Land Use Law Update:
New Hampshire Supreme Court Cases

Local Government Center's 2011 Municipal Law Lecture Series

SUPPLEMENT #1

Christopher L. Boldt, Esq.
Donahue, Tucker & Ciandella, PLLC
Exeter, Portsmouth and Meredith, NH
cboldt@dtclawyers.com

I. SUBDIVISION AND SITE PLAN REVIEW

G. Limited Editions Properties, Inc. v. Town of Hebron, __ N.H. __ (Docket # 2010-586; Issued September 22, 2011) – Denial of Subdivision Application; Adequacy of Record; Distinguishing Motorsports & Derry Senior Development

- The Supreme Court affirmed the Trial Court's upholding of the Planning Board's denial of subdivision application on grounds of aesthetics, environmental and safety concerns.
- The developer sought approval for 20 lots on 112.5 acres at north end of Newfound Lake to be accessed via an internal road "2,600 ft. in length, with a 10% grade for about 1,600 to 1,700 ft. and would have a 'switch back' with a 150-ft.curve radius…3 substantial retaining walls, topped by a 6-ft metal fence: one retaining wall would be 255 ft. long, 40 to 50 ft. wide and 26 ft. high in the center; another would be 90 ft. long and 17 ft. high in the center; and the third would be 70 ft. long and 10 ft. high in the center. Hebron Bay is down-slope from the proposed road."
- The developer sought "preliminary conditional approval" prior to going for state and federal permits; and the Planning Board refused saying that it could not approve the application "in stages" but would either conditionally approve the application or deny it.
- After several hearings, a motion to deny the application passed 3 – 2.
- On appeal, the developer relied on Motorsports Holdings v. Tamworth claiming that the Board failed to provide a record capable of meaningful review because it did not provide a written notice of decision containing its reasons.
- The Supreme Court distinguished Motorsports and held that the Board here held a detailed discussion of specific concerns and adequately listed its reasons for denial in its minutes wherein individual members stated their concerns over aesthetic damage to the Lake District, safety concerns over the slope of the road, and environmental concerns including erosion and drainage during and after construction.

- The Supreme Court also held that the Board gave the developer a full and fair hearing and that the developer's "tactical decision" to proceed without the engineering information needed for the state and federal permits was "not an error attributable to the Board."
- The Supreme Court further rejected the developer's interpretation of Derry Senior Development that "meeting state and federal agency requirements creates a presumption that the proposal protects the public interest." Rather the Court noted that the regulations involved in Derry (which incorporated the state standard) created the presumption and that "the presumption does not, as the petitioner suggests, attach automatically."
- The Court also rejected the developer's claim that the Board had misrepresented the procedures to be followed and "prematurely denied the application…before vital information could be presented." In so doing, the Court reviewed the "unofficial transcripts" provided by the developer and relied upon by both parties without objection; and in so doing, the Court noted that the developer had objected to the Board's desire for another engineering review claiming that the Board had "all the information it needed to approve the application" and that it was the developer's responsibility to present the Board with evidence sufficient to make its decision.
- Furthermore, the Court rejected the developer's claim that the Board's decision was based on personal opinion: "Although a planning board is entitled to rely in part on its own judgment and experience in acting upon applications, the board may not deny approval on an ad hoc basis because of vague concerns." Here, the Board members "may have, at times, expressed personal opinions and feelings, the record shows that they based their decision on the evidence presented."
- That evidence included staff comments, analysis of a review engineer, and testimony of the executive director of the Newfound Lake Region Association.

III. VARIANCES

G. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, __ N.H. __ (Docket # 2010-782; Issued September 22, 2011) – Sign Variances under the "New" Standard

- 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."

- 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.
- 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.
- 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."
- The Court noted that it has "recognized two methods for ascertaining" whether such a violation occurs: (1) whether the variance would "alter the essential character of the neighborhood" or (2) whether the variance would "threaten public health, safety or welfare."
- 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.
- 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."
- 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.
- 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."
- 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.
- 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.

- "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'."
- 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."
- 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.
- 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."
- Accordingly, the grant of the marquee sign variance was upheld.