THE ZONING BOARD OF ADJUSTMENT IN NEW HAMPSHIRE
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A. INTRODUCTION

The purpose of this Article is to give you, as a volunteer ZBA member, an overview (along with a few "cheat sheets") concerning the four main areas of your deliberations: (i) Appeals of Administrative Decision; (ii) Special Exceptions, (iii) Variances, and (iv) Equitable Waivers. A far more-lengthy article on the basic overview of the organization, powers, duties and relevant statutory and case law authority from prior years' presentations are still available on my Firm's website as well as on the websites of the New Hampshire Office of Strategic Initiatives ("OSI", formerly known as "the Office of Energy and Planning"), the New Hampshire Municipal Association ("NHMA"). I also highly recommend the various articles and materials of both the NHMA and OSI together with 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. 2021) (referred to as "Loughlin", herein) being of particular value to ZBA members. I also 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.

B. 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, 172 N.H. 69 (2019)(remand for ZBA to consider whether the Trust/fraternity was an "institution" itself under the Zoning Ordinance provisions); Working Stiff Partners, LLC v. Portsmouth, 172 N.H. 611 (2019)(interpretation of Zoning Ordinance definition of "dwelling unit" as distinct from listed "transient occupancy" such as hotel, motel, rooming house or boarding house to support prohibition of Airbnb type usage).

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.

[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 March 28, 2019.

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. See, PPI Enters., LLC v. Town of Windham, ___ N.H. ___ (Docket Nos. 2020-0249 & 2020-0250; Issued June 23, 2021; 2021 N.H. Lexis 109).

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 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 Assocs. 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, Signs for Jesus et al. v. Town of Pembroke, et al., 977 F3d 93 (1st Cir. Court of Appeals; Issued October 7, 2020) (Electronic Sign involving 1st Amd & RLUIPA Claims; ZBA's denial of sign permit upheld); 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.

A summary checklist for such Appeals is attached as "**Appendix A**".

C. 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 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)(ZBA cannot ignore need for Special Exception clearly required under the circumstances); 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).

[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.

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.

A summary checklist for such Special Exceptions is attached as "**Appendix B**".

D. 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 if you are a history buff and truly have trouble sleeping, 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 may still available at the NHMA website or in the wilds of the Internet.

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:

> (2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
>
> (A) The variance will not be contrary to the public interest;
>
> (B) The spirit of the ordinance is observed;
>
> (C) Substantial justice is done;
>
> (D) The values of surrounding properties are not diminished; and
>
> (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
>
> (b)(1) For purposes of this subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
>
> (A) 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
>
> (B) The proposed use is a reasonable one.
>
> (b)(2) If the criteria in subparagraph (1) 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.
>
> (b)(3) 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 (A)(2).

A summary checklist for Variances is attached as "**Appendix C**".

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 (b)(1) and (b)(2) 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)(2), 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 (b)(1) is not met, this second standard does not precisely mirror the language from Governor's Island[4].

b. Perreault v. Town of New Hampton, 171 N.H. 183 (2018)

In this case, after several hearings and site visits and a rehearing, the ZBA denied a variance for a permanent shed one (1) foot from the side boundary line (when 20 was required) adjacent to a non-conforming shed on the abutting property (despite the impacted abutter's support); and the Trial Court and the Supreme Court upheld that denial. The ZBA specifically found that the shed would contribute to congestion in the area, that there was an alternative location that would not need a variance, and that the "other violations" of sheds in the neighborhood either (i) predated the zoning provision, (ii) were not in violation, or (iii) were previously unknown to the Town and were now under investigation.

In affirming the lower Court's decision, the Supreme Court noted the limited nature of judicial review in zoning cases, the "prima facia" lawful and reasonable standard, and that the Court's review is "not to determine whether it agrees with the ZBA's findings, but

[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.

to determine whether there is evidence upon which they could have been reasonably based." Id., at 186. The Court again restated that the First and Second Variance Criteria are related and viewed under the same standard of "unduly and in a marked degree conflict with the stated purposes of the Zoning Ordinance" with a citation back to Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007); and that "mere conflict with the terms of the ordinance is insufficient" with a citation back to Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 512 (2011). Perreault at 186.

One additional interesting aspect of the Perreault decision is its analysis of the "cumulative effect" comment in the plurality decision of Bacon v. Town of Enfield, 150 N.H. 468 (2004). That "cumulative effect" (whether the project in question has an impact on the neighborhood "if everyone did it") was considered by the ZBA and the Trial Court and not challenged by the Applicant; and that lack of challenge allowed the Supreme Court to "assume, without deciding, that is a proper consideration in the variance context." Perreault, at 188. Given the ZBA's stated concern against "overbuilding lots", the Supreme Court found that there was no error of law in the conclusion. Id., at 188-189.[5]

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

This was 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)(1) and (b)(2) are "similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island. Id., at 513.

[5] But see, Dietz v. Town of Tuftonboro, 171 N.H. 614 (2019), where the Court rejected the Abutter's attempt to use that "cumulative effect" argument in an Equitable Waiver case since Bacon was not binding precedent.

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.

d. 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),[6] many of the decisions

[6] 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 time

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

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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.

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.[7]

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 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

[7] 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.

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.

e. 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).

E. EQUITABLE WAIVERS OF DIMENSIONAL REQUIREMENTS

i. Statutory Criteria

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."[8] 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.

ii. Dietz v. Town of Tuftonboro, 171 N.H. 614 (2019)

In this case, 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 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."[9]

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

[8] Note, however, that a 3JX (i.e., non-binding precedent) case of RDM Trust v. Town of Milford (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.

[9] The Court in Dietz 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.

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.

F. 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 may indirectly 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. When in doubt, we urge the Chairs to consult with your own municipality's attorney for actual applications of these statutes and decisions to any fact patterns facing particular boards, we urge the Chairs to contact their legal counsel. As we said in the beginning, 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.

APPENDIX A

REQUIREMENTS FOR APPEALS OF ADMINISTRATIVE DECISIONS (NHMA LAND USE CONFERENCE SEPTEMBER 18, 2021) by

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- Confirm that the "Administrative Decision" involves only the Zoning Ordinance or ordinances adopted via the Town Meeting/City Council public hearing process.
    - ZBA does not have authority to review Decisions of the Planning Board concerning its Site Plan or Subdivision Regulations.
    - Likewise, the ZBA does not have authority over the Selectmen's decision to bring an enforcement action, even if the subject is within the Zoning Ordinance

- Confirm that the Appeal was "timely filed" in accordance with the provisions of the Zoning Ordinance or, if the Ordinance is silent, the ZBA's Rules of Procedure.
    - If both are silent, call your Municipal attorney who will look to the Court cