motion within 30 days
- To do this, hold a public **meeting** (not a hearing) to decide whether or not to rehear the case.
  - Don't take testimony or comments from the public on this – it's just a discussion and vote by the board.

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Motion for Rehearing

- Avoid new findings of fact or new reasoning when denying a motion for rehearing (just say "denied").
- If new grounds for initial decision have been identified, better to grant the motion to rehear and hold a new hearing to create a more complete record.
  - *MacDonald v. Effingham ZBA*, 152 N.H. 171 (2005)
- New evidence submitted with motion for rehearing:
  - If it could have been presented during original hearing, Board doesn't **have** to consider it, but **may**.

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Holding a Rehearing

- If motion for rehearing is granted, the case begins again from the beginning.
- Rehearing is not limited to the issues originally identified in the motion for rehearing.
  - Notify all parties again. Who pays for this?
  - Require all parties to present all information again; create a new decision based on this new record.
  - Adopt procedural rules to reduce confusion and dispute.

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When Do Motions for Rehearing Stop?

- If a motion to rehear is denied, can someone move to rehear the denial?
  - No. That would create an endless loop. The only place to go from a denial of rehearing is up to court.
- If a motion to rehear is granted, automatic next step is to schedule rehearing, send notices, hold the rehearing, and create a new decision.
  - ZBA reaches same result for same reasons, unclear if another motion to rehear is needed – if filed, ZBA usually simply denies.
  - ZBA reaches different decision, or the same decision for different reasons, motion for rehearing is necessary to appeal.

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Appeals to Superior Court

- If motion for rehearing is denied:
  - Any person aggrieved may file a petition for appeal with the superior court within 30 days of the date of the board's vote. RSA 677:4.
  - "Person aggrieved" includes any party entitled to request a rehearing under RSA 677:2.
  - Only the governing body may appeal on behalf of the town/city, not any other board.
    - *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003)

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Appeals to Superior Court

- If an appeal is filed, ZBA usually works with the local governing body to manage the litigation with town counsel (except if governing body made the decision being appealed from or filed the appeal – then ZBA needs separate counsel).
- Compile and preserve "the record" as completely as possible because it is the record for court review.

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Appeals to Superior Court

- The certified record includes everything the ZBA has on the case.
  - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, notices, certified mail receipts.....
  - Court will set a date by which the "Certified Record" must be submitted
    - Work with town counsel to assemble it.
    - Counsel will determine if anything is privileged or doesn't belong; best course is to send counsel everything.

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Concluding Suggestions

- Stay up to date on changes in the law – are your procedures current?
- Find out how applicants, the public, and professionals view your procedures.
- Stay in touch with enforcement officials and Planning Board – are you helping or hindering one another?
- See how other boards in your municipality and in other municipalities do things.

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Concluding Suggestions

- Encourage all ZBA members and staff to become informed about laws, ordinances, and rules.
- Legal advice – everyone should know when to ask for it and how to find it.
- **The process is important** – because people's property is at stake, the courts are interested in assuring the decision was reached fairly.

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Thank you!

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THE ZONING BOARD OF ADJUSTMENT IN NEW HAMPSHIRE

June 2019 OSI Conference

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A. INTRODUCTION

The purpose of this Article is to give you as a volunteer ZBA member a basic overview of the organization, powers, duties and relevant statutory and case law authority to make your service both more enjoyable and productive. I highly recommend the various materials made available to you through the New Hampshire Office of Strategic Initiatives (formerly known as "the Office of Energy and Planning"), the New Hampshire Local Government Center, and the noted treatises of Portsmouth Attorney Peter Loughlin found in the New Hampshire Practice Guide Series, with Vol. 15 Land Use Planning and Zoning (4th Ed., 2000; Supp. 2018) (cited hereafter as "Loughlin") being particularly useful for more in depth discussions on the topics covered by this Article as well as many related topics beyond the scope of this Article. I strongly suggest that you consult with your municipality's legal counsel on any specific questions you may have as this article is not intended to give you legal advice on any particular set of facts which may be facing you.

I also wish to thank my Associate, Austin Mikolaities, for his assistance in reviewing and updating this year's materials.

B. ORGANIZATION OF THE ZBA

1. Establishment and Organization

Pursuant to RSA 673:1, IV, "Every zoning ordinance adopted by a legislative body shall include provisions for the establishment of a zoning board of adjustment." Thus, to have a valid zoning ordinance, you must have a ZBA to act as the "constitutional safety valve" in a quasi-judicial capacity to interpret the zoning ordinance for the protection of the citizens.

Per the terms of RSA 673:3, the ZBA shall consist of five (5) members who may be either elected or appointed in the manner prescribed by the local legislative body in the zoning ordinance. Each member must be a resident of the municipality in order to be appointed or elected. Furthermore, pursuant to RSA 673:5, II, the terms of ZBA members shall be for three (3) years on a staggered basis with no more than two (2) members being appointed or elected in any given year. Per RSA 49-C:20, an appointed official's term continues until a successor is appointed; and while local land use board members' terms are limited to three years, this statute states that if a successor has yet to

be appointed and qualified at the end of the appointed member's term, the member may remain in office until such time.

Upon appointment or election, the ZBA members must take the oath of office set forth in Part II, Article 84 of the New Hampshire Constitution per RSA 42:1; and the municipal records should clearly state the dates of appointment/election and expiration of terms. While the provisions of RSA 673:3-a are not mandatory, it is recommended each member complete at least six (6) hours of training within six (6) months of assuming office for the first time.

RSA 673:3, III-a clarifies that a town meeting vote to change from elected to appointed members or vice versa can occur by a simple majority vote of the local legislative body without having to follow the procedures needed to amend the Zoning Ordinance. In SB2 towns, the issue may be placed on the official ballot and if not. then on a separate warrant article to be voted on at town meeting.

By the terms of RSA 673:7, I and II, an elected or appointed planning board member may be a member of the ZBA as with any other municipal board or commission; but this cannot result in two (2) planning board members serving on the same board or commission. Note, however, that if one or more planning board members sit on the ZBA, they should recuse themselves from any administrative decision appeals of planning board decisions brought to the ZBA.

RSA 673:8 states that a chairperson shall be elected from the members and that other offices may be created as the ZBA deems necessary. The most frequent "other office" is that of "vice chair", so that a person is designated to conduct the meetings in the chairperson's absence. The term of the chairperson and any other officers is for one year but they may be reelected without term limit. RSA 673:9.

Meetings are held "at the call of the chairperson and at such other times as the board may determine"; and a majority of the members shall constitute a quorum to transact business at any meeting. RSA 673:10. This schedule differs from the planning board which is required by subsection II of this statute to hold at least one meeting every month. Note also that RSA 674:33, III requires the concurring vote of 3 members of the ZBA to reverse the administrative official or to rule in favor of the applicant. While no New Hampshire case has yet "required" a continuance if there is less than a full board, many if not most boards will make such an offer (or at least grant one if requested) to avoid a challenge that the denial of the continuance would result in a fundamentally unfair hearing (i.e., the applicant having to reach a unanimous decision rather than convince only 3 out of 5 members).

2. Alternate Members

Up to five (5) alternate members may be provided for by the local legislative body to be either elected or appointed as the case may be. See, RSA 673:6. Alternates for city or town council members, selectmen or village district commissioners shall be appointed

by such bodies in the same way on subject to the same qualifications as such members under RSA 673:2. See, RSA 673:6, III. The terms of such alternate members shall also be three (3) years and staggered as with full members. Alternates serve in the absence of a "full" member and are appointed to sit on a particular case or meeting by the chairperson. RSA 673:11. If the "full" member is not just absent or disqualified for the meeting, then the procedures of RSA 673:12 concerning vacancies must be followed. Per RSA 673:6, V, alternate members of land use boards may participate in meetings of the board as a non-voting member, provided that the Board establishes procedural rules to set the details of how and when the alternate may participate.

3. Filling Vacancies

The method for filling a vacancy depends upon the status of the member who is being replaced. Thus, if a member was elected, her vacancy is filled by appointment of the remaining board members for an interim term lasting until the next regular municipal election; and at that election, a successor is elected to either fill the unexpired term of the replaced member or a complete new term as the case may be. RSA 673:12, I.

If the member being replaced is either an appointed, *ex officio* or alternate member, her vacancy is filled by the original appointing (i.e., the Board of Selectmen or Town/City Council) or designating authority (i.e., the Chairperson of the ZBA), for the unexpired term. RSA 673:12, II.

Per RSA 673:12, III, the Chairperson can designate an alternate member to serve temporarily until the vacancy is filled as above; but the restriction on who can fill in for an *ex officio* member still applies.

4. Removal of Members

As with members of the planning board, appointed members of the ZBA may be removed by the appointing authority after a public hearing upon written findings of inefficiency, neglect of duty or malfeasance in office; and elected members or alternate members may be removed by the Selectmen for such cause after a public hearing. RSA 673:13, I and II. Note that the malfeasance complained of must be directly related to or connected with the performance of the member's duties. See, Williams v. City of Dover, 130 N.H. 527, 531 (1988)(reversing removal where planning board member's assistance of his employer's installation of a driveway and additional greenhouse without the necessary planning board approvals or permits was not directly related to the member's duties); and Silva v. Botch, 121 N.H. 1041, 1045 (1981)(remand for award of attorney's fees to *ex officio* member illegally removed from planning board - despite stipulation at trial court that both sides had acted in good faith).

A more common reason for considering the removal of a member is the member's failure to attend meetings. This problem can be addressed via the ZBA's rule making authority under RSA 676:1 whereby the excused or unexcused absence from a given

number of meetings would be deemed a "malfeasance" or "neglect of duty" and thereby grounds for removal.

5. Rules of Procedure

Although RSA 676:1 does not prescribe the content of the ZBA's Rules of Procedure, this statute does mandate that the ZBA have such Rules. Such Rules must be adopted at a regular public meeting with a copy thereafter kept on file with the City, Town or Village District Clerk to be available to the public. A copy should also be available on the municipality's website and to an applicant with the application packet.

These Rules should cover both the ZBA's internal organization and how it conducts its public business. Items that can be covered include:

a. Authority of the Board, Election of Officers, and Designation of Alternates;
b. Requirements for a Complete Application;
c. Methods for filing materials, e.g., hours, via fax or email, etc.;
d. Designation of Quorum and Rules for Disqualification;
e. Scheduling and Conduct of Meetings, including Order of Business and Policy on Nonpublic Sessions;
f. Notices of Decisions, Findings and Requests for Rehearings;
g. Creation of the Certified Record for any Appeals;
h. Joint Meetings with Planning Board;
i. Process for Amending the Rules; and
j. Fees and expenses to be charged including the costs of special investigative studies, administrative expenses, and third party review and consultation related to application reviews or appeals per RSA 676:5, V.

A set of model Rules of Procedure can be found on the website of the New Hampshire Office of Strategic Initiatives as Appendix A to The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OSI revised December 2017): http://www.nh.gov/osi/planning/resources/documents/zoning-board-handbook.pdf.

C. POWERS AND DUTIES

1. Separation from Other Municipal Boards

As with the State and Federal Government, municipal government in New Hampshire operates under a system of "separation of powers" and "checks and balances". Under this system, the local legislative body (whether the Town Meeting, the Town Council or the City Council) has the authority to enact and amend the Zoning Ordinance pursuant to the provisions of RSA Chapter 675. Note also that the Planning Board is given certain authority to suggest amendments to the Zoning Ordinance and to amend Subdivision Regulations and Site Plan Review Regulations under provisions of RSA 674 and 675.

The ZBA, however, does not possess such legislative functions. Indeed, its role is quasi-judicial in that it generally reviews decisions made by another municipal agent or body or evaluates whether an applicant merits a particular waiver, exception or variance from the ordinary application of the municipal ordinances.

The express powers of the ZBA are set forth in RSA 674:33, and include the power to hear administrative appeals, to grant variances and special exceptions, and, pursuant to RSA 674:33-a, the power to grant equitable waivers of dimensional requirements. In exercising such powers, the ZBA may reverse or affirm, wholly or in part, or may modify the order or decision appealed from and may make such order or decision as ought to be made "and, to that end, shall have all the powers of the administrative official." RSA 674:33, II. Moreover, in making any decision – whether to reverse an administrative official or grant an application – at least three (3) members of the ZBA must concur in the decision. RSA 674:33, III. Thus, when less than a full board of five (5) members and/or alternates is present, the Chairperson should apprise the applicant of this requirement and provide the applicant with an opportunity to continue the hearing until a date certain.

2. Appeals of Administrative Decisions

Pursuant to RSA 674:33, I(a) and RSA 676:5, the ZBA is charged with the duty to hear appeals "taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer" concerning the zoning ordinance. RSA 676:5, I. An "administrative officer" is defined as "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." RSA 676:5, II(a); see, e.g., Ouellette v. Town of Kingston, 157 N.H. 604 (2008)(ZBA properly conducted *de novo* review under RSA 674:33 of Historic District Commission denial of certificate for supermarket); and Sutton v. Town of Gilford, 160 N.H. 43 (2010)(challenges to building permit must first be made to ZBA). A "decision of the administrative officer" is further defined to include "any decision involving construction, interpretation or application of the terms of the [zoning] ordinance" but does not include "a discretionary decision to commence formal or informal enforcement proceedings". RSA 676:5, II(b); see, e.g., Batchelder v. Town of Plymouth, 160 N.H. 253 (2010)(Planning Board interpretation of Zoning Ordinance provision allowing placement/removal of fill being "incidental to lawful construction"); Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017)(Zoning Officer's interpretation of Zoning Ordinance provision limiting student housing to situations "in conjunction with another institution" and meaning of "non-conforming use"); New Hampshire Alpha of SAE Trust v. Town of Hanover, __N.H.__ (Case No. 2017-0634; Issued March 26, 2019)(remand for ZBA to consider whether the Trust/fraternity was an "institution" itself under the Zoning Ordinance provisions).

Thus, while the Selectmen's decision to bring an enforcement action against, for example, a junk yard operator for violations of the junk yard provisions of the zoning ordinance is not within the jurisdiction of the ZBA's review, any construction, interpretation or application of the terms of the ordinance "which is implicated in such enforcement proceedings" does fall within the ZBA's jurisdiction. RSA 676:5, II(b). Furthermore, per the terms of RSA 676:5, III, the ZBA has jurisdiction to review decisions or determinations of the Planning Board which are based upon the construction, interpretation or application of the zoning ordinance, unless the ordinance provisions in question concern innovative land use controls adopted under RSA 674:21[1] and those provisions delegate their administration to the planning board.

Prior to August 31, 2013, an applicant may well have had to bring a "dual track" appeal of a planning board decision – one track to the Superior Court within 30 days of the planning board's decision under 677:15 and one track to the ZBA "within a reasonable time" of that decision under RSA 676:5, I.; and failure to do so may result in a waiver of that appeal. Hoffman v. Town of Gilford, 147 N.H. 85 (2001) and Saunders v. Town of Kingston, 160 N.H. 560, 563-564 (2010). Effective August 31, 2013, however, RSA 677:15 was significantly amended to provide:

> I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under *RSA 676:5*, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under *RSA 677:3*, subject to the provisions of paragraph I.

This means that the appeal to the ZBA should come first; and if a "dual track" appeal is brought to the Superior Court before the ZBA proceedings have concluded, then the Superior Court matter will be abated.

The Supreme Court confirmed that a planning board decision regarding a zoning ordinance provision is ripe and appealable to the ZBA when such a decision is actually made. See, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) and Saunders, 160 N.H. at 564-565. The planning board need not complete its consideration of the planning issues involved in a site plan review for a zoning issue to be ripe and appealable to the

[1] Note that a provision of 2013 SB 124, which passed creating a process for an integrated land development permit via NH DES allowed municipalities to adopt a provision under RSA 674:21 whereby a project receiving this type of permit via DES would not have to conform with all aspects of zoning if the planning board made certain findings concerning water quality and other environmental concerns. The effective date of this bill is currently July 1, 2017.

ZBA. Id. at 510. Therefore, an appellant who waits to appeal the zoning issue to the ZBA until a final decision on the plan is made by the Planning Board runs the risk of filing an untimely appeal to the ZBA. But see, Accurate Transport, Inc. v. Town of Derry, 168 N.H. 108 (2015)(mere vote to accept a plan as complete for jurisdictional purposes is not enough to trigger requirement to file appeal of administrative decision – apparently distinguishing Atwater on the level of discussion of the zoning issue involved). However, an appellant does get a "second bite at the apple" when a developer comes in to amend their previously approved application. See, Harborside v. City of Portsmouth, 163 N.H. 439 (2012)(ZBA's decision to uphold Planning Board's amendment of site plan which allowed change of use within approved space from retail to conference center after parking regulations had been modified reversed on appeal.)

Additionally, ZBA has authority to determine that unappealed CEO's decision that variance is needed was error. See, Bartlett v. City of Manchester, 164 N.H. 634 (2013) ("contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance.")

The definition of "a reasonable time" should be contained in the ZBA's Rules of Procedure and should be referenced in any decision of an administrative officer to provide fair notice to the potential appellant. That defined time period can be as short as 14 days. See, Daniel v. Town of Henniker Zoning Board of Adjustment, 134 N.H. 174 (1991); see also, Kelsey v. Town of Hanover, 157 N.H. 632 (2008)(ordinance definition of 15 days from date of posting of permit sufficient to uphold dismissal of appeal as untimely). In the absence of such definition, however, the Superior Court will determine whether the time taken by the appellant is reasonable. See, Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998)(appeal brought within 55 days was held to be outside a reasonable time); see also, 47 Residents of Deering, NH v. Town of Deering et al., 151 N.H. 795 (2005)(provision of zoning ordinance authorized ZBA to waive deadline for administrative appeal); Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006)(affirming dismissal of declaratory judgment action brought five months after planning board's site plan determination); and McNamara v. Hersh, 157 N.H. 72 (2008)(affirming dismissal of declaratory judgment action brought eight months after ZBA denial of neighbor's appeal of administrative decision).

Furthermore, pursuant to RSA 676:6, an appeal to the ZBA has the effect of staying the action being appealed, unless, upon certification of the administrative officer, the stay would cause "imminent peril to life, health, safety, property, or the environment". Thus, when an appeal is brought over the issuance of a building permit, the permit holder must cease and refrain from further construction, alteration or change of use. Likewise, when an appeal is brought from a notice letter from the Code Enforcement Officer, the Officer should refrain from further enforcement actions until the ZBA makes its determination.

Note also that appeals of administrative decisions may well include constitutional challenges against the applicable provisions of the zoning ordinance. See, Carlson's Chrysler v. City of Concord, 156 N.H. 399 (2007)(provisions of sign ordinance against

auto dealer's moving, electronic sign found to be constitutional); see also, Community Resources for Justice, Inc. v. City of Manchester, 157 N.H. 152 (2008)(ban on private correctional facilities in all districts violated State constitutional rights to equal protection; intermediate scrutiny requires the government to prove that the challenged ordinance be substantially related to an important governmental objective); Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633 (2006)(overturning prior Metzger standard of review and redefining the "rational basis test" to require that the ordinance be only rationally related to a legitimate governmental interest without inquiry into whether the ordinance unduly restricts individual rights or into whether there is a lesser restrictive means to accomplish that interest); and Taylor v. Town of Plaistow, 152 N.H. 142 (2005)(ordinance provision requiring 1000 feet between vehicular dealerships upheld).

Additionally, such appeals may involve claims of municipal estoppel, the law of which has been in a considerable state of flux in light of various decisions. See, Sutton v. Town of Gilford, 160 N.H. 43 (2010)(representation by Town Planning Director concerning "non-merged" status of lots could not be justifiably relied upon); Cardinal Development Corporation v. Town of Winchester ZBA, 157 N.H. 710 (2008)(ZBA not estopped to deny motion for rehearing as untimely filed where ZBA Clerk did not have authority to accept after hours fax on 30th day nor could applicant's attorney reasonably rely that clerk had such authority); Thomas v. Town of Hooksett, 153 N.H. 717 (2006)(finding of municipal estoppel reversed where reliance on prior statements of Code Enforcement Officer and Planning Board Chairman, which were contrary to express statutory terms, was not reasonable); but see, Dembiec v. Town of Holderness, 167 N.H. 130 (2014), (Assertion of a municipal estoppel claim for the first time in the trial court is not barred by the exhaustion of administrative remedies doctrine because the applicable statutes do not confer jurisdiction upon ZBA to grant relief under the equitable doctrine of municipal estoppel; also noting that although prior cases including Thomas v. Town of Hooksett involved municipal estoppel claims that were initially asserted at the ZBA, the Court did not address whether the ZBA had jurisdiction to decide those claims.) See also, Forster v. Town of Henniker, 167 N.H. 745 (2015)(determining that weddings are not a valid "accessory use" under statutory definitions of agriculture or agritourism)[2]. Accordingly, the ZBA should seek advice of municipal counsel before voyaging into these rough and ever changing waters.

3. 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. Cf., Tonnesen v. Town of Gilmanton, 156 N.H. 813 (2008)(without referring to RSA 674:33, the Court upheld the Town's right to "regulate and control" via special exception aircraft takeoffs and landing under RSA 674:16, V). It is important to remember the key distinction between a special exception and a variance. A special exception seeks permission to do something that the zoning ordinance permits

[2] Note that RSA 674:32-b concerning Existing Agricultural Uses was amended in 2018 to prohibit municipalities from adopting any "ordinance, bylaw, definition or policy" concerning Agritourism activities that conflicts with RSA 21:34-a.

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 (formerly termed a "use" variance), or to construct the new building partially within the side set-back line (formerly an "area" variance); and, as is set forth below in more detail, the standards for any variance without distinction are the subject of much judicial interpretation and flux.

A use permitted by special exception is also distinguishable from a non-conforming use. As described above, a special exception is a *permitted* use provided that the petitioner demonstrates to the ZBA compliance with the special exception requirements set forth in the ordinance. By contrast, a non-conforming use is a use 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).

In the case of 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); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988). Although the ZBA may not vary or waive any of the requirements set forth in the ordinance, the applicant may ask for 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); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002). 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); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Section 23.02, page 365. Finally, as with variances, 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); see also, Loughlin, §23.05, page 369; but see, Garrison v. Town of Henniker, 154 N.H. 26 (2006)(Supreme Court noted without comment the restriction on the variance that it would terminate if the applicant transferred the property).

In 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. In 2018, those statutory provisions were amended again to allow municipalities to amend their Zoning Ordinances to provide for the termination of all variances and special exceptions "authorized prior to August 19, 2013 and that have not been exercised". See, RSA 674:33, I-a (b) and RSA 674:33, IV (c). These amendments require that, after the amendment of the Zoning Ordinance, the Planning Board "shall post notice at the City or Town Hall for one year and shall state the expiration date of the notice" and that variances/special exceptions authorized prior to August 19, 2013 shall be "valid if exercised within two years of the expiration date of the Notice" unless further extended by the ZBA for good cause. Id.

Also note that effective June 1, 2017, RSA 674:71 et seq. are added to require municipalities that adopt a zoning ordinance to allow accessory dwelling units as a matter of right, or by either conditional use permit pursuant to RSA 374:21 or by special exception, in all zoning districts that permit single-family dwellings. While the details of this issue are beyond the scope of this presentation, this continues to be a "hot topic" with the Legislature and may require further attention during the 2019 Town Meeting cycle.

4. Variances

As ZBA members across the State are aware, the changes to the standards for variances begun with the Simplex decision in December 2001 and modified with the Boccia decision in May 2004, until re-structured by the Legislature in 2009. A detailed analysis of the development of these standards is beyond the scope of this article; but I direct you to my articles on this subject from the 2005 LGC Lecture Series "A Brief History of Variance Standards" and the 2009 LGC Lecture Series "The Five Variance Criteria in the 21st Century" (co-authored with Attorney Cordell Johnston of the LGC), which are available at the OSI website.

a. The Current Standard

The 2009 Legislature substantially revised RSA 674:33, I (b) via SB 147 to override the Boccia decision and ostensibly "simplify" the standard. The current statutory language is 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).

A summary checklist of these criteria is provided as "**Appendix A**" to these materials; but it is hoped that the more detailed discussion below can serve as a reference guide to board members as they are confronted by issues in any given application. Of course, members should look to their own municipal attorney for precise guidance on any particular issue.

While this new language has applied to all variance applications/appeals filed on or after January 1, 2010, there continues to be much discussion amongst members of the municipal/land use bar of whether this revision works a "simplification" or a "complication" of the variance standard. While the stated rationale for this legislation was to codify the Simplex criteria for "unnecessary hardship," the language of the statute does not track the three-prongs of Simplex (see below). "Special conditions" of the subject property are clearly emphasized; but both subparagraphs (A) and (B) rely in large part on the subjective determination of what is a "reasonable" use – a determination which could well retain the economic considerations many boards found difficult in

applying the Boccia criteria. Additionally, while the opening clause of subparagraph (B), coupled with the Statement of Intent of SB 147, Sec. 5[3], clearly state that an applicant reaches this second standard if the first set of criteria in subparagraph (A) is not met, this second standard does not precisely mirror the language from Governor's Island[4].

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

The first decision issued by the Supreme Court to apply the current standard was Harborside. The Supreme Court affirmed in part, reversed in part and remanded the Trial Court's partial affirmance and partial reversal of ZBA's grant of sign variances for Parade's new Marriot hotel (down the street from Harborside's 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 511-12. 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 this case was decided under the revised variance standard effective January 1, 2010; and in stating the text of the unnecessary hardship criteria, the Court noted that the two definitions of RSA 674:33, I (b)(5)(A) and (B) are "similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island. Id., at 513.

[3] The Statement of Intent reads as follows: "The intent of section 6 of this act is to eliminate the separate 'unnecessary hardship' standard for 'area' variances, as established by the New Hampshire Supreme Court in the case of Boccia v. City of Portsmouth, 151 N.H. 85 (2004), and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), as those standards have been interpreted by subsequent decisions of the Supreme Court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the Simplex decision, as exemplified by cases such as Governor's Island Club, Inc. v. Town of Gilford, 124 N.H. 126 (1983)."

[4] The key language in Governor's Island is as follows: "For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land. See Assoc. Home Util's, Inc. v. Town of Bedford, 120 N.H. 812, 817, (1980). If the land is reasonably suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met." Governor's Island Club, Inc. v. Town of Gilford, 124 N.H. 126, 130 (1983). Note also that in Sutton v. Town of Gilford, 160 N.H. 43 (2010), a case dealing with the same property involved in Governor's Island, the Court cites to the Governor's Island decision as "abrogated" by Simplex – a term meaning "to abolish by authoritative action" or "to treat as a nullity" with a synonym being "nullified". We will have to wait to see if the Court "meant" to use this term.

The Court next addressed the Trial Court's reversal of the parapet sign variance by stating that, since the ruling is "somewhat unclear, we interpret it either to be" a ruling that the ZBA erred in finding the variance would not be contrary to the public interest and consistent with the spirit of the ordinance, or that the ZBA erred in finding the variance would work a substantial justice. Id., at 513-514. In analyzing the public interest/spirit of the ordinance criteria, the Court cited to Farrar and Chester Rod & Gun Club for the continued premise that these two criteria are considered together and require a determination of whether the variance would "unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." "Mere conflict with the terms of the ordinance is insufficient." Id., at 514. The Court noted that it has "recognized two methods for ascertaining" whether such a violation occurred: (1) whether the variance would "alter the essential character of the neighborhood" or (2) whether the variance would "threaten public health, safety or welfare." Id. The Court chastised the Trial Court for instead focusing on whether allowing the signs would "serve the public interest" and considered the record to support the ZBA's factual findings so that the Trial Court's rulings were reversed on these two criteria. Id., at 514-515.

The Court similarly examined the substantial justice criterion and restated its position from Malachy Glen, Harrington and Daniels that "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Id., at 515. The Court again chastised the Trial Court for its focus on "the only apparent benefit to the public would be an ability to identify [Parade's] property from far away" while the ZBA correctly focused on whether the public stood to gain from a denial of the variance. Id., at 516. The Court again considered the record to support the ZBA's factual findings so that the Trial Court's ruling on this criterion was reversed; but the Court remanded the parapet sign variances back to the Trial Court to "consider the unnecessary hardship criteria in the first instance." Id., at 517.

Turning to the marquee sign variance, the Supreme Court noted that the ZBA used only the first of the new statutory definitions and agreed with the ZBA's determination that the "special condition" of the property was its sheer mass and its occupancy by a hotel. Id. The Court rejected Harborside's argument that size is not relevant based on the concurrence in Bacon v. Enfield. The Court noted that the concurrence was not adopted by the majority so that it does not have precedential value and that Parade is not claiming that the signs are unique but that the hotel/conference center property is. Id., at 518. "Because a sign variance is at issue, we find no error in examining whether the building upon which the sign is proposed to be installed has 'special conditions'." Id. The Court also rejected Harborside's argument that there could be no unnecessary hardship since Parade could operate with the smaller sized sign: "Parade merely had to show that its proposed signs were a 'reasonable use'....Parade did not have to demonstrate that its proposed signs were 'necessary' to its hotel operations." Id., at 519.

The Court similarly rejected Harborside's argument that Parade could not meet the public interest, spirit of the ordinance or substantial justice criteria because it could

have achieved "the same results" by installing smaller signs: "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia. Id. Finally, the Court rejected Harborside's argument that there was no evidence on no diminution of surrounding property values other than the statement of Parade's attorney since "it is for the ZBA...to resolve conflicts in evidence and assess the credibility of the offers of proof" and that the ZBA was "also entitled to rely on its own knowledge, experience and observations." Id. Accordingly, the grant of the marquee sign variance was upheld.

c. Several "Old Chestnuts"

As had become apparent through the various decisions from Simplex to Boccia and beyond, Zoning Board members are being called upon to evaluate each of the five required elements for any variance application that comes before them on an *ad hoc* basis with particular emphasis on how the variance would impact both the stated purposes of the municipal ordinance and the existing neighborhood involved. In short, the particular facts of a given application and the depth of the presentation to the Zoning Board of Adjustment may never have been more important. In all likelihood, the variance standards as set forth in these cases will be further refined and clarified as the Court receives the next wave of variance appeals; but I believe that we can expect the following cases to remain viable, at least in part.

i. Simplex and "Unnecessary Hardship"

Under the Simplex criteria for proving "unnecessary hardship," applicants must provide proof that:

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

Simplex, 145 N.H. at 731 - 732. The purpose stated by the Court for this "new" standard was, in part, that prior, more restrictive approach was "inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate." Simplex, 145 N.H. at 731, *citing*, Belanger v. City of Nashua, 121 N.H. 389, 393 (1981). In so changing the standard, the Court recognized again the "constitutional rights of landowners" so that zoning ordinances "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.'" Simplex, 145 N.H. at 731, *citing*, Town of Chesterfield v. Brooks, 126 N.H. 64, 69 (1985). The Court then summarized its rationale for this change of standard with the following statement of constitutional concerns:

Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property. See N.H. CONST. pt. I, arts 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.

Simplex, 145 N.H. at 731. This constitutional balancing test should continue to be considered by ZBA members in all variance applications.

ii. Rancourt and "Reasonable Use"

The first decision to actually apply the new Simplex standard to a variance application on appeal was Rancourt v. City of Manchester, 149 N.H. 51 (2003). In Rancourt, the appeal was brought by abutters who had lost before the ZBA and the Hillsborough County Superior Court (Barry, J.) on the applicants' variance request to stable horses on the applicants' three acre residential lot. In starting its analysis, the Supreme Court noted that variance applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land: "Rather, they must show that the use for which they seek a variance is 'reasonable,' considering the property's unique setting in its environment." Id., at 53 - 54.

In applying the three criteria for unnecessary hardship set forth in Simplex, Supreme Court in Rancourt found that both the Trial Court and ZBA could rationally have found that the zoning ordinance precluding horses in the zone interfered with the applicants' reasonable proposed use of the property considering the various facts involved: that the lot had a unique, country setting; that this lot was larger than surrounding lots; that the lot was uniquely configured with more space at the rear; that there was a thick wooded buffer around the proposed paddock area; that the proposed 1 ½ acres of stabling area was more than required per zoning laws to keep two livestock animals in other zones. Id., at 54. "The trial court and the ZBA could logically have concluded that these special conditions of the property made the proposed stabling of two horses on the property 'reasonable'." Id.

iii. Vigeant and the Applicant's Reasonable Use

While Boccia v. City of Portsmouth, 151 N.H. 85 (2004), has been written out of the list of relevant case law as a result of SB 147 (at least for now),[5] many of the

[5] It appears the New Hampshire Supreme Court still finds the "use" and "area" variance distinction to be useful in certain contexts. In 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011), for example, the Court did not evaluate the *merits* of a variance using the Boccia distinction between "use" and "area"; rather, the Court used the "use" and "area" distinction in applying the expansion of non-conforming use doctrine. In 1808 Corporation, the office building at issue was permitted by special exception. At the

decisions that would have been considered progeny of Boccia may still be relevant for their discussions of the remaining four "non-hardship" criteria. One such case is Vigeant v. Town of Hudson, 151 N.H. 747 (2005), wherein the Court agreed in part with the Town's argument that the reasonableness of the proposed use must be taken into account and held that "it is implicit under the first factor of the Boccia test that the proposed use must be reasonable." Id., at 752. However, the Court limited that holding:

When an area variance is sought, the proposed project is presumed reasonable if it is permitted under the Town's applicable zoning ordinance....If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.

Id., at 752 – 753. An argument can be made that this logic still applies under the "new" hardship criteria since "reasonableness" expressly remains as an element to be proven by the applicant. This may be particularly relevant where the variance at issue would have been an "area" type under the Boccia standard, e.g., set-back encroachments, frontage or acreage deficiencies, etc. In the case of Vigeant's application, the ZBA had considered that the applicant could have made an alternate use with fewer dwelling units; but the Supreme Court rejected that argument out of hand: "In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material." Id. In light of the configuration and location of the lot in question, the Court determined that it was "impossible to comply with the setback requirements" such that an area variance is necessary to implement the proposed plan from a "practical standpoint." Id. In so finding, the Supreme Court upheld the Trial Court's determination that the ZBA's denial of the variance was unlawful and unreasonable.

iv. Harrington and the Hardship Standard including Comments on "Self-Created Hardship" and "Substantial Justice"

In the case of Harrington v. Town of Warner, 152 N.H. 74 (2005), the Court turned its attention to the issue of unnecessary hardship and provided an analysis of the distinction between a use and an area variance:

The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction....If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction....Whether the variance sought is an area or use variance requires a

time of the special exception approval, petitioners also received a variance from one of the special exception criteria which limited the area of the foundation to 1,500 sq. ft. Years later, the petitioners argued that they were entitled to expand the office use based on the expansion of non-conforming use doctrine. The Court disagreed reasoning that because the use was a permitted use per special exception and the variance granted was an "area" variance and not a "use" variance, the expansion of non-conforming uses doctrine does not apply.

case-by-case determination based upon the language and purpose of the particular zoning restriction at issue.

Id., at 78. The Court then analyzed the applicable provisions of the Warner zoning ordinance and found that it was a limitation on the intensity of the use in order to preserve the character of the area such that the provision was a use restriction requiring a use variance under the Simplex criteria. Id., at 80. This type of analysis may still be valid for a Board's consideration under the "new" hardship criteria.

While not actually analyzing each prong of the "three-prong standard set forth in Simplex" for unnecessary hardship, the Court noted that Simplex first requires "a determination of whether the zoning restriction as applied interferes with a landowner's reasonable use of the property" and that "reasonable return is not maximum return". Id., at 80. Additionally, the Court held that, while the constitutional right to enjoy property must be considered, the "mere conclusory and lay opinion of the lack of...reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence" of such interference with reasonable use. Id., at 81. Since the 2009 amendments to RSA 674:33 were ostensibly to codify the Simplex criteria for unnecessary hardship, the Court's guidance in Harrington on consideration of "reasonable use" remains relevant.

The Court in Harrington continues with a "second" determination – whether the hardship is a result of the unique setting of the property; and the Court states that this requires that "the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property." Id. While the property need not be the only one so burdened, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." Id. Furthermore, that burden must arise from the property and not from the individual plight of the landowner. Id. Furthermore, the Court considers the "final" condition – the surrounding environment, i.e., "whether the landowner's proposed use would alter the essential character of the neighborhood." Id. This analysis also has validity under the "new" hardship criteria.

The Court also considered the issue of "self-created hardship" and relied on its prior decision in Hill v. Town of Chester, 146 N.H. 291, 293 (2001) to find that self-created hardship does not preclude the landowner from obtaining a variance since "purchase with knowledge" of a restriction is but a "nondispositive factor" to be considered under the first prong of the Simplex hardship test. Harrington, 152 N.H. at 83. But see, Alex Kwader v. Town of Chesterfield (No. 2010-0151; Issued March 21, 2011) (a "non-binding" 3JX decision by Justices Dalianis, Duggan and Conboy, which remanded a case back to the ZBA due to its denial of an area variance to the petitioner solely because of the ZBA's finding on self-created hardship, thereby making this factor dispositive.)

In addressing the other issues raised by the abutters, the Court gave the issues short shrift. The Court found that the applicant showed that the variance was not contrary to the spirit of the ordinance and did not detract from the intent or purpose of the

ordinance because: (1) mobile home parks were a permitted use in the district; (2) a mobile home park already exists in the area; (3) the variance would not change the use of the area; and (4) were he able to subdivide his land, the applicant would have sufficient minimum acreage for the proposed expansion. Harrington, 152 N.H. at 84-85. Additionally, the Court found that "substantial justice would be done" because "it would improve a dilapidated area of town and provide affordable housing in the area." Id., at 85.

This comment on "substantial justice" is one of the few found in the case law of variances. A previous statement suggests that the analysis should be whether the loss the applicant will suffer by its inability to reasonably use its land as it desires without the variance outweighs any gain to the public by denying the variance. See, U-Haul Co. of N.H. & Vt., Inc. v. Concord, 122 N.H. 910, 912-13 (1982)(finding that substantial justice would be done by granting a variance to permit construction of an apartment in the general business district since it would have less impact on the area than a permissible multi-family unit); see also, Loughlin, §24.11, page 394, citing the New Hampshire Office of State Planning Handbook 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.

As more scrutiny is given to the "non-hardship" prongs of the variance criteria, we can expect further discussions on the element of "substantial justice". See, Subsection (h), below, concerning Malachy Glen.

v. Chester Rod and Gun Club and an Analysis of "Public Interest", "Rights of Others" and "Spirit of Ordinance" Criteria

In the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005), the Supreme Court held that the Zoning Ordinance is the relevant declaration of public interest to be examined rather than any specific vote at Town Meeting. Id., at 581. In that case, the ZBA had been faced with two variance application for competing Cell Towers – one on the Club's property and one on the Town's. A previous March Town Meeting had passed an article stating that all Cell Towers should be on Town owned land; and the ZBA relied on that article to grant the Town's application and deny the Club's. On appeal, the Trial Court reversed the ZBA and ordered that it grant the Club's variance.

In reversing the Trial Court in part, the Supreme Court stated what we as practitioners in the field have long espoused: that the criteria of whether the variance is "contrary to the public interest" or would "injure the public rights of others" should be construed together with whether the variance "is consistent with the spirit of the

ordinance". Id., at 580. 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. Id., at 581. 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.

However, the Supreme Court took the unusual step of reprimanding the lower court for improperly ordering the issuance of the variance. Instead, the Trial Court was instructed to remand the matter back to the ZBA for factual findings on all five prongs of the variance criteria.

vi. **Garrison and the Re-emphasis on "Uniqueness"**

In the case of Garrison v. Town of Henniker, 154 N.H. 26 (2006), the Supreme Court upheld the reversal of variances granted for an explosives plant, which was to be located in the middle of 18 lots totaling 1,617 acres - all zoned "rural residential". The applicant had sought use variances to allow the commercial use in the residential zone and to allow the storage and blending of explosive materials where injurious or obnoxious uses are prohibited. After an extensive presentation of the nature of the applicant's business and the site, the ZBA voted 3-2 to grant the variances with two conditions: (1) the 18 lots had to be merged into one; and (2) the variances would terminate if the applicant discontinued the use.

Upon appeal by abutters, the Trial Court reversed the ZBA's decisions by finding that the evidence before the ZBA failed to demonstrate unnecessary hardship. In upholding that decision, the Supreme Court agreed with the Trial Court that, while the property was ideal for the applicant's desired use, "the burden must arise from the property and not from the individual plight of the landowner." Id., *citing*, Harrington v. Town of Warner, 152 N.H 74 (2005). In discussing the three-prong Simplex standard for unnecessary hardship, the Supreme Court focused on the first prong: that a zoning restriction "interferes with their reasonable use of the property, considering the unique setting of the property in its environment." Garrison, 154 N.H. at 30 - 31, *citing*, Rancourt v. City of Manchester, 149 N.H. 51, 53-54 (2003)(emphasis original). In doing so, the Court agreed with the Trial Court that the evidence failed to show that the property at issue was sufficiently different from any other property within the zone to be considered "unique".

As a minor "bone" to the applicant, the Supreme Court did agree that Harrington's requirement of "dollars and cents" evidence of lack of reasonable return may be met though either lay or expert testimony; but such evidence as presented was not enough to convince the Court that the hardship resulted from the unique setting of the property. Garrison, 154 N.H. at 32.

Thus, the Court charged applicants with presenting sufficient evidence to allow the ZBA to determine that the use is reasonable and that the property is unique, i.e., distinguishable from surrounding properties in a manner that could justify use relief.

vii. **Malachy Glen and Analysis of the "Public Interest", "Spirit of the Ordinance", "Special Conditions" and "Substantial Justice" Criteria**

In Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007), the Supreme Court affirmed the trial court's reversal of the Town's ZBA and the court's order that the area variance in question be granted. Malachy Glen had obtained site plan approval in 2000 for a self-storage facility on Dover Road (Route 4), which showed structures and paved surfaces within 100 feet of a wetland. At the time of approval, the Town did not have a wetlands ordinance; but prior to construction, the Town implemented such an ordinance creating a 100 foot buffer around all wetlands. Malachy Glen applied for a variance from this ordinance and was initially denied; and that decision was reversed and remanded by the trial court for failure to consider the proper standard.

On remand, the ZBA *sua sponte* bifurcated the application into two separate requests, granted the variance for the needed driveway and denied the variance to build the storage units within the buffer zone. The trial court found that the denial was unlawful and unreasonable, in part, because the ZBA "failed to consider the evidence placed before it."

On appeal, the Supreme Court noted that "where the ZBA has not addressed a factual issue, the trial court ordinarily must remand the issue to the ZBA," Id., at 105, *citing* Chester Rod & Gun Club. "However, remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion," Malachy Glen, 155 N.H. at 105, *citing* Simpson v. Young, 153 N.H. 471, 474 (2006)(a landlord/tenant damages case).

In addressing the variance criteria, the Court again cited the rule from the Chester case that the requirement that the variance not be contrary to the public interest is "related to" the requirement that the variance be consistent with the spirit of the ordinance: "[T]o be contrary to the public interest...the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Malachy Glen, 155 N.H. at 105 – 106. In making that determination, the Court restated that the ZBA is to ascertain whether the variance would "alter the essential character of the locality" or "threaten the public health, safety or welfare." Id. The Court rejected the ZBA's finding that the variance would be contrary to the public interest and to the spirit of the ordinance because "it would encroach on the wetlands buffer". Id., at 106. The uncontroverted evidence was that this project was in an area consisting of a fire station, a gas station and a telephone company, that the variance for encroachment for the driveway had been granted, and that applicant's wetlands consultant had testified that the project would not injure the wetlands in light of the closed drainage system, detention pond and

open drainage system designed for the project to protect the wetlands. The Court also rejected the ZBA's argument that it is not bound by the conclusions of the experts in light of their own knowledge of the area, in part, because the ZBA members' statements were conclusory in nature and not incorporated into the "Statement of Reasons" for their denial: "The mere fact that the project encroaches on the buffer, which is the reason for the variance request, cannot be used by the ZBA to deny the variance." Id., at 107.

While examining the ZBA's treatment of the Boccia hardship standard for an area variance, the Court stated that the element of "special conditions" requires that the applicant demonstrate that the property is unique in its surroundings. Id., *citing* Garrison, 154 at 32-35 (a use variance case). Additionally, the Court cited to Vigeant for the proposition that the proposed project is presumed reasonable if it is a permitted use and that an area variance may not be denied because the ZBA disagrees with the proposed use of the property. Malachy Glen, 155 N.H. at 107. Furthermore, the Court cited to the national treatise, 3 K. Young, Anderson's American Law of Zoning §20.36, at 535 (4th ed. 1996), for the proposition that unnecessary hardship peculiar to the property "is most clearly established where the hardship relates to the physical characteristics of the land." Id. With the express retention of "special conditions" in the verbiage of the "new" hardship criteria, it is safe to conclude that this guidance remains applicable to a Board's future considerations.

The Court also rejected the ZBA's argument that there were other reasonably feasible methods available to the applicant via the elimination of a number of the desired storage units. The Court clearly stated that "the ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application." Id., at 108, *citing* Vigeant, 151 N.H. at 753 ("In the context of an area variance...the question [of] whether the property can be used differently from what the applicant has proposed is not material"). While noting that if the proposed project could be built without the need for the area variance, then it is the applicant's burden to show that such alternative is cost prohibitive, the Court stated that "the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner." Malachy Glen, 155 N.H. at 108. In this case, the Court recognized that reducing the project by 50% would result in financial hardship to the applicant and that no reasonable trier of fact could have found otherwise. Id.

On the issue of substantial justice, the Court quoted the passage from Loughlin as found at the end of Subsection (e), above. Id. at 109. Additionally, the Court noted that the ZBA should look at "whether the proposed development was consistent with the area's present use". Id. The Court expressly held that the ZBA's stated reason of "no evidence" that a scaled down version of the project would be economically unviable "is not the proper analysis under the 'substantial justice' factor." Id. Since the ZBA applied the wrong standard, the trial court was authorized to grant the variance if it found as a matter of law that the requirement was met. In this case, the trial court had found via uncontroverted evidence that the project was appropriate for the area, did not harm the

abutters or nearby wetlands, and that the general public would realize no appreciable gain from denying this variance.

viii. Naser, Use of Conservation Easement Space in Yield Plan, and Analysis of the "Public Interest" and "Spirit of the Ordinance" Criteria

In Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008), the Supreme Court affirmed in part, reversed in part and remanded the trial court's upholding of the ZBA's decision denying a variance and finding the open space subdivision application did not comply with the zoning ordinance. At issue was the applicant's usage in its yield plan of approximately fifty acres previously burdened by a conservation easement given to the Town. The Planning Board had determined that this usage was improper; and the applicant appealed that decision to the ZBA and applied for a variance to allow the usage in the yield plan.

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

However, in examining the denial of the variance, the Supreme Court noted that ZBA found that the applicant failed to meet all but the "diminution in value" criteria and that the trial court focused only upon the "public interest" and "spirit of the ordinance" criteria. Relying heavily on its Malachy Glen decision, the Court looked to the objectives listed under the relevant portion of the zoning ordinance, which included conservation of agricultural and forestlands, maintenance of rural character, assurance of permanent open space and encouragement of less sprawling development. Since the applicant was seeking to develop 14 lots on the remaining 27 acres, the Court stated that "we fail to see how permitting the plaintiff to use the conservation land in this manner would unduly, and in a marked degree conflict with the ordinance" *citing*, Malachy Glen, 155 N.H. at 105 (quotations omitted; emphasis added). The Court continued by holding "as a matter of law, that this in no way conflicts with the ordinance's basic zoning objectives to conserve and preserve open space." Thus, the trial court's decision on the variance was reversed and remanded for consideration of the unnecessary hardship and substantial justice criteria.

Note two additional points of import in this case: (1) the Supreme Court effectively merged the "public interest" and "spirit of the ordinance" criteria into one discussion and implicitly found that these two prongs had been met (since they were not the subject of the remand); and (2) the Court did not state whether this was a "use" or

"area" variance. This first point could be viewed as the continuation of a trend started with Chester Rod & Gun Club, supra; and the second can be considered as a reason that this case will remain relevant under the "new" hardship criteria. Indeed, in one "3JX" decision (i.e., one decided by a panel of three justices and thereby not considered "binding precedence") Justices Dalianis, Duggan and Galway remanded a case back to the ZBA, in part, because the Board had found that the request did not conflict with the public interest so that the Board "could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance." Zannini v. Town of Atkinson, (No. 2006-0806; Issued July 20, 2007).

ix. Nine A, Variances Associated with Replacement of Non-Conforming Use

In Nine A, LLC v. Town of Chesterfield, 157 N.H. 361 (2008), the Supreme Court upheld the denial of both area and use variances for this lakefront development. The parcel in question totaled approximately 86 acres bifurcated by Route 9A: six acres bordering the lake in the Spofford Lake Overlay District (which allows single family dwellings only and imposes two acre minimum lot size and building and impermeable coverage limitations) and 80 acres in the Residential District (which allows duplexes and cluster developments). The applicant sought various area and use variances to develop the six acres into either seven single family lots (with the 80 acres remaining undeveloped) or a condominium cluster development of seven detached homes (together with three duplexes on 24 of the 80 acres). In either case, the applicant argued that it was benefiting the area by removing the vacant, non-conforming 90,000 square foot rehabilitation facility on the six acre parcel.

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

x. Daniels and the Impact of the Telecommunications Act on Variances

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

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

Concerning the "diminution in value" criterion, the Court held that the ZBA is "not bound to accept the conclusion" of the tower company's site specific impact study or of any witness (but the Court did not specifically address its contrary ruling in Malachy Glen where the uncontroverted evidence of the expert was ignored by the Board to its peril). Rather, the Court looked at the "substantial evidence" on property values tendered in the form of numerous studies, testimony of at least one expert, "the lack of abatement requests", and the members' own knowledge of the area and personal observations to uphold the decision. Finally, in one paragraph, the Court addressed the remaining criteria relying heavily on the fact that this tower would fill the existing coverage gap.[6]

xi. Farrar, Unnecessary Hardship for Mixed Use and "Substantial Justice"

In Farrar v. City of Keene, 158 N.H. 684 (2009), the City's ZBA granted both use and area variances to allow for the mixed residential and office usage of an historic 7000 sq. ft. single family home located on a 0.44 acre lot in the City's Office District which abutted the Central Business District. The use variance was needed since the District

[6] While not involved in the case itself, it is important to note that effective Sept. 22, 2013, "neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2." RSA 674:33, VII.

allowed both multi-family and commercial offices, but did not clearly allow the proposed mixed use; and the area variance was to address a lower number of on-site parking spaces based on that configuration (the ordinance would have required 23, the applicant wanted only 10, the ZBA granted the variance with a requirement of 14 spaces being created). Id., at 687.

The abutters appealed claiming the ZBA chair had a conflict of interest and that the variances had been improperly granted. The Cheshire County Superior Court (Arnold, J.) found no conflict of interest (without substantive discussion), affirmed the area variance but vacated the use variance based on a finding that the applicant had failed to submit sufficient evidence only on the first prong of the Simplex unnecessary hardship criteria – that the zoning restriction as applied interferes with the applicant's reasonable use of the property considering its unique setting in the environment. The applicant and the City appealed contending that the Trial Court had overlooked the evidence – particularly the large size of the house and the lot size compared with the number of available parking spaces and the usual layout of the District – and that the Trial Court did not give sufficient deference to the ZBA and its members' personal knowledge. The abutters in turn argued that the applicant's financial hardship of retaining the property as a single family residence was personal, unrelated to any unique characteristic of the property, and unsupported by any "actual proof". Id., at 688.

In addressing the first prong of the Simplex unnecessary hardship criteria, the Supreme Court noted that this issue is "the critical inquiry" for determining whether such hardship exists; and the Court pointed to the Harrington v. Warner decision, *above*, for several "non-dispositive factors": first, whether the zoning restriction as applied interferes with the owner's reasonable use of the property; second, whether the hardship is the result of the unique setting of the property; and third, whether the proposed use would alter the essential character of the neighborhood. Farrar, 158 N.H. at 689. The Supreme Court reviewed the evidence, including the size of the lot, the size of the house, the allowed uses in the District, and the fact that the adjacent historic homes had been turned into professional offices with their commensurate higher traffic volume than the proposed use, and held that "the ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, the zoning restriction still interferes with [the applicant]'s reasonable use of the property as his residence." Id. The Court noted that the applicant's minimal evidence of a reasonable return on his investment was sufficient since that issue was only one of the nondispositive factors for the ZBA to consider. Id. at 690. In closing its analysis of this first prong of the Simplex unnecessary hardship test, the Court acknowledged that this is a "close case" and that in such instances "where some evidence in the record supports the ZBA's decision, the Superior Court must afford deference to the ZBA" whose members have knowledge and understanding of the area. Id.

In addressing the second prong of the Simplex unnecessary hardship test, the Supreme Court affirmed the lower court's reasoning that the criteria had been met since the desired mixed use was allowed in the adjoining district and that the variance would not alter the composition of the neighborhood. Id., at 690-691. As to the third prong – that the variance would not injure the public or private rights of others – the Supreme Court again noted that "this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance" – namely that the variance would not be contrary to the public interest and the variance is consistent with the spirit of the ordinance. Id., at 691. In making its analysis of these issues, the Court looked to the purpose statement in the City's Zoning Ordinance for the Office District, which included references to "low intensity" uses and serving as a buffer between higher density commercial areas and lower density residential areas. Id., at 691-692. The Court upheld the lower court's finding that the proposed use would be of lower intensity than a full-office use allowed in the District, that such office use would have more traffic, and that the abutters' concerns were over a commercial use of the property. While the "three prongs" of Simplex are not expressly retained in the "new" hardship criteria, we can safely conclude that the Court's present analysis of these prongs will remain relevant to a Board's future considerations.

Finally, the Supreme Court addressed the "substantial justice" criteria and cited the Malachy Glen decision, *above*, for the standard that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." Farrar, 158 N.H. at 692. In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (i) the use would not alter the character of the neighborhood, injure the rights of others or undermine public interest; (ii) the applicant currently resides at the property and wished to remain; (iii) the applicant had made substantial renovations to the historic structure; (iv) the structure would not be economically sustained as a single family residence; (v) the residential appearance of the building would not change; (vi) adjoining buildings are currently offices; and (vii) if the property was used entirely as offices, the traffic and intensity of usage would be greater. Id.

d. Disability Variances

An additional authority granted to the ZBA by RSA 674:33, V, concerns 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).

5. Other Powers and Responsibilities

a. Equitable Waivers of Dimensional Requirements

Pursuant to the terms of RSA 674:33-a, the ZBA has the power to grant equitable waivers from physical layout, and mathematical or dimensional requirements imposed by

the zoning ordinance (but not use restrictions – see, Schroeder v. Windham, 158 N.H. 187 (2008)) when the property owner carries his burden of proof on four (4) criteria:

i. That the violation was not noticed or discovered by any owner, agent or representative or municipal official , until after the violating structure had been substantially complete, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. RSA 674:33-a, I(a);

ii. That the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith on the part of the owner or its agents, but was instead caused by either a good faith error in measurement or calculation made by the owner or its agent, or by an error of ordinance interpretation or applicability by a municipal official in the process of issuing a permit over which he has authority. RSA 674:33-a, I(b);

iii. That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and

iv. That due to the degree of construction or investment made in ignorance of the violation, the cost of correction so far outweighs any public benefit to be gained such that it would be inequitable to require a correction. RSA 674:33-a, I(d).

This provision is sometimes considered an escape hatch for an "honest mistake."[7] Note also that the statute allows an owner to gain a waiver even without satisfying the first and second criteria if the violation has existed for more than 10 years and that no enforcement action, including written notice of violation, has commenced during such time by the municipality or any person directly affected. RSA 674:33-a, II.

In Dietz v. Town of Tuftonboro, __ N.H.__ (Case No. 2017-0536; Issued January 8, 2019), the Supreme Court dealt with the provisions of RSA 674:33-a for the first time. The lakefront property in question had multiple approved additions over the years, including a second floor addition that the building inspector noted "had no change in the footprint". In 2014, the property was resurveyed, which indicated that more of the structure was in the setback than had been previously represented during the prior approval processes, including approvals by the ZBA for the structure to be within the 50 foot setback from the Lake. The abutters sought injunctive relieve to require the violating portions of the structure to be removed. The ZBA granted the property owner

[7] Note, however, that a recent 3JX (i.e., non-binding precedent) case of RDM Trust v. Town of Milford ___ N.H. ___ (Docket No. 2015-0495; Issued March 31, 2016) reversed the Trial Court's affirmance of the ZBA's grant of an equitable waiver where the error was not based on the owner's error in measurement but rather on a conscious decision to hold the non-conforming line of the existing house.

an equitable waiver, denied the abutters' request for rehearing; and the Supreme Court upheld the Trial Court's affirmation of the ZBA's decision. In so doing, the Supreme Court noted that the provisions of RSA 674:33-a "must be read in context of the overall statutory scheme and not in isolation." Thus, the Court rejected the abutters' argument that the property owner "must always be ignorant of the underlying facts" because to do so would "render the municipal error element of Paragraph I(b) a virtual nullity." The Court also notes that "the members of the ZBA were entitled to use their own knowledge to conclude that the cost of correcting the zoning violations would, in this case, be substantial." The Court further rejected the abutters' argument that the "cumulative impact" of the zoning violations violated the "spirit of the ordinance" such that is a variance criterion "not present in the equitable waiver statute."[8]

Note that the statute also mandates that the property shall not be deemed a "non-conforming use" once the waiver is granted and that the waiver shall not exempt future use, construction, reconstruction, or additions from full compliance with the ordinance. RSA 674:33-a, IV. This section is expressly deemed not to alter the principle of an owner's constructive knowledge of all applicable requirements, nor does it impose any duty on municipal officials to guarantee the correctness of plans reviewed or property inspected by them. Id. Finally, applications for such waivers and hearings on them are governed by RSA 676:5 through 7; and rehearings and appeals are governed by RSA 677:2 through 14, and RSA 674:33-a, III.

b. The Powers to Compel Witness Attendance and to Administer Oaths

Pursuant to RSA 673:15, the ZBA Chairperson (or acting Chairperson) has the authority to administer oaths. Additionally, the ZBA may, at its sole discretion, compel the attendance of witnesses; but the expenses of compelling such attendance shall be paid by the party requesting that the witness be compelled to attend. While there are no cases interpreting this statute, it may be safe to conclude that the ZBA may have to obtain a Superior Court order to enforce this authority in the event a particular witness refuses the summons. See, Loughlin, §21.07, page 323.

c. Staff and Finances

Per the terms of RSA 673:16, I, the ZBA is authorized to appoint "such employees as it deems necessary for its work who shall be subject to the same employment rules as other corresponding civil employees of the municipality." Additionally, this provision authorizes the ZBA to contract with "planners, engineers, architects and other consultants for such services as it may require." As a practical note, however, such employees or contractors can only be paid via funds allocated to the ZBA by the legislative body so that, in light of typically small ZBA budgets, such hiring must occur through the auspices of the Selectmen or Town/City Council. With the limited exception of when the ZBA and the Selectmen/Council are on opposite sides of a lawsuit,

[8] The Court in Deitz and in Perreault v. Town of New Hampton, 171 N.H. 183 (2018) noted that the "cumulative impact" theory raised by the plurality opinion of Bacon v. Enfield, 150 N.H. 468 (2004) is "not binding precedent, but rather, at most, persuasive authority." See, Perreault, at 188.

this usually means that ZBA will not have the ability to select its own counsel to handle ZBA issues. See, RSA 673:16, II; and Loughlin, §21.08, page 324. The ZBA is authorized, however, to expend fees collected from applicants for particular purposes (such as notice, mailings, and engineer review) on such purposes without approval of the local legislative body. RSA 673:16, II. This statute also mandates the procedures under which such funds are to be kept and disbursed.

D. PROCEDURES AND PROCESSES

1. Applications to the ZBA and Notification to Abutters and Others

As part of its responsibility to adopt Rules of Procedure, the ZBA should also adopt acceptable forms of applications so that both the applicant knows what information must be provided to the board and the board knows what it is being asked to consider. As with the model Rules of Procedure, the OSI has provided various forms as attachments to its The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OSI revised December 2018).

In addition to providing the basics of property location, identity of owner and applicant (if different), type of relief sought, and how the criteria for such relief are met in the eyes of the applicant, the application must also provide a complete and accurate mailing list of all abutters and conservation/preservation restriction holders who are to receive notice. In this way, the ZBA can comply with the statutory requirements of RSA 676:7, I(a) to provide written notice of the date, time and place of the hearing to such persons and the applicant by **verified** mail[9] at least five (5) days before the date fixed for the hearing. Additionally, a public notice must be published in a paper of general circulation in the area not less than five (5) "clear" days before the date fixed for the hearing (i.e., not including the date of posting). RSA 676:7, I(b) and RSA 675:7, I.[10]

[9] Per 2017 HB 299, Effective Aug. 1, 2017, "certified mail" was changed to "verified mail", which per RSA 451-C:1, VII, means "any method of mailing that is offered by the United States Postal Service or any other carrier and which provides evidence of mailing."

[10] While not directly a ZBA issue, please note that RSA 675:7 was amended in July 2014 via the following language to Subsection I: "Any person owning property in the municipality may request notice of all public hearings on proposed amendments to the zoning ordinance, and the municipality shall provide notice, at no cost to the person, electronically or by first class mail. If a proposed amendment to a zoning ordinance would change a boundary of a zoning district and the change would affect 100 or fewer properties, notice of a public hearing on the amendment shall be sent by first class mail to the owners of each affected property. If a proposed amendment to a zoning ordinance would change the minimum lot sizes or the permitted uses in a zoning district that includes 100 or fewer properties, notice of a public hearing on the amendment shall be sent by first class mail to the owner of each property in the district. Notice by mail shall be sent to the address used for mailing local property tax bills, provided that a good faith effort and substantial compliance shall satisfy the notice by mail requirements of this paragraph. Petitioned amendments as authorized in RSA 675:4 shall not be subject to notification by mail requirements."

Furthermore, RSA 675:7, II was amended by adding the following: "The notice of a hearing on a proposed amendment to a zoning ordinance to be sent electronically or by first class mail shall include a statement describing, to the greatest extent practicable and in easily understood language, the

The costs of such notices shall be paid by the applicant in advance; and failure to pay such costs constitutes valid grounds for the ZBA to terminate further consideration and to deny the appeal without public hearing. RSA 676:7, IV. Note that failure to provide proper notice to all appropriate persons or failure to properly describe the relief being sought invalidates the proceedings and requires a fresh hearing. See, Hussey v. Barrington, 135 N.H. 227 (1992); Sklar Realty, Inc. v. Merrimack, 125 N.H. 321 (1984); and Carter v. Nashua, 113 N.H. 407 (1973); cf., Weeks Restaurant Corp. v. Dover, 119 N.H. 541 (1979).

Furthermore, once the ZBA makes a determination (at a properly noticed public hearing) that the development being the subject of an appeal has potential regional impact, the board must follow the statutory notice procedures set forth in RSA 36:57. Note also that when in doubt, there is a statutory presumption that the development in question has a potential regional impact. RSA 36:56. This determination means that regional planning commissions and the potentially affected municipalities are afforded status as abutters for the purposes of providing notice and giving testimony. RSA 36:57, I. Not more than 5 business days after the ZBA makes its determination that the appeal has potential regional impact, the board shall, by certified mail, furnish the affected commission(s) and municipalities with copies of the minutes of the meeting wherein the determination was made; and the ZBA shall at the same time submit an initial set of plans to the commission(s) with the costs borne by the applicant. RSA 36:57, II. Furthermore, the ZBA is obligated to notify the commissions and affected municipalities by certified mail at least 14 days prior to the hearing of the date time and place of the hearing and their right to testify. RSA 36:57, III; see also, Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642 (2000)(proper notice of hearing and right to testify given despite failure to mail minutes of determination hearing to abutting towns). There are additional regional notification requirements for wireless communications facilities, such as cell towers, that are visible in other communities within a 20 mile radius. See, RSA 12-K:7.

Two additional items that the ZBA may consider requiring in an application include: (i) the decision of the Zoning Administrator or Code Enforcement Officer from which the appeal is brought, and (ii) copies of all prior ZBA and/or Planning Board decisions affecting the subject property. In this way, the ZBA members can be assured that they know the context in which the appeal is brought and that there has been a significant change in circumstances or the application itself to warrant the ZBA's acceptance of any reapplications. See, Fisher v. Dover, 120 N.H. 187, 190 (1980)("When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition."); but see, The Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009)(Fisher could not be used as a "sword" to argue that a second variance application would be futile – especially where the ZBA invited the second application).

proposed changes to the zoning ordinance, the areas affected, and any other information calculated to improve public understanding of the proposal."

Note also that if the file indicates that a variance was denied under the "old" variance criteria – especially prior to Simplex, then a "significant change of circumstance" may have occurred as a matter of law requiring the new application to be considered under the current variance criteria. See, Brandt Development Company of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553 (2011). See also, CBDA Development, LLC v. Town of Thornton, 168 N.H. 715 (2016)(the Fisher Standard applies to Planning Board decisions as well).

2. Public Hearings and Site Walks

The ZBA is statutorily required to hold the public hearing within thirty (30) days of the receipt of the notice to appeal. RSA 676:7, II. Note, however, that an applicant is not entitled to the relief sought merely because this time requirement is not met by the board. Barry v. Amherst, 121 N.H. 335 (1981)(finding that the legislature did not provide that such failure would constitute approval).

The applicant may address the board either in person or through its agent or attorney. RSA 676:7, III. The board must also hear from all direct abutters and those who can demonstrate that they are affected directly by the subject of the appeal. See RSA 672:3, RSA 677:4 and 677:2 for definitions of "abutter" and "person aggrieved"; see also, Thomas v. Town of Hooksett, 153 N.H. 717 (2006)(gas station owner located approximately 1000 feet away from the subject property found to have standing despite the presence of an "anticompetitive motive"); and Portsmouth Advocates, Inc. v. City of Portsmouth, 133 N.H. 876 (1991)(citizens' group for historic preservation had standing to sue over rezoning affecting historic district). Based on a recent New Hampshire Supreme Court case, it is strongly advised that the ZBA, in determining who is an "abutter" and/or "aggrieved person", should make specific findings of fact with respect to each person based on the criteria set forth in Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544–45 (1979), including "the proximity of the challenging party's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the challenging party's participation in the administrative hearings". See, Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675 (2011) (upholding Trial Court's determination that the ZBA's conclusion that the resident petitioners were aggrieved was not supported by the record where the ZBA made no factual findings with respect to standing.)

Furthermore, the board need not hear testimony for witnesses and experts first hand but may consider "offers of proof" from the applicant's attorney. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 519 (2011); Hannigan v. City of Concord, 144 N.H. 68 (1999).

It is advisable that the Chair maintain both order and decorum during the meetings. Speakers should neither be allowed to drone on without end nor directly argue with an opponent. Plans or drawings should be posted on an easel or bulletin board where they can be viewed by the participants; but reduced copies can and should be available to the board members to ease in their deliberations. Once the public hearing is

concluded, no further public input should be allowed – from either the applicant or the other parties – unless in response to direct questions from the board. If, however, the Board finds that it cannot conclude the public hearing within the time available, the Board may vote to continue the hearing to a specified time and place with no additional notice required. See, RSA 676:7, V, effective Aug. 1, 2017

There are frequently instances where the ZBA would benefit from a site walk of the subject property. Remember that such activities constitute a meeting of a quorum of the board so that all provisions of RSA 91-A must be complied with including notice and minutes. The notice provisions can be complied with by announcing the date and time of the site walk during the original public meeting; but an agenda for such site walk should still be posted. If a significant portion of the interested parties have already left the original meeting by the time the board makes its determination to hold a site walk, a "best practice" is to mail notice of the walk to the same persons entitled to the original notice.

3. Joint Meetings/Hearings

Occasionally, an applicant may petition two or more land use boards to hold a joint meeting when the subject matter is within the responsibility of those boards. RSA 676:2 requires that each board adopt rules of procedure relative to joint meetings and hearings. Additionally, that statute authorizes the boards themselves to initiate the request for a joint meeting, but each board has the discretion as to whether or not to hold a joint meeting with another board. When a joint meeting is held, the planning board chair shall chair the joint meeting (unless the planning board is not involved), but each board is still responsible for rendering its decision on the subject within its jurisdiction. RSA 676:2, I and III. The procedures for the joint meeting/hearing on such subjects as testimony, notice and filing of decisions shall be consistent with the procedures established by the individual boards. RSA 676:2, II.

4. Discussions, Voting, Notice of Decisions, Findings and Conditions of Approval

During their deliberative sessions, all of the ZBA members should fully discuss their individual thoughts on how the evidence presented to them addresses the particular criteria of the application before the Board. Those discussions on whether or not the particular criteria are met should be tied to the evidence (or lack thereof) rather than simply be conclusory statements of whether the criteria are or are not met. As noted above, non-voting alternates can participate in these discussions if the ZBA Rules of Procedure allow such (see RSA 673:6, V); but caution should be exercised: the non-voting members should not be advocates one way or the other to avoid both the appearance of impropriety and claims of violation of due process by the applicant or abutters (whichever "lost" the vote).

When it comes to a vote, the Chair may call for a Motion (i) on the ultimate question: to grant or deny the Application, or (ii) on whether the individual criteria have been met; but note that as of the 2018 amendments to RSA 674:33, I (c), the ZBA must

use "one voting method continuously until it votes to change the method." Moreover, the change does not take effect until 60 days after the vote and only applies prospectively, i.e., the changed method does not apply to any pending or filed applications. RSA 674:33, I (c).

The Motion should state the reasons based on the discussions held during the deliberative session, e.g. "I move that we grant the Variance Application as requested by Ms. Smith because the evidence presented supports finding that the 5 variance criteria have been met" (or "finding that the 1st variance criterion has been met") or "I move that we deny the Variance Application requested by Ms. Smith because the evidence presented supports finding that the spirit of the ordinance, public interest, unnecessary hardship and no diminution of value criteria have not been met." Note, in any Motion to Deny an application, any of the criteria NOT listed will be viewed has having been met. The Chair will ask if the Motion is seconded; and if so, then the Chair will ask if there is any further discussion at which point, if there are none, then it is beneficial to have someone state that the prior discussions during deliberations are sufficient. If there has been a split attitude during the deliberations, those points can be summarized by members of the opposing positions prior to the vote of the Board.

Pursuant to the requirements of RSA 676:3, the ZBA must issue a final written decision which either approves or disapproves an application; and if the application is denied, the board "shall provide the applicant with written reasons for the disapproval." RSA 676:3, I. Under the authority of RSA 676:3, II, the ZBA is entitled to attach conditions to its grant of relief. If conditions are imposed, clarity and specificity are required for both performance and enforcement purposes. Geiss v. Bourassa, 140 N.H. 629 (1996). The written decision of approval must include "a detailed description of all conditions necessary to obtain a final approval" and, when a plat is to be recorded, "the final written decision, including all conditions of approval, shall be recorded with or on the plat." RSA 676:3, III. Any failure to comply with the conditions of approval may constitute a violation. Healey v. New Durham, 140 N.H. 232 (1995); see also, Robinson v. Town of Hudson, 154 N.H. 563 (2006).

Moreover, the minutes of the meeting together with a copy of the written decision containing the reasons shall be placed on file in the board's office and available for public inspection within 5 business days of the vote; and in towns where the ZBA does not have an office with regular business hours, the copies shall be filed with the town clerk. RSA 676:3, II.

In Thomas v. Town of Hooksett, 153 N.H. 717 (2006), the Supreme Court vacated the Trial Court's reversal of the ZBA's grant of a variance and remanded the matter for further proceedings. In part, the Trial Court's reversal had been based on the fact that the ZBA had made no finding as to why a departure from the ordinance was justified. In reviewing the decision, the Supreme Court noted that the applicant had addressed the five elements for a use variance in its application and that the ZBA "briefly discussed the variance and ruled unanimously in favor of granting it." Moreover, the Supreme Court held that "the ZBA's decision to grant the variance amounted to an

implicit finding by the board that the Simplex factors were met." Id., at 724, *citing*, Pappas v. City of Manchester Zoning Board, 117 N.H. 622, 625 (1977). In concluding on this point, the Court noted the following:

> Although disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefore, is not in and of itself error.

Id., *again citing*, Pappas. The Court noted that, while it disagreed with the Trial Court's determination that the ZBA was required to set forth specific findings to support its decision to grant the variance, the matter should be remanded back to the ZBA since it gave only cursory consideration to the variance criteria in light of the companion appeal of administrative decision concerning a revoked building permit. See also, Dietz v. Town of Tuftonboro, __ N.H. __ (Case No. 2017-0536; Issued January 8, 2019)("The equitable waiver statute requires only that the ZBA make findings, not that it must set forth those findings in writing."), Rochester City Council v. Rochester ZBA, 171 N.H. 271, 276 (2018)("ZBA's grant of a variance carries with it an implicit finding of hardship"), Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998)(ZBA denial reversed because it failed to support both its finding of adverse effect of pit access road and its finding that existing town road was on historic or natural landmark).

Additionally, there are special rules in the Federal Telecommunications Act of 1996 pertaining to personal wireless services facilities (commonly known as cell towers) that any denial be "in writing and supported by substantial evidence contained in the written record." See, 47 U.S.C. Sec. 332 (c)(7)(B)(iii); New Cingular Wireless PCS, LLC v. Town of Greenfield, 2010 WL 3528830, *4 (D.N.H.; filed September 9, 2010). There are also special rules on the time by which the Board must issue a decision on a cell tower application: 90 days for applications to co-locate antenna on an existing facility (and co-location includes adding height to an existing tower up to 10% or 20 feet); or 150 days for new structures – both from the time the application is complete. See, FCC Order 09-99, dated November 18, 2009. Board members are strongly encouraged to consult their counsel for assistance in meeting such deadlines, as a detailed discussion is beyond the scope of these materials. Failure to meet the Federal deadlines enables the tower applicant to bring an action in Federal or State Court; and the burden is on the municipality to demonstrate that the "delay" is not "unreasonable".

5. Requests for Rehearing

Under the provisions of RSA 677:2, 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) unaware. See, Ireland v. Town of Candia, 151 N.H. 69 (2004); and Pellitier v. City of Manchester, 150 N.H. 687 (2004). See also, 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. See, DiPietro v. City of Nashua, 109 N.H. 174 (1968)(decided under former statute).

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); McNamara v. Hersh, 157 N.H. 72 (2008)(rejecting attempt to couch late filed appeal of administrative decision as a declaratory judgment action); Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642 (2000)(appeal correctly dismissed where plaintiff failed to file a request for rehearing on special exception); and, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010)(rejecting argument that the ZBA erred in concluding petitioners had only fifteen days to appeal the planning board's decision because petitioners failed to raise this argument in the motion for reconsideration filed with the ZBA); but see, Colla v. Town of Hanover, 153 N.H. 206 (2006)(reversing dismissal of Superior Court appeal where request for rehearing listing such grounds as "the decision is unreasonable", "the decision denies their constitutional rights to equal protection and due process", "the decision is contrary to Boccia", and "the decision is contrary to the ordinance" was deemed to be sufficient); The Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009)(regulatory taking claim considered – and denied on other grounds – despite no appeal of variance denial); and Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013)(issues raised by successful party before ZBA can be basis for affirmance of decision by Court).

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 McDonald 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. In so holding, the Court reversed the dismissal of McDonald's appeal and related claims and remanded the matter to the Superior Court.

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

6. Appeals to Superior Court

Under RSA 677:4, "any person aggrieved by any order or decision" of the ZBA may file a petition with the Superior Court within 30 days of the date upon which the board voted to deny the motion for rehearing. See, Trefethen v. Town of Derry, 164 N.H. 754 (2013).(Deadline under 30 day rule of RSA 677:4 extended to the following business day if deadline falls on a Saturday, Sunday or legal holiday per RSA 21:35, II). This

statute provides that "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2; and while the use of the word "includes" implies that such list is not exhaustive, the Court has determined that such does not include all possible municipal boards. See, Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment, 149 N.H. 63 (2003). See also, Hannaford Brothers Company v. Town of Bedford, 164 N.H. 764 (2013) (Competitor 3+ miles away did not qualify.)

The petition to the Court must specify the grounds upon which the decision or order of the ZBA is claimed to be illegal or unreasonable. RSA 677:4. See also, Saunders v. Town of Kingston, 160 N.H. 560, 568 (2010)(finding that plaintiffs failed to meet their burden by merely citing ordinance provisions and claiming that the planning board violated them). As with motions for rehearing, there is a right to amend the original petition in the event the ZBA fails to file its minutes and decision within 144 hours of the vote. In light of the property rights involved, the Legislature has mandated that these cases shall be given priority on the Court's docket. RSA 677:5.

Pursuant to RSA 677:6, the burden of proof in such cases rests upon the party seeking to set aside the ZBA's order or decision to show that it is unlawful or unreasonable; and countless cases have restated this statute's requirement of the limited nature of the Court's review in zoning cases:

> The factual findings of the ZBA are deemed *prima facia* lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is persuaded, based upon a balance of probabilities, on the evidence before it, that the ZBA's decision is unreasonable.

See, Pike Industries, Inc. v. Woodward, 160 N.H. 259, 262 (2010), *citing*, Harrington, 152 N.H. 74, 77 (2005); see also, Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013), *citing*, Brandt Dev. Co. of N.H. v. City of Somersworth, 162 N.H. 553, 555 (2011).

Since cases on appeal have had a significant prior life before the ZBA, an appeal to the Superior Court seldom comes as a shock to the board. Hopefully, the municipal attorney has been previously involved in the matter; but, even if not, it is advisable that the attorney for the municipality be authorized to accept service of the Orders of Notice and Petition in the case. This affords the attorney prompt notice of the complaint and avoids the unfortunate event that the petition is delayed or even mislaid in the paper shuffle. Sometimes these cases are simply styled in the name of the municipality or in the name of the municipality and its ZBA. In either case, there is in essence only one defendant – the municipality as it has acted through its ZBA.

The Summons/Orders of Notice from the Court under the new Superior Court Rules effective October 1, 2013 will usually set forth two dates: (a) the date by which the Appearance, Answer and Certified Record must be filed; and (b) the date of the hearing on the merits. See, RSA 677:8 and RSA 677:12. The Appearance is a relatively benign form by which the municipality's attorney officially identifies himself/herself to the

Court and the opposing parties. The Answer is a more detailed document wherein each paragraph of the petition is either admitted, denied, or further explained in some way. This document should be prepared by the attorney with the active participation of the ZBA Chair and Secretary who should have the requisite knowledge. The Certified Record should be prepared in the same way so as to contain a full and complete copy of the ZBA's file on the matter. The Certified Record should contain not only the underlying application and any documents received into evidence by the ZBA, but also all notices, minutes of meetings, decisions and the request for rehearing.

Sometimes the parties may decide to abate the Superior Court action to allow the ZBA to reconsider an issue. While this is frequently a cost effective move, the Board (and their attorney) should be cautious of how such abatement agreements are worded so that the applicant cannot contend that there was an "agreement to grant" their requested relief. See, Huard v. Town of Pelham, 159 N.H. 567 (2009)(agreement to have ZBA reconsider appeal of administrative decision concerning issues of "lapsed" variance vs. expansion of non-conforming use did not obligate ZBA to grant requested relief). However, that agreement must be by the ZBA rather than the Board of Selectmen since the Selectmen have no authority to grant relief under RSA 674:33 or RSA 674:33-a. See, Buxton v. Exeter, 117 N.H. 27 (1977).

Note that unlike the effect of filing the original appeal to the ZBA, there is no automatic stay of any enforcement proceeding via the filing of a petition with the Superior Court. RSA 677:9. This statute does authorize, however, the Court, "on application and notice, for good cause shown" to grant a restraining order against such enforcement pending the outcome of the case. If such relief is requested by an appealing party, the Orders of Notice will also include a date for a preliminary hearing on whether the restraining order is warranted, which will usually include a requirement of a showing of irreparable harm.

Hearings on the merits before the Superior Court are usually conducted on "offers of proof", whereby the attorneys for the parties present a summary of what the witnesses would testify to if they took the stand and arguments based upon the Certified Record and relevant case law. This ability to summarize testimony is contingent upon the requirement that the potential witness must be physically present in the Courtroom at the time; and if such person is not present, the opposing party is entitled to object to such summarized testimony being given. RSA 677:10 loosens the rules of evidence in such proceedings to allow the Court to consider the evidence received by the ZBA, but this does not allow the Court to make a *de novo* review of the proceedings since the statutory standard of review set forth in RSA 677:6 controls. See, Lake Sunapee Protective Ass'n v. New Hampshire Wetlands Board, 133 N.H. 98 (1990). Likewise, RSA 677:13 allows the Court to appoint a referee to hear the case and report her findings of fact and conclusions of law to the Court.

The judgment of the Superior Court shall either dismiss the appeal, vacate the order or decision in whole or in part, and, if so vacated, remand the matter back to the ZBA for further proceedings not inconsistent with the decree. RSA 677:11. Costs are

not to be awarded against the municipality unless the ZBA is found to have "acted in bad faith or with malice or gross negligence" in making its decision. RSA 677:14. From such decree, the as-yet-unsatisfied party may still bring a further appeal to the Supreme Court by filing a Notice of Appeal within 30 days of the date of the Superior Court Clerk's Notice of Decision; but such proceedings are beyond the scope of this article.

7. RSA 91-A

The ZBA, by definition found in RSA 91-A:1-a, VI(d), is a "public body" and any meeting of a quorum of its members is thus subject to the provisions of this statute pursuant to RSA 91-A:2, I. See also, RSA 673:17. Accordingly, all meetings must be properly noticed at least 24 hours in advance and be open to the public unless qualified as either a "non-meeting" under RSA 91-A:2, I, or as a "non-public session" under RSA 91-A:3.[11] While a detailed discussion of this statute is beyond the scope of this article, it is important to remember that there is a presumption that the meeting is to be open to the public unless the session qualifies under one of the express statutory exceptions (which will be strictly construed by the Court on review). Orford Teachers Ass'n v. Watson, 121 N.H. 118 (1981); see also, N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003)(concerning presumption of public records).

Additionally, minutes of each land use board meeting must be available for public inspection not more than five (5) business days after the public meeting per RSA 91-A:2, II and within 72 hours of any non-public session (unless sealed by vote of two-thirds of the board) per RSA 91-A:3, III. A "business day" is defined by RSA 91-A:2, II as "the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays." Additionally, pursuant to recent amendments to RSA 91-A:2, II-b, copies of approved minutes are to be posted on the municipality's website (if there is one) or a notice is to be posted on the website informing where the minutes may be reviewed. Similarly, if the municipality posts notices of meetings on its website, it must do so in a consistent manner or post a notice stating where meeting notices are posted. In light of the negative ramifications of a violation of RSA 91-A, ZBA's should err on the side of caution and limit "non-public" sessions to those "non-meetings" with counsel present in person or by phone to discuss legal matters.

It has been suggested that where an "*ex parte*" communication occurs in violation of the statute, such a contact could theoretically be cured by disclosing the substance of the contact to all interested parties and allowing them an opportunity to respond. See, Paul G. Sanderson, *Ex Parte Communications and Land Use Boards*, New Hampshire Town and City, Oct. 2007, at 34; but this concept has not yet been the subject of Court scrutiny. A word of caution, however: when the Court has been asked to scrutinize a

[11] While Ettinger v. Town of Madison Planning Board, 162 N.H. 785 (2011) held that a Board could not go into "non-meeting" to discuss Town Attorney's opinion letter and communications with Town staff without Attorney being present in person or by phone, the Legislature modified RSA 91-A:3 (II) in 2015 to add new subsection (l) [as in "L"] to allow a "non-public session" for consideration of legal advice, either in writing or orally, even when the attorney is not present.

municipal board's conduct under RSA 91-A, the relief sought is sweeping and expensive. See, e.g., Professional Firefighters of NH v. Local Government Center, Inc., 159 N.H. 699 (2010); ATV Watch v. New Hampshire Department of Resources and Economic Development, 155 N.H. 434 (2007). Note that this statute is the subject of much on-going debate in the Legislature so particular attention should be paid to amendments that may/will be made in each session.

8. **Disqualification of Members**

RSA 673:14, I states the following:

> No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission or agricultural commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

RSA 673, I (emphasis added); see also, Rochester City Council v. Rochester ZBA, 171 N.H. 271 (2018), Webster v. Town of Candia, 146 N.H. 430 (2001); and City of Dover v. Kimball, 136 N.H. 441 (1992). The Supreme Court has decided that a member of a land use board who is acting in a quasi-judicial, as opposed to a legislative, capacity must be disqualified if he or she is "not indifferent" to the outcome of the application. Winslow v. Town of Holderness, 125 N.H. 262 (1984). Members act in a "quasi-judicial" capacity when they apply the law (including local land use regulations and provisions of State law that may be applicable) to a particular set of facts, and render a decision on a proposed use of land. They act in a legislative capacity, for example, when they debate and decide the content of local land use regulations, or decide what recommendation to make to the voters about that content.

Thus, when the board members are acting in their "quasi-judicial" capacity, potential disqualification rests upon an analysis of two distinct but basically "common sense" areas: (a) is the member directly interested in the outcome of the board's decision in a personal or financial way, and (b) would the member be "stricken for cause" from serving as a juror if the matter was before the Court.

The first analysis takes into account that the member's interests must be different from those of the citizenry at large – e.g., concerns over increasing taxes or decreasing property values are common concerns of the citizenry and thereby not likely grounds for disqualification; however, concerns over the impact of development adjacent to the member's property (and that of close relatives) would likely be grounds for disqualification.

The second analysis takes into account various "juror standards" used in trial court proceedings, which basically would prevent a person from serving as a juror on a matter where the person: (a) expects to gain or lose upon the disposition of the case; (b) is related to either party; (c) has advised or assisted either party; (d) has directly or indirectly given an opinion or formed an opinion; (e) is employed by or employs any party; (f) is prejudiced to any degree; or (g) employs any of the counsel appearing in the case. See, RSA 500-A:12.

Additionally, there is no single statutory definition of what constitutes a conflict of interest. Bourne v. Sullivan, 104 N.H. 348, 351 (1962). As general rule, however, a conflict of interest will be found to exist when a board member has a direct personal and pecuniary interest in the matter before the board that is immediate, definite and capable of demonstration, as opposed to being speculative, uncertain, contingent or remote. If the member has some connection to the matter before the board, but the interest is such that individuals of ordinary capacity and intelligence would not be influenced by it, then there is no impermissible conflict. Atherton v. Concord, 109 N.H. 164 (1968). See also, Totty v. Grantham Planning Board, 120 N.H. 388 (1980) (Board member's ownership of land abutting a project presents conflict of interest sufficient to disqualify board member from voting without any showing of actual prejudice).

A distinction must be made between preconceived points of view and prejudgment of a matter. Preconceived points of view about certain principles of law or a predisposed view about certain public policies (e.g. planning board members favoring or opposing growth control as a general matter) is not necessarily disqualifying. But a prejudgment concerning issues of fact in a particular case certainly disqualifies an individual from sitting in a quasi-judicial capacity in the review of such an application. New Hampshire Milk Dealers Ass'n v. Milk Control Board, 107 N.H. 335, 339 (1966). State v. Laaman, 114 N.H. 794 (1974).

As Attorney Peter Loughlin states in his treatise:

> Common sense must be applied because, unlike a jury pool which may be drawn from a county of more than 100,000 persons, the board of adjustment may be composed of volunteers from a town of less than 1,000 persons. Board members are going to know the applicant and the abutters. They may gain or lose from the decision in a particular case in that the granting or denying of relief may affect the tax rate of the community or they may have advised a potential applicant of the proper procedure for applying to the board. Board members may well have expressed an opinion on a very similar application during deliberations on a previous application. In such case, they are acting in a capacity which is more akin to that of a judge who has previously ruled on a similar case than a juror who will normally never have seen a similar fact situation....The key element ...is whether or not the board member can be indifferent.

Loughlin, §20.08. Note, however, that even individuals who have formed opinions are not necessarily disqualified if they can set aside their opinions and decide the case

impartially on the evidence before them. This is true even where the person is sitting as a juror in a criminal prosecution. State v. Aubert, 118 N.H. 739 (1978); State v. Laaman, 114 N.H. 794 (1974).

By way of procedure, the issue of disqualification may be raised by the applicant, an abutter and any interested person; however, the issue must be raised prior to the Board's vote otherwise the issue may be deemed waived. Rochester City Council v. Rochester ZBA, 171 N.H. 271 (2018); Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Bayson Properties v. City of Lebanon, 150 N.H. 167 (2003); Sanderson v. Town of Candia, 146 N.H. 598 (2001); Bradley v. City of Manchester, 141 N.H. 329 (1996); and Appeal of Cheney, 130 N.H. 589 (1988).

Additionally, if there is a question on whether a member should be disqualified, RSA 673:14, II provides that such member or another member of the board (but no one else unless the board's Rules of Procedure otherwise provide) may request a vote of the board on the issue; and while such vote must occur, it is advisory only and not binding on the member being reviewed. That being said, there are at least two instances where a board member will be deemed automatically disqualified: where the member is an abutter per Totty v. Grantham, 120 N.H. 388 (1980), and where a member has publicly taken a position on an application other than in ruling on a prior similar application per Winslow v. Holderness Planning Board, 125 N.H. 262 (1984). Note also that per the Winslow decision, if a disqualified person takes part in the decision of the board, the decision itself will be invalid – even if that member's vote was not determinative of the outcome.

An open issue that the NH Supreme Court has yet to squarely address is the extent to which a voluntarily disqualified member can participate in the public hearing from which the member is disqualified. One school of thought is that the member does not lose his/her U.S. Const. First Amendment/N.H. Const. Part I, Article 22 rights of free speech by being disqualified to act as a board member. Cf., Garcetti v. Ceballos, 547 U.S. 410 (2006)(public employee's speech within scope of employment not protected from discipline by 1st Amendment but noting that employee retains rights as citizen to speak on matter of public concern). The opposing school of thought would recognize that the disqualified member could unfairly influence the remaining members and thus open any decision to appeal by an adversely affected party. See, Barry v. Historic District Commission of the Borough of Litchfield, 108 Conn. App. 682, 950 A.2d 1 (2008)(disqualified member who testified at length as "a member of the public and an expert in architecture" found to have violated the plaintiff's right to a fair and impartial hearing so as to warrant remand of the matter back to the commission).

E. CONCLUSION

The law which land use board members are asked to apply in their volunteer capacities is constantly changing – more so than in possibly any other area of municipal activity. While the job of the board members is not necessarily to say "yes" to every application coming before them, the members are charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the "bureaucratic maze" of regulations, ordinances and hearings, while not expressly advising them. See,

Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 (1992); compare with, Kelsey v. Town of Hanover, 157 N.H. 632 (2008)(no constitutional duty to take initiative to educate abutters about project and permit/appeal process). Moreover, the ZBA is charged via the Simplex line of cases with being the "constitutional safety valve" to protect both the municipality as a whole and the individual applicant's property rights (and this obligation still applies now that the "new" variance criteria has become law); and more and more, the ZBA will have to be conscious of legislative and regulatory changes that impact their quasi-judicial activities, e.g., RSA 91-A and the Shoreland and Water Quality Protection Act to name but two. These can be daunting tasks to say the least.

As we began, so shall we end. This article is intended to be a brief overview of the subject area and not to provide substantive legal advice on any particular issue facing any particular land use board. For actual applications of these statutes and decisions to any fact patterns facing particular boards, we urge the Chairs to contact their legal counsel.

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.

As before, 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, 4th 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 2010 legislative change: the "use" vs. "area" distinction created by the Boccia decision is removed but the post-Simplex court interpretations of

the various criteria are ostensibly left in place. 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 - 53 (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.

Town of Hudson, New Hampshire Bylaws

Zoning Board of Adjustment

~~(Revised as of April 11, 2019)~~

Working Copy

Chapter 143

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143.1 History

12-14-1978: Adopted by the Zoning Board of Adjustment of the Town of Hudson
06-23-1988: Amended in its entirety,
06-23-2011: Amended again in its entirety.
Subsequent amendments noted where applicable.
10-12-17: Amended in entirety.
04-11-19: Subsequent amendments noted where applicable.

143.2 Authority

These bylaws of the Hudson Zoning Board of Adjustment, hereinafter referenced simply as the Board, are adopted under the Authority of NH-RSA (New Hampshire Revised Statues Annotated) 676:I. In the event of a difference between these bylaws and the applicable NH-RSAs, the NH-RSAs take precedence over these Bylaws.

143.3 Purpose

The purpose of these bylaws is to ensure an orderly procedure in the execution of the duties of the Board.

143.4 Amendments

These bylaws may be amended by a majority vote of the voting members at a regular meeting of the Board provided such amendments are read at two successive public meetings.

143.5 Officers

1. A Chairman shall be elected annually by a majority vote of the Board at the first meeting in the month of January.
The Chairman shall preside over all meetings and hearings, appoint such committees as directed by the Board and shall affix his/her signature in the name of the Board.

2. A Vice-Chairman shall be elected annually by a majority vote of the Board at the first meeting in the month of January.
The vice-Chairman shall preside in the absence of the Chairman and shall have the full powers of the Chairman on matters which come before the Board during the absence of the Chairman.

3. A Clerk shall be elected annually by a majority vote of the Board at the first meeting in the month of January.
The clerk shall ~~maintain a record of all meetings, transactions and decisions of the Board, and perform such other duties as the Board may direct by resolution~~.take attendance, read cases into the record, and process the member decision sheets for a summary of decision made.

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4. All officers shall serve for one year and shall be eligible for re-election.

143.5A Recorder
The Recorder is not a Member or Alternate. The Recorder shall transcribe the minutes and notices of decisions in accordance with State RSA requirements, and have such available for members to accept.

143.6 Members and Alternates
1. Five Regular Members shall be appointed by the Board of Selectmen attend all meetings, and sit as voting members

2. Five Alternate Members shall be appointed by the Board of Selectmen, attend all meetings to familiarize themselves with the workings of the Board and stand ready to serve whenever a regular member of the Board is unable to fulfill his/her responsibilities.

3. A Selectman Liaison may be appointed by the Board of Selectman to act as a liaison between the two Boards and should attend all meetings but shall have no voting powers nor the ability to sit in place of any regular member not in attendance.

4. At meetings of the Board, alternates who are not activated to fill the seat of an absent or recused member or who have not been appointed by the Chairman to temporarily fill the unexpired term of a vacancy may participate with the Board in a limited capacity. During a public hearing, alternates may sit at the table with the regular members and may view documents, listen to testimony, ask questions and interact with other Board members, the applicant, abutters and the public. Alternates shall not be allowed to make or second motions. Once the Board moves into deliberations, alternates shall remove themselves from any further deliberations with the Board. During work sessions or portions of meetings that do not include a public hearing, alternates may fully participate, exclusive of any motions or votes that may be made. At all times, the Chairman shall fully inform the public of the status of any alternate present and identify the members who shall be voting on the application.

5. All members and alternates must reside in the community and are expected to attend each meeting of the Board to exercise their duties and responsibilities. Any member unable to attend a meeting shall notify the Chairman as soon as possible. Members, including the Chairman and all officers, shall participate in the decision-making process and vote to approve or disapprove all motions under consideration. Three (3) consecutive unexcused absences by a member or alternate shall be reported to the Board of Selectmen through the Town Administrator, to take appropriate action.

143.7 Meetings
1. Regular meetings (for appeals and Hearings) shall be held at Hudson Town Hall, at 7:00pm on the fourth Thursday of each month in accordance with RSA 676:5-7 and RSA 91-A:2. The Chairman may schedule additional overflow meetings, or reschedule meetings after consultation with the Zoning Administrator (or designee).

2. Other meetings may be held on the call of the Chairman, or a majority vote of the Board in accordance with RSA 91-A: 2II.

All Board members shall be given notice of meetings by mail or email one week prior to the meeting date.

3. Quorum: A quorum for all meetings of the Board shall be three members, including alternates sitting in place of members.

a. The Chairman shall make every effort to ensure that all five members, and one or two alternates, are present for the consideration of any appeal or application.

b. If any regular Board member is absent from any meeting or hearing, or disqualifies himself from sitting on a particular case, the Chairman shall designate one of the alternate members to sit in place of the absent or disqualified member, and such alternate shall be in all respects a full member of the Board while so sitting.

c. Alternates shall generally be activated on a rotating basis from those present at a particular meeting. When an alternate is needed, the Chairman shall select the alternate who has not been activated for the longest time.

d. If there are less than five members (including alternates) present, the Chairman shall give the option to proceed or not to the applicant. Should the applicant choose to proceed with less than five members present that shall not solely constitute grounds for a rehearing should the application fail.

3. Disqualifications: If any member finds it necessary to disqualify himself from sitting in a particular case, as provided in RSA 673:14, he shall notify the Chairman as soon as possible so that an alternate may be requested to sit in his place. When there is uncertainty as to whether a member should be disqualified to act on a particular application, that member or another member of the Board may request the Board to vote on the question of disqualification. Any such request shall be made before the public hearing gets underway. The vote shall be advisory and non-binding.

Determining the threshold of disqualification can be difficult. To assist a member in determining whether or not they should step down (recuse themselves) Board members should review the questions which are asked of potential jurors to determine qualification (RSA 500-A: 12). A potential juror may be asked whether he or she:

a. Expects to gain or lose upon the disposition of the case;
b. Is related to either party;
c. Has advised or assisted either party;
d. Has directly or indirectly given an opinion or formed an opinion;
e. Is employed by or employs any party in the case;
f. Is prejudiced to any degree regarding the case; or
g. Employs any of the counsel appearing in the case in any action then pending in the court.

Either the Chairman or the Member disqualifying himself/herself before the beginning of the public hearing on the case shall announce the disqualification. The disqualified shall step away from the table during the public hearing and during all deliberation on the case as they so choose.

4. Order of Business

The order of business for regular meetings shall be as follows:

a. Call to order by the Chairman – introduction/order of business. Attachment “A”.~~.~~

b. Pledge of allegiance

~~a.~~

~~b.~~c. Roll call by the clerk

~~c.~~d. Unfinished Business (Continued or Deferred Hearings)

~~d.~~e. New Hearing(s)

~~e.~~f. Requests for Rehearing

~~f.~~g. Approval of Minutes from Previous Meeting (s)

g. New Business

h. Communications and items of interest to the Board, Other Business

i. Adjournment

(Note: Although this is the usual order of business, the Board may wish to hold the hearings immediately after the roll call in order to accommodate the public, based on a positive vote of the Board.)

143.8 Application Process

1. **Applications**

   a. Each application for a hearing before the Board shall be made on forms provided by the Board and shall be presented to the Zoning Administrator (or designee) who shall record the date and time of receipt.

   Application deadline for meeting is 12:00 noon, 12 business days (Monday-Friday including Holidays) prior the scheduled meeting date.

   Only complete and accurate applications will be submitted for agenda action, incomplete or inaccurate applications will not be submitted for agenda action.

   b. Appeals from an administrative decision taken under RSA 676:5 shall be filed within 30 days of the decision or when such decision becomes known or reasonably could have been known by the petitioner as determined by the Board.

   c. All forms and revisions prescribed shall be adopted by resolution of the Board and shall become part of these rules of procedure

2. **Public Notice**

   a. Public notice of hearings on each application shall be given in general newspaper and shall be posted at Town Hall, Town Public Library and the Post Office not less than five (5) days before the date fixed for the hearing. Notice shall include the name of the applicant, description of property to include tax map identification, action desired by the applicant,

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provisions of the zoning ordinance concerned, the type of appeal being made, and the date, time and place of the hearing.

b. Personal notice shall be made by certified mail to the applicant and all direct abutters and regular mail for indirect abutters within 200′ not less than five (5) days before the date of the hearing.

c. The applicant shall pay for all required notice costs in advance.

3. Public Hearing

The conduct of public hearings shall be governed by the following rules:

a. The Chairman shall call the hearing in session by instructing the clerk to report on the first case.

b. The Zoning Administrator shall report why the case has been brought before the Board.

c. Members and Alternates of the Board, and any party to the case, may ask questions at any point during testimony once recognized by the Chairman.

d. Each person who appears shall be required to state his/her name and address for the record and indicate whether he/she is a party to the case or an agent or counsel of a party to the case.

e. The applicant shall be called to present his appeal.

f. Those appearing in favor of the appeal shall be allowed to speak.

g. Those in opposition or neutral to the appeal shall be allowed to speak.

h. The applicant and those in favor shall be allowed to speak in rebuttal.

i. Those in opposition to the appeal shall be allowed to speak in rebuttal.

j. Any person who wants the Board to compel the attendance of a witness shall present his request in writing to the Chairman in accordance with RSA 673.15

k. The Board of adjustment will hear with interest any evidence that pertains to the facts of the Case or how the facts relate to the provisions of the zoning ordinance and state zoning law.

l. The Chairman shall present a summary setting forth the facts of the case and the claims made for each side (see Findings of Facts form in Appendix C). Opportunity shall be given for correction from the floor.

m. The public hearing on the Case shall be declared closed and the Case will be declared to be before the Board. The Board will deliberate and make its decision.

n. All subsequent cases shall then be heard in the order they were presented.

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143.9 Decision Process [04-11-19]

Before deliberations begin, the Chairman shall allow non-sitting alternates, the Selectmen's Liaison, if present, and the Zoning Administrator or his/her replacement to ask questions and give input, if they so desire.

Once this phase is completed, the Chairman shall declare the matter before the Board and the sitting members present who are voting will raise any further questions they may have and then deliberate all concerns in order to reach a decision on the request.

The Board shall vote on each of the applications for which testimony was given, after adequate deliberations

For the granting of variances: the Board will consider a "vertical" (member) method of voting on each request.

The Chairman shall announce all decisions after the vote has been taken, and explain that the appeal/Re-Hearing process is available to all aggrieved w/in 30 days of the meeting vote .

143.10 Deferment and Withdrawal

After public notice has been given, each application presented to the Board for consideration may be deferred or withdrawn only by action of the Board, following receipt of written notice to the Zoning Administrator or to the Board, itself, by the applicant. A sitting member must make a motion to defer until the next regular meeting or a date specific, that motion must be seconded and voted on by the sitting members of the case in question, and abutter notice shall be presumed to have been accomplished by the decision of the Board's vote.

In the event that a deferred applicant is not ready when the case comes back before the Board, the Board may initiate withdrawal of the application, with or without prejudice, where "with prejudice" means that any new application (unless substantially changed) cannot be filed for a period of one year. Filing fees shall not be returned for withdrawn cases that have been reviewed and processed by staff with public notice of a scheduled hearing having been posted.

Moreover, once an application has been withdrawn, any re-application shall be considered a new application and the applicant shall be required to pay all applicable fees for consideration. In the event of a Board-initiated deferment, because members felt it necessary for more information or other reason, a sitting member must make a motion to defer until the next regular meeting or a date specific, that motion must be seconded and voted on by the voting members of the case in question, and abutter notice shall be presumed to have been accomplished by the decision of the Board's vote, but in some rare instances the Board may require that notification fees be paid again for deferred cases in order to ensure that abutters are properly notified. In the event of the Board's acceptance of a request for deferment by the applicant at the meeting, the request shall be handled in the same manner as a Board-initiated deferment. In the event that the applicant is not ready when the case comes back before the Board, the Board may initiate withdrawal of the application, with or without prejudice, as described above.

143.11 Reconsideration by the Board

The Board may reconsider a decision to grant or deny an application or grant or deny a motion for rehearing provided such reconsideration is within the appeal period of the original decision as per RSA 667:3

DRAFT

143.12 Motions for Rehearing

If the Board grants a motion for rehearing, the new public hearing shall be held within 30 days of the decision to grant the rehearing provided all notice fees are paid and an updated abutters list is submitted by the party requesting the rehearing. Notification of the rehearing shall follow the procedures set forth in RSA 677:2.. [October 2012]

143.13 Records

1. The records of the Board shall be kept by the Zoning Administrator and made available for public inspection at Hudson Town Hall in accordance with RSA 673:17.
2. Final written decisions will be placed on file and available for public inspection within 5 business days after the decision is made. RSA 676:3
3. Minutes of all meetings including names of Board members, persons appearing before the Board, and a brief description of the subject matter shall be open to public inspection within 5 business days of the public meeting. RSA 91-A:2 II

143.14 Waivers

Any portion of these rules of procedure may be waived in such cases where, in the opinion of the Board, strict conformity would pose a practical difficulty to the applicant and a waiver would not be contrary to the spirit and intent of the rules. A majority of the Board present shall vote any waiver.

