

New Hampshire 2010-11 Legal Update

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PART I
Recent Statute Changes

Local Land Use Boards and Their Members

Terms of Office; Land Use Board Def'n

2010 Ch. 226 (HB 1174)

■ RSA 673:5, III

- For appointed land use board members, if upon expiration of term no successor has been appointed, provides for continuation until such appointment is made – “holdover” status

■ RSA 672:7

- Amends definition of “local land use board” to include any board or commission authorized under RSA 673
 - Formerly only planning board, zoning board of adjustment, building code board of appeals, historic district commission, building inspector
 - Now also includes heritage commission, agriculture commission, housing commission and anything else the Legislature might subsequently include in RSA 673

■ Pay attention to statutes that refer to “land use boards”

Role of Alternate Board Members

2010 Ch. 270 (SB 448)

- RSA 673:6, V
 - “An alternate member of a local land use board may participate in meetings of the board as a nonvoting member pursuant to rules adopted under RSA 676:1.”
- RSA 676:1
 - “... The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.”
- Amend your rules of procedure to address this!

Special Meetings for Zoning in SB2 Towns 2010 Ch. 69 (HB 1211)

- RSA 40:13, XVII
 - If the sole purpose of the special town meeting is for adoption, amendment or repeal of zoning, historic district ordinance, or building code, no deliberative session required

- Why? Because zoning amendments can't be amended at the deliberative session – one session, only for voting

Planning Board Members on Other Boards 2011 Ch. 190 (HB 409)

■ RSA 673:7

- Current law prohibits more than one planning board member from serving on other local boards and commissions
- **New:** 2 planning board members may serve on other boards or commissions, except that only 1 planning board member may serve on
 - Local governing body
 - Conservation commission
 - Other local land use board

Planning Board Procedure

Dam Owner Notification

2009 Ch. 31 (SB 28)

■ RSA 676:4, I

- (b) Application requirements: “Since construction of ***any structure near streams or rivers*** downstream of a dam can increase the hazard classification of the dam established by the department of environmental services, ***the application shall identify the nearest dam upstream*** and include the name and address of the dam owners.”
- (d) Certified mail notice required to upstream dam owners and DES dam bureau for development proposals “near rivers and streams and downstream from a dam.”

Dam Owner Notification, revisited

2011 Ch. 164 (HB 205)

- RSA 676:4, I(b) and (d)
 - Introduced as a repeal of 2009 legislation; House changed to reform
 - Removes 2009 language from RSA 676:4, I(b) and (d)
 - Adds new subparagraph to RSA 676:4, I(d)
 - (2) For those proposals in which any structure or proposed building site will be ***within 500 feet of the top of the bank*** of any lake, pond, river, or stream, the planning board shall also notify the department of environmental services by ***first class mail*** at the same time that notice is provided to abutters, cost to be paid in advance by the applicant consistent with subparagraph (d)(1). ***The sole purpose of notification to the department shall be to provide information to the department for dam hazard classification. This requirement shall not confer upon the department the status of an abutter. Failure by the municipality to notify the department shall not be considered a defect of notice.***

Planning Board Application Acceptance

2010 Ch. 39 (SB 328)

■ RSA 676:4, I(b)

- An application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i).

■ RSA 676:4, I(i)

- **Conditional approvals:** "... Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits."
- Must a planning board accept an application for something that would obviously violate zoning?
- If so, must it also approve it, subject to ZBA approval?

Agriculture and Timber Harvesting

2011 Ch. 85 (SB 104)

- RSA 674:1, VI (Planning board duties)
 - Powers *“shall not include regulating timber harvesting operations that are not part of a subdivision application or a development project subject to site plan review under this chapter.”*
 - Means that boards can't address pre-application logging
- RSA 674:17, I(i) (Zoning enabling statute)
 - To encourage the preservation of agricultural lands and buildings *and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings*

ZBA Procedure

Zoning Variance Standards (1 of 3)

2009 Ch. 307 (SB 147)

■ RSA 674:33, I(b)

- A rough codification of Simplex v. Newington, 145 N.H. 727 (2001), incorporation of the test in Governor's Island Club v. Gilford, 124 N.H. 126 (1983), and a rejection of the distinction between use and area variances in Boccia v. Portsmouth, 151 N.H. 85 (2004)
- But see legislative purpose statement for treatment of post-Simplex cases, including Boccia.

Boards of adjustment may grant a variance if they find—

- (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
- ...

Zoning Variance Standards (2 of 3)

- RSA 674:33, I(b) (cont'd)
 - (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.

Zoning Variance Standards (3 of 3)

■ RSA 674:33, I(b) (cont'd)

- 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 shall apply to any application or appeal for a variance that is filed on or after the effective date of this act (1/1/10)

■ Summary

- Eliminates the distinction between “use” and “area” variances
- Roughly codifies the language of Simplex; codifies the stricter Governor’s Island test if Simplex can’t be met
- Boccia’s economic analysis language is still good law! (Maybe)

ZBA May Charge for Consultant Review 2010 Ch. 303 (HB 1380)

■ RSA 676:5

- IV. ZBA “may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.” (Identical to planning board’s authority in RSA 676:4, II(g)).
- V.(a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, ***provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.*** (Italicized text also now required of planning board in RSA 676:4-b, I.)
 - (b) Detailed invoices and accounting of costs required.

- Addresses a long-standing question of law, which played an important part behind the scenes in Continental Paving v. Litchfield, 158 NH 570 (2009).

Vesting and Growth Management

More-Than-4-Year Exemption

2009 Ch. 93 (SB 93)

■ RSA 674:39

- For any subdivision or site plan approved by a planning board between January 1, 2007 and July 1, 2009
 - **Three years** (not 12 months) in which to undertake active and substantial development or construction
- For any subdivision or site plan approved by a planning board between January 1, 2005 and July 1, 2009
 - **Six years** (not four) in which to achieve substantial completion (after which vesting is permanent)

New “Vesting” Periods 2011 Ch. 215 (SB 144)

- RSA 674:39 – ~~Four~~⁵-Year Exemption
 - “Vesting” is protection against changes to land use regulations
 - Existing par. V, adopted in 2009: “Notwithstanding the time limits established in paragraph I, every subdivision plat and site plan approved by the planning board on or after January 1, 2007 and prior to July 1, 2009 shall be allowed 36 months after the date of approval to achieve active and substantial development or building as described in subparagraph I(a) and every subdivision plat and site plan approved by the planning board on or after July 1, 2005 and prior to July 1, 2009 shall be allowed 6 years after the date of approval to achieve substantial completion of the improvements as described in paragraph II.”
 - Delete V and change to a **FIVE-year** exemption for projects to achieve substantial completion; with 24 months in which to undertake “active and substantial development or building”

Approval Date	“Active and Substantial” Period	“Substantial Completion” Period
1. Past – 12/31/2004	12 months	4 years
2. 1/1/2005 – 12/31/2006*	12 months	6 years
3. 1/1/2007 – 6/30/2009*	36 months	6 years
4. 7/1/2009 – present	24 months	5 years

BUT #4 might only apply as of the effective date of 2011 Ch. 215 (June 27, 2011); if so, then #1 would apply from 7/1/2009 through 6/26/2011

** From 2009 Ch. 93 (SB 93)*

Lot Mergers

Involuntary Lot Mergers Prohibited

2010 Ch. 345 (SB 406)

■ RSA 674:39-a

- “No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner.”

■ Consider: abutting substandard lots owned by the same person

- Does this limit a planning board’s ability to require merger as part of site development? Probably not.
- Does it limit a ZBA’s ability to require merger instead of granting a variance for development of one lot? Probably yes.
- Does it apply retroactively to undo previous involuntary mergers? Probably not.

Involuntary Lot Mergers Undone 2011 Ch. 206 (HB 316)

■ RSA 674:39-aa

- Lots involuntarily merged (for zoning, assessing, or taxation purposes) prior to Sept. 18, 2010 shall be restored to their pre-merger status at the request of the owner, ***provided***
 - Request is made prior to Dec. 31, 2016
 - No owner in chain of title voluntarily merged the lots; all subsequent owners estopped from requesting restoration. Municipality has the burden to prove voluntary merger
- Requests made to local governing body, whose decisions may be appealed pursuant to RSA 676
- Municipalities may adopt more liberal ordinances
- Municipalities must post notice that lots may be restored; public place (no later than Jan. 1, 2012 and in 2011 – 2015 annual reports)

Residential Sprinklers

Residential Sprinkler Moratorium

2010 Ch. 282 (HB 1486)

- Uncodified section (§4) of session law
 - Detached one- and two-family dwellings; through June 30, 2011
 - No new sprinkler requirements by municipalities or local land use boards by ordinance, regulation, code, or administrative practice
 - OK to require that sprinklers be *offered*
 - This “shall not prevent a planning board from finding that particular subdivision applications are scattered or premature, in accordance with RSA 674:36, II(a), for lack of adequate fire protection. In such cases, applicants may propose, and a planning board may accept, the installation of fire sprinkler systems as a means of addressing the planning board’s findings.”
- For land use boards, “administrative practice” probably means *conditions of approval*

Sprinkler Requirements *Prohibited* 2011 Ch. 203 (HB 109) & Ch. 269 (SB 91)

- [HB 109] RSA 674:36 (subdivisions)
 - Planning boards shall not require as a condition of approval, or adopt regulations requiring, fire suppression sprinklers in proposed 1- and 2-family structures exclusively used for residential purposes
 - Other conditions and requirements OK – cisterns, fire ponds, etc.
 - Governor's veto overridden
- [SB 91] RSA 674:51 (building codes)
 - No municipality or local land use board shall adopt [*or enforce*] any ordinance, regulation, code, or administrative practice requiring sprinklers in 1- and 2-family structures used only for residential purposes; categorical exemption for mobile homes
 - “or enforce” clause removed over concerns from fire chiefs about ability to enforce previously adopted regulations and conditions
 - Governor's veto overridden

Environment and Energy

Shoreland Protection 2011 Ch. 224 (HB 2)

- Listen to Darlene.

Property Assessed Clean Energy (PACE) 2010 Ch. 215 (HB 1554)

■ RSA Chapter 53-F

- Enabling legislation – allows municipalities to create districts in which municipal loans may be made to property owners to do energy efficiency and clean energy improvements
- Improvements must be based on an energy audit by a certified auditor
- Improvements must be cash-flow positive for property owner
- Repayment cannot exceed expected life of improvements
- Repayment made as part of property tax bill, secured by lien in event of delinquency

- PACE is currently held up nationally by Federal questions (FHFA, Fannie Mae, and Freddie Mac are concerned about priority status of municipal liens)

Property Assessed Clean Energy (PACE), revisited – 2011 Ch. 68 (HB 144)

■ RSA Chapter 53-F

- Introduced as to repeal PACE; House instead reforms it
- Limits municipal bonding to revenue bonds (not general obligation bonds that pledge full faith and credit)
- Eliminates authority to use general municipal revenues, including for loan loss reserve
- Eliminates provision for priority lien for delinquencies; liens shall be junior to existing liens of record

Workforce Housing

Workforce Housing (1 of 2)

2008 Ch. 299 (SB 342)

■ RSA 674:58 - :61

- All communities must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable”, and including rental multi-family housing
- Also adds a series of definitions as a means of providing greater guidance than the Court’s opinion
 - Affordable: 30% of gross income
 - Renter household at 60% area median income
 - Owner household at 100% area median income
- Opportunity for WH development must exist in a majority of residentially zoned area in a municipality
- Exceptions for those communities that can demonstrate that they have provided their “fair share” of current and projected regional needs for affordable housing
- Accelerated appeals mechanism—hearing within 6 months, either by judge or by court-appointed referee
- Effective January 1, 2010 (extended from 7/1/09 by Ch. 157 ‘09)

Workforce Housing (2 of 2)


2010 Ch. 150 (HB 1395)

- RSA 674:60, IV
 - Explicitly allows planning boards to require long-term affordability restrictions as a condition of approval of workforce housing

***Workforce Housing guidebook
now available –***

www.nhhfa.org/rl_WHguide.cfm





PART II
Recent Court Decisions

Planning and Zoning Cases

- Impact Fees
 - *Clare v. Town of Hudson*, 160 N.H. 378 (2010)
- Timing of Appeals
 - *Atwater v. Town of Plainfield*, 160 N.H. 503 (2010)
- Expansion of Variances and Special Exceptions
 - *1808 Corporation v. New Ipswich*, 161 N.H. 772 (2011)
- Standing to Appeal
 - *Golf Course Investors of NH v. Jaffrey*, 161 N.H. 675 (2011)
- Variances, Old and New
 - *Brandt Development Co. v. Somersworth*, ___ N.H. ___ (2011)
 - *Harborside Assoc. v. Parade Residence Hotel*, ___ N.H. ___ (2011)
- Planning Board Approvals
 - *Limited Editions Properties v. Hebron*, ___ N.H. ___ (2011)

Impact Fees

■ *Clare v. Town of Hudson* (2010)

- RSA 674:21, V – Impact fees
 - ▣ Must be used within 6 years of collection
 - ▣ May only be used for the purpose for which they were collected
 - ▣ Must be directly related & proportional to development's impact
 - ▣ Funds must be accounted for separately from town funds
- Subdivision approved in 2000; \$81,705 performance bond required for off-site road improvements; administered through impact fee ordinance; work scheduled for 2005, but postponed; funds encumbered; Brox hired, and paid \$251,87 in 2007; \$89,154 (incl. interest) from the development account
- Funds properly encumbered within 6 years
- Clare contests purpose (“town-wide paving”), but court disagrees
- Proportionality and accounting: Brox details \$75,438 of costs for relevant portion of work; Town shows \$62,586 of its own costs; but paid account balance entirely to Brox. Court: return \$13,716
- Different result if the Town had paid itself a portion?

Impact Fees

- *Clare v. Town of Hudson* (2010)

Practice Points

- Encumber impact fees within 6 years of collection
- Be sure that the planning board approval or impact fee ordinance clearly indicates the purpose of the fees
- Use the fees for the purpose(s) for which they were intended

Timing of Appeals

■ *Atwater v. Town of Plainfield* (2010)

- Planning board approves site plan on August 6
 - One condition precedent; three conditions subsequent
- Zoning administrator sends notice of decision on August 8
- Board finds that condition precedent is met on August 23
- Abutters file administrative appeal under RSA 676:5 with ZBA on September 6 (also a superior court appeal filed on Sept. 5)
- **When does the clock start?** Court: for ZBA appeals, as soon as possible; don't wait for the fulfillment of non-zoning conditions precedent; compare RSA 676:5 with RSA 677:15
- ZBA rejects appeal: not filed within 15 days, as required by zoning
- But the timing of RSA 676:5 appeals is "within a reasonable time, as provided by the rules of the board."
 - Plainfield ZBA's rules say 30 days! But the plaintiffs failed to make this argument in their motion to ZBA for rehearing. 😞
- Saunders v. Kingston: 3 days after *Atwater*, similar issue, similar result: planning board's zoning determinations immediately appealable to ZBA

Expansion of Variances and Special Exceptions

- *1808 Corporation v. New Ipswich (2011)*
 - ZBA approvals in 1998: special exception to establish an office use in the Village District, applicant says will be limited to front 3760 s.f. of 7275 s.f. building (rear portion for tenant storage); variance to allow office of more than 1500 s.f.
 - 2008 site plan application to Planning Board to use building entirely for office; applicant argues no further ZBA action necessary; Board disagrees and defers consideration for 180 days to allow ZBA review
 - Administrative appeal to ZBA contesting this decision; ZBA upholds Planning Board, owner appeals to court; superior court upholds ZBA
 - Issue: was further ZBA review necessary? Applicant argues
 - (1) expansion was within the 1998 variance; or
 - (2) expansion represents expansion of nonconforming use

Expansion of Variances and Special Exceptions (cont'd)

- *1808 Corporation v. New Ipswich* (cont'd)
 - Supremes: record is “meager” but supports the idea that variance was limited to the front
 - the scope of a variance is dependent upon the representations of the applicant and the intent of the language of the variance at the time it was issued
 - The doctrine of expansion of nonconforming uses does not apply
 - The use was allowed by special exception, not by variance; the variance only addresses the area devoted to the office use
 - A couple things to think about:
 - What authority does the Planning Board have to “defer action” on an application it has already accepted? This was not litigated

Standing to Appeal

■ *Golf Course Investors of NH v. Jaffrey (2011)*

- Planning board approves a 2-lot subdivision; 7.39 and 1.75 acres (with a building); no appeal; several months pass...
- GCI seeks subdivision and site plan approval to divide building into 4 residential condo units and to rehab the historic structure; 7 residents appeal to ZBA – should have gone to ZBA for special exception (major development, multi-family, and open space development plan)
- Standard zoning would have required 6 acres; OSDP, 4.8 acres
- Appeal: → “...we believe that a revised proposal on at least 4.8 acres of platted land could be readily approved by the Planning Board as an Open Space Development Plan...” → “We are pleased that the [building], gutted and unused for many years, has been proposed by [GCI] to be redeveloped into attractive housing.” → “We believe the resulting redevelopment ... on a plot of at least 4.8 acres will be a very good reuse of this historic 1912 building.”
- Why did they appeal?

Standing to Appeal (cont'd)

■ *GCI v. Jaffrey* (cont'd)

- “Aggrieved persons” – owners of land 450’, 900’, 1200’, and 2000’ distant from subject property; none is an abutter, though one was provided notice of the planning board hearing as an abutter
- At ZBA hearing, town attorney says none meets the RSA 672:3 definition of abutter, but could show that their property would be directly affected by the proposal
- Residents: ‘too much housing on too little land’
- Later ZBA deliberations – standing considered
 - Chair: none is an abutter; another member: “...the State has regional impact going as far as Marlborough. The appellants are closer than Marlborough.”
 - Town attorney: definition of abutter is for notice purposes; don’t have to be an abutter to be an aggrieved party; two choices:
 - Deny the appeal agree with the Planning Board; or
 - Grant the appeal return case to the Planning Board
 - **[3rd option: dismiss appeal for lack of standing]**

Standing to Appeal (cont'd)

■ *GCI v. Jaffrey* (cont'd)

- ZBA summarily sees residents' standing and grants appeal; GCI appeals
- Who has standing? Supremes: "direct, definite interest in the outcome."
- *Weeks Restaurant Corp. v. Dover* (1979); fact-based inquiry that may include factors such as:
 - *Proximity* – alone is insufficient
 - *Type of change proposed* – little change to building footprint
 - *Immediacy of the injury claimed* – appellants like the proposal! No evidence supporting particularized harm
 - *Challenging party's participation in the administrative hearings* – one party, *de minimis* involvement
- Standing does not extend to all persons in the community who might feel that they are hurt by the proposal

Standing to Appeal (cont'd)

- *GCI v. Jaffrey* (cont'd)
 - *Proximity* – Town contended that the court had earlier said that abutters to a zoning change are presumed to have standing
 - Supremes disagree: “...we did not adopt a bright line rule identifying whether and to what extent physical proximity establishes direct interest sufficient to confer standing.”
 - “...while close proximity is relevant, we reject the notion suggested by the Town that a non-abutter necessarily establishes a direct, definite interest by close proximity alone.”
 - Is the Court also suggesting that someone could be an abutter, and yet not have standing to appeal?
 - **Probably not**, but intentionally ambiguous language is curious
 - Who else could appeal to ZBA, if not the non-abutter neighbors?
 - RSA 676:5 – any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer
- Practice point: you can't expand upon the statutory definition of abutter for the purpose of conferring standing, but you can notify more people if you want to have better-attended hearings!

Variations, Old...

- *Brandt Development Co. v. Somersworth* (2011)
 - Duplex in the R-Multi District
 - 1994 variance to convert to 4 dwelling units: denied (not clear if on all 5 criteria), no appeal
 - Bedrooms added by permit to make it 7BR and 3BR
 - 2009 variance to convert to 4 dwelling units: denied, appeal; application filed before 1/1/10, so old statutory standard applies
 - Trial court affirms denial: Fisher v. Dover (1980) – new variance applications may be accepted if there are material change (1) proposed use of land, or (2) circumstances affecting merits of the application; only the hardship criterion has changed
 - Supreme Court reverses: language of variance **criteria** did not change between 1994 and 2009, but case law interpreting them did change significantly – Simplex (2001) and Boccia (2004)

Variances, Old...

- *Brandt Development Co. v. Somersworth* (cont'd)
 - Simplex: "...a new standard that is markedly more favorable to property owners seeking variances than was the standard under Governor's Island."
 - Boccia: "...relaxed the unnecessary hardship standard for area variances, thereby creating a higher likelihood that an applicant will prevail under the new test."
 - But those only apply to *hardship*. What about the other 4 criteria?
 - Chester Rod & Gun Club (2005): contrary to the **public interest** if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives."
 - Gray v. Seidel (1999): benefit to **public interest** need not be shown, only that granting the variance will not be contrary to it
 - Malachy Glen v. Chester (2007): 2 critical inquiries in **substantial justice** – (1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use
 - These only clarified various factors, but lend weight to conclusion that circumstances have changed

Variances, Old...

- *Brandt Development Co. v. Somersworth* (cont'd)
 - “It does not follow...that a material change in the doctrine of unnecessary hardship does not constitute a material change in circumstances with respect to the 2009 application. Indeed, **although it is but one factor in our statute, unnecessary hardship is central to the very concept of a variance.**”
 - “...the five criteria of RSA 674:33, at least before they were modified by the legislature in response to Boccia, are not discrete and unrelated criteria, but interrelated concepts that aim to ensure a proper balance between the legitimate aims of municipal planning and the **hardship** that may sometimes result from a literal enforcement of zoning ordinances.
 - Material change? Only need a reasonable possibility, no an absolute certainty to overcome Fisher v. Dover

Variations, ... and New

- *Harborside Assoc. v. Parade Residence Hotel* (2011)
 - Request for 2 parapet (not an allowed use) and 2 marquee signs (too big: 20 s.f. allowed; 35 s.f. sought); granted by ZBA; trial court upholds marquee signs, reverses parapet signs; both parties appeal. Application filed after 1/1/10, so new statute applies
 - ZBA's findings:
 - "...parapet signs as placed to not feel like visual clutter or overreach as to height. ...Reasonable and not overly aggressive."
 - Not contrary to the public interest, no change to the essential character of the neighborhood.
 - Sheer mass of the building and occupancy by a hotel create a special condition. Visitors need to ID their destination.
 - Marquee signs not disruptive, and may enhance streetscape
 - No benefit to the public that would outweigh the hardship on the applicant if the variances were denied.
 - No evidence of negative impact on neighborhood.

Variations, ... and New

- *Harborside Assoc. v. Parade Residence Hotel* (cont'd)
 - Supreme Court reviews Legislature's rewrite of variance criteria: "...similar, but not identical, to..." Simplex and Governor's Island
 - **Parapet signs:** (Supremes say...) trial court's decision unclear, but seems to be based on (1) public interest, (2) spirit of the ordinance, and (3) substantial justice. Trial court found the only apparent public benefit would be the ability to identify the property from far away; this purpose doesn't outweigh the "clear provision of the ordinance"
 - Supreme Court continues to collapse "public interest" and "spirit of the ordinance" into a single consideration

Variations, ... and New

- *Harborside Assoc. v. Parade Residence Hotel* (cont'd)
 - Public interest and spirit of the ordinance are related
 - “As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto” (quoting Chester Rod & Gun Club)
 - Mere conflict with the terms of the ordinance is insufficient to demonstrate that granting the variance would violate the ordinance’s basic zoning objectives
 - *Basic zoning objectives* – would granting the variance
 - alter the essential character of the neighborhood? or
 - threaten the public health, safety or welfare?
 - Trial court applied incorrect test: it’s not a question of whether it *serves* the public interest, only whether it violates the public interest
 - Here: record supports ZBA’s factual findings

Variations, ... and New

- *Harborside Assoc. v. Parade Residence Hotel* (cont'd)
 - Substantial justice: public benefit vs. private harm if denied
 - But the Court slips into an analysis of the public gain from *granting* the variance and mitigation of impacts based on locations chosen for siting of parapet signs (remember, they're not an allowed use, regardless of specific location); feels like a Boccia area variance analysis (though it would have been a use variance under the old test)
 - Remanded for consideration of hardship; other criteria met
 - **Marquee signs:** Supreme Court focuses on hardship in its first application of the new language in RSA 674:33
 - (A) ...“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.

Variations, ... and New

■ *Harborside Assoc. v. Parade Residence Hotel* (cont'd)

- “Special conditions of the property” – ZBA concluded that the “sheer mass of the building and the occupancy by a hotel” were special conditions. Trial court agrees. So do the Supremes.
- “Uniqueness” – does size matter? The key is not the special conditions of the thing for which the variance is sought (the signs), but the special conditions of the property on which the thing will be located (the building). In this case, size does matter.
- But something doesn't need to be truly “unique” – only very uncommon (“...there are ‘very few buildings’ in Portsmouth of a similar size...”)
- Smaller marquee signs could be used, but the proposed thing for which a variance is sought does not need to be *necessary* for the underlying use, it only needs to be *reasonable*, given the special conditions of the property.

■ Practice Points...

Variances, ... and New

- *Harborside Assoc. v. Parade Residence Hotel* (cont'd)

Practice Points

- Special conditions can be *created* based on circumstances; not limited to the natural environment
- The thing for which a variance is sought need not be necessary for the underlying use; it only needs to be reasonable
- Mere conflict with the terms of the ordinance is not a reason for denial (after all, that's why a variance is needed)
- Denial appropriate if contrary to the ***public interest***
 - If it unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives
 - Joined at the hip with "spirit of the ordinance"

Planning Board Approvals

■ *Limited Editions Properties v. Hebron* (2011)

- Proposed 20-lot subdivision of 112.5 acres at NW corner of Newfound Lake, close to Hebron Bay; 37.4 acres steeply sloping
 - Access road: 2,600 feet, 10% grade for about 1,600 to 1,700 feet and a “switch back” with a 150-foot curve radius; three retaining walls – 255’L x 26’H; 90’L x 17’H; and 75’L x 10’H – all topped by a 6’ metal fence
 - “Hebron Bay is down-slope from the proposed road.”
- Applicant wants ‘bifurcated’ review – “preliminary conditional approval” of the overall concept, particularly the road and lot layout; acknowledges the plan would not meet state regulations
- Board determines that it would not approve in stages
- Lots of hearings, lots of discussion, lots of deliberation
- Denied, 3-2; trial court affirms

Planning Board Approvals

- *Limited Editions Properties v. Hebron* (cont'd)
 - Applicant argues that there is an inadequate record, partly because the three who voted to deny did so for different reasons – “individual sentiments rather than collective consensus.”
 - Reasons of the three board members who voted to deny:
 1. aesthetics; probability of damage to neighbors and the lake
 2. safety of people and property, aesthetics, the clearing of trees
 3. maintenance of the dirt during the construction process erosion going into the lake, the road and the neighbors' yards
 - Board further discussed and agreed on this recitation

Planning Board Approvals

- *Limited Editions Properties v. Hebron* (cont'd)
 - Trial court concluded that the board denied based on “...aesthetics (damage to the scenic Lake District), safety concerns, and environmental concerns, including erosion and drainage.” Supremes uphold as reasonable
 - Lesson: vote on the whole, not on discrete elements
 - Compare Motorsports Holdings v. Tamworth (2010)

Planning Board Approvals

- *Limited Editions Properties v. Hebron* (cont'd)
 - Applicant argues there was not a full and fair hearing,
 - Applicant should have been allowed to proceed with state and federal permitting – presumption that public interest is met
 - The board had inadequate information to make an informed decision
 - Hearing was “cut short before vital information could be presented...”
 - State and Federal permits do not automatically create a presumption that public safety concerns have been met (compare Derry Senior Development, LLC v. Derry (2008))

Planning Board Approvals

- *Limited Editions Properties v. Hebron* (cont'd)
 - Applicant further complains that the board didn't seek independent engineering review, which the applicant resisted and then complained wasn't sought – but ample evidence on the record to support the board's decision
 - Subdivision regulation road standards were “technically” met, but aesthetic, environmental, and safety concerns remained
 - Also a suggestion that the applicant was not entirely forthcoming with the board about how the road would look
 - Applicant insisted on a bifurcated approval process; the board refused, fearing that it would not be able to revisit its conditions

Planning Board Approvals

■ *Limited Editions Properties v. Hebron* (cont'd)

Practice Points

- Planning boards do more than check boxes on a list
- Bifurcated process (preliminary conceptual approval) isn't an option provided by statute – conditions precedent, yes, but the board must do its own job
 - But a board can create its own processes, consistent with statutes
- State and Federal permits do not alone create a presumption of public safety; municipalities can require higher standards to be met (often)
 - Be aware of subject areas where local regulation may be preempted
- It's OK to express/rely on personal opinion, *in part*
- Different board members can come to the same conclusion for different reasons; but aggregate your reasons into a unified whole



Questions?