143.15 Joint Meetings and Hearings

1. RSA 676:2 provides that the Board of Adjustment may hold joint meetings or hearings with other "Land Use Boards," including the Planning Board, the Historic District Commission, the Building Code Board of Appeals, and the Inspector of Buildings, and that each Board shall have discretion as to whether or not to hold a joint meeting with any other land use Board.
2. Joint business meetings with any other land use Board may be held at any time when called jointly by the Chairman of the two Boards.
3. A public hearing on any appeal to the Board of Adjustment will be held jointly with another Board only under the following conditions:
    a. The joint public hearing must be a formal public hearing on appeals to both Boards regarding the same subject matter; and
    b. If the other Board is the Planning Board, RSA 676:2 requires that the Planning Board Chairman shall chair the joint hearing. If the other Board is not the Planning Board, then the Board of Adjustment Chairman shall chair the joint hearing; and
    c. The provisions covering the conduct of public hearings, set forth in these rules, together with such additional provisions as may be required by the other Board, shall be followed; and
    d. The other Board shall concur with the above.

DRAFT

Attachment "A"

Chairman's introduction/order of business

Good evening ladies and gentlemen. Welcome to the Hudson Zoning Board of Adjustment. I call this meeting to order (**state the time**).

If you could please stand and join me in the Pledge of Allegiance…….

We will proceed with cases in the order they appear on tonight's agenda unless the Board deems it appropriate to take a case out of order. State law and local ordinances set out the criteria that must be met in order for this Board to grant a request before the Board. These minimum requirements are outlined on application forms in the Town's Land Use Office. Applicants should proceed with this format to provide adequate justification for the Board to grant their request.

The Chairman will open the meeting to hear testimony either for or against the request. The order of testimony will first be the applicant presenting their case as why it should be approved; next testimony from those supporting the applicant will be heard; and last will be testimony from those either neutral to or against the proposed case. If necessary a second round of testimony will be heard to respond to those in opposition and subsequent rebuttal.

All discussions will be between the applicant and the Board. Please be respectful of all and in interest of time refrain from repeating previous testimony. New documentation will be accepted by the Board for consideration this evening, but may cause the case to be continued or deferred. The Board reserves the right to ask for additional testimony at anytime.

After hearing the facts from all parties the Chairman will close the public hearing and the Board will deliberate and vote either to approve, deny or defer the request before moving on to the next case.

DRAFT

Handouts are at the back of the room: consisting of the agenda for tonight, and information for those that feel aggrieved and wish to appeal any decision the Board may have made.

All those that wish to speak are asked to come either to the lecturn or the adjacent table, speak clearly, state your name and address. Please spell your last name for the recorder.

Before we begin a few housekeeping items:

- Turn off your cell phones
- There is no smoking in the building
- Please refrain from talking amongst yourselves as it distracts from hearing the testimony of the case

Will the Clerk please call for attendance.....

DRAFT

Proposed Zoning Ordinance amendments 6-27-19 Cover Sheet

1) Prioritized master list (with "items") double sided.
2) Item A – expansion of exist. Non-conforming, 2 pages w/attachment "A".
3) Item B – Doggie day care , 1 pg.
4) Item C – Home Occupation Day Care Special Exception, 3 pages.
5) Item D – Manufactured homes, 1 pg.

Item	Z.O. Section	Item/Topic	Comments	Priority	Discussion
A	334-31 (A)	*Alteration or Expansion of Non-Conforming Structures	Add to A - tear down and replace in kind	1	*These 3 items should be considered 1 entire meeting to shore up the ordinance; could be a 1
A	334-31 (A)	*Alteration or Expansion of Non-Conforming Structures	Adding an addition to a non-conforming structure	1	
A		*Equitable Waivers	Consider granting as a matter of course if applicant is before the ZBA for something else, as long as conditions are met?	1	
B		Doggie Day Care/Training	Add to 'Kennel' defintion and section; include dog 'fostering'	1	HOSE or Variance required in the interim; definitions and included on Table of Permitted Uses
C		Special Exception - Day Care	Needs specific criteria	1	Correct daycare outside requirements
D	334-43 (M)	Manufactured Home Parks	Refers to obsolete BOCA code	1	Remove BOCA; shore up what is included w/ Mfg's homes ie mobile?
	334 - Attachment 1	Table of Permitted Uses	Align/Streamline Table	1	Dedicated meeting
		Backyard Farming	Defined, where allowed, as an accessory use to a principle dwelling	1	Bruce defined; this is almost ready to go; ensure NO roosters!!
	334-60; 334-64	EMC/Electronic Signs	Un-complicate Verbiage	2	Bring experts in, DOT, NH Municipal Assoc - bruce to look at ICC for signs
		Trailers	Include RV's and use on lots	2	Time limit on occupying on residential lots
		Lighting	On signage	2	Turn off at night for "dark skies"
		Ocean Containers	Definition Added; need where allowed/used/restrictions ie painted to remove signage	2	Validate definition on 2018 ballot; add to table of permitted uses

Z.O. Section	Item/Topic	Comments	Priority	Discussion
	Campgrounds	Where Used, Table of Permitted Uses	3	Define and add to Table of permitted uses
334-120	Alternative Energy	Includes Small Wind energy Systems and Solar Panels/Cells	3	Define and add to Table of permitted uses (residential + commercial)
	Town Right of Way	Referring to Parking and/or Activities in Town RoW	3	Clarify to include side and front setbacks
	Tiny Homes	Defined, where allowed, as an accessory use to a principle dwelling	3	Need in ordinance
334.91 - 334.107	Wireless Communication Facility	Remove SE requirement and allow with a Planning Board Conditional Use Permit	?	George Language - Hold off on this one
334-15	Off Street Parking	Clarify to eliminate front/yard setbacks	?	Remove - duplicated
334-15	Driveways		?	Remove/co-ordinate w/ PB/Engr
334:33 - 334:41	Wetland Conservation District	Eliminate permit process for permitted uses; SE exception process for non-permitted uses after Con Comm input	?	George Language

A

Zoning Ordinance Amendment item A 6-27-19 discussion

Item	Z.O. Section		Item/Topic	Comments	Priorit
"A"	334-31 (A)		*Alteration or Expansion of Non-Conforming Structures	Add to A - tear down and replace in kind	1
				See attachment "A"	
"A"	334-31 (A)		*Alteration or Expansion of Non-Conforming Structures	Adding an addition to a non-conforming structure	1
				See attachment "A"	
"A"			*Equitable Waivers	Consider granting as a matter of course if applicant is before the ZBA for something else, as long as conditions are met? **Bruce comment: The E.W. of D.R. would need to be "noticed" as a Hearing etc.**	1

The Ordinance as written, Bruce comments in red:

§ 334-31 **Alteration and expansion of nonconforming structures.**

A.

"A nonconforming structure may not be altered or expanded, except by variance." If a structure is non-conforming due to a front yard setback encroachment, in my opinion if the expansion is in the rear of the existing structure, (not in the setbacks) why would they need a variance as they are doing the expansion in an area that is allowed. If the expansion is occurring within a setback, yes a variance is required as it is increasing the non-conformance. *"A nonconforming structure may be altered, reconstructed, externally or structurally modified, provided that such alterations, reconstruction, extension or structural modification does not make any portion or*

portions of the existing structure more nonconforming. A nonconforming structure cannot be reconstructed after demolition, except when the structure was demolished by an act of God, fire or flood". A voluntary demolition of a non-conforming structure may be reconstructed, provided there is no additional non-conformance. "*A nonconforming building or a building occupied by a nonconforming use may be strengthened and made safe."*

10,350 SQFT
LOT

PROPOSED
NEW
ADDITION

15'

115

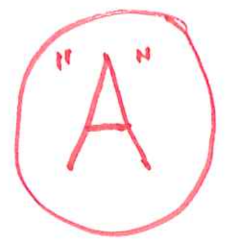
EXISTING

30'

90

R.O.W.

1" = 20'



B

Zoning Ordinance Amendment item B 6-27-19 discussion

Doggie day care etc.

New definition:

Kennel / Doggie day care

An **establishment** in which a primary **use** is housing dogs, cats, or other **household pet**s, and/or grooming, breeding, boarding, training, or selling of animals.

Currently:

In Principal Permitted Uses:

R-1	R-2	TR	B	I	G	G-1
N	N	N	S	P	P	P

I propose in Principal Permitted Uses:

R-1	R-2	TR	B	I	G	G-1
N	N	N	P	P	N	N

I propose adding in the Accessory Uses Table:

R-1	R-2	TR	B	I	G	G-1
S	S	S	P	P	S	S

Kennel / Dog Day Care Special Exception:

Overnight boarding?

Hours of drop off

Hours for pick up

Parking

Employees?

Animal Control Officer Involvement?

Outside/pen area?

Noise control?

C

Zoning Ordinance amendments item C 6-27-19 discussion

§ 334-24 **Home occupations.**
[Amended 3-13-2007 by Amdt. No. 3; 3-10-2009 by Amdt. No. 3]

Home occupations are defined by the Zoning Ordinance as "any activity carried out for gain by a resident in their dwelling unit, and such activity is a secondary use to the residence." The intent of providing a home occupation special exception is to allow for growth and development of a small in-home business while maintaining the character of residential areas. The applicant acknowledges that if the business grows and no longer meets the listed requirements, the business shall be moved to an appropriately zoned location such as Business, General or Industrial. Home occupations which include sales or service operations for wholesale goods produced or services provided on-site shall be permitted only as a special exception. The Zoning Board of Adjustment must find any such home occupation application to be in full compliance with the following requirements prior to approval of such special exception:

A.
The home occupation shall be secondary to the principal use of the home as the business owner's residence.

B.
The home occupation shall be conducted only by the residents of the dwelling who reside on the premises. If the applicant is the owner, the owner must sign an affidavit, stating he/she is the owner, and the residents of the dwelling are the only individuals conducting the activities associated with the home occupation. Said affidavit shall also state that the owner is responsible for any violations of this chapter. If the applicant is a renter, the owner of the dwelling must sign an affidavit, stating he/she is the owner, and shall acknowledge that the home occupation for the premises shall only be conducted by the current renter(s), who shall be identified on the application. The owner shall also acknowledge that he/she, as the owner of the dwelling, is responsible for any violations of this chapter conducted at said dwelling. Approval of the home occupation special exception expires with the change of ownership of the property or the rental agreement in effect at the time the home occupation special exception was granted. The home occupation special exception is conditional on the residents of the dwelling and not on the property.

C.
There shall be no employees or "for hire" staff conducting the home occupation activities, unless the employee(s) also resides on the premises.

D.
The home occupation business shall be carried out within the residence and/or within a structure accessory to the residence, such as a garage.

E.
The requested special exception shall be for an occupation which is consistent for what is routinely and/or typically done in a home environment such as a day care, direct office billing, or other activities that are generally service-oriented or produce goods for wholesale purposes.

F.
On-site retail sales are an expressly prohibited home occupation special exception use.

G.
No more than 50% of the finished living space of the dwelling unit shall be used in connection with the home occupation.

H.

Other than the sign(s) permitted under Article XII, there shall be no exterior display nor other exterior indication of the home occupation, nor shall there be any variation from the primarily residential character of the principal or accessory building.

I.

Exterior storage may be permitted only by special exception, granted by the Zoning Board of Adjustment, and must be screened from neighboring views by a solid fence or by evergreens of adequate height and bulk at the time of planting to effectively screen the area. In situations where a combination of existing foliage and/or long distances to neighboring views provide screening, the fencing requirements may be waived at the discretion of the Board.

J.

Objectionable circumstances, such as, but not limited to, noise, vibrations, dust, smoke, electrical disturbances, odors, heat or glare, shall not be produced.

K.

No traffic shall be generated by the home occupation activity that will be substantially greater in volume than would normally be expected in the neighborhood.

L.

Parking.

(1)

Parking for the home occupation shall be provided off-street and shall not be located in the front yard or within the required setbacks from the side and rear lot lines. Only the existing driveway may be used for the parking of customers. Customer parking shall be limited to a maximum of two vehicles at any one time.

(2)

Parking of vehicles used in commerce:

(a)

One registered vehicle used in commerce may be parked at the principal or accessory structure, and further provided that personal vehicles used in commerce are excluded from this provision.

(b)

In the B, I and G Zones (pertaining only to the home occupation activity), one registered vehicle used in commerce may be parked at the principal or accessory structure, provided that there are no heavy commercial vehicles which exceed a weight of 13,000 pounds (gross vehicle weight) and the screening requirements of § 334-24I are met, and further provided that personal vehicles used for purposes of commerce are excluded from this restriction.

M.

Approval of the home occupation special exception expires with the change of ownership of the property or the rental agreement in effect at the time the home occupation special exception was granted. The home occupation special exception is conditional on the residents of the dwelling and not on the property.

N.

The Community Development Director/Zoning Administrator reserves the right to revoke the home occupation special exception if all conditions of the special exception are not maintained.

From the Zoning Ordinance definitions:

FAMILY GROUP DAY-CARE HOME

An occupied residence in which child day care is provided for less than 24 hours per day, except in emergencies, for seven to 12 children from one or more unrelated families. The 12 children shall include all children related to the caregiver and any foster children residing in the home, except children who are 10 years of age or older. In addition to the 12 children, up to five children attending a full-day school program may also be cared for up to five hours per day on school days and all day during school holidays.

Currently, This is/is not permitted as an Accessory Use:

R-1	R-2	TR	B	I	G	G-1
N	N	N	P	P	P	P

I would propose as follows:

R-1	R-2	TR	B	I	G	G-1
S	S	S	P	P	S	S

FAMILY GROUP DAY-CARE HOME Special Exception

An owner occupied SFR/duplex residence in which child day care is provided for less than 24 hours per day, except in emergencies, for seven to 12 children from one or more unrelated families. The 12 children shall include all children related to the caregiver and any foster children residing in the home, except children who are 10 years of age or older. In addition to the 12 children, up to five children attending a full-day school program may also be cared for up to five hours per day on school days and all day during school holidays.

Hours for drop off _____
Hours for pick up ______

Parking available ______

Outdoor area – fenced/barrier?

Employees?

FD requirements and inspection required

D

Zoning Ordinance Amendments – item D 6-27-19 Discussion

Item	Z.O. Section	Item/Topic	Comments	Priority	Discussion
D	334-43 (M)	Manufactured Home Parks	Refers to obsolete BOCA code	1	Remove BOCA; shore up what is included w/ Mfg's homes ie mobile?

§ 334-43 Manufactured home parks.

A.

Manufactured home parks shall be permitted in the General District; see the Table of Permitted Principal Uses in § 334-21 of Article V.

M.

All manufactured homes must comply with ~~BOCA~~ and State of NH RSA 205-D Manufactured Housing Installation Standards and current FHA manufactured home standards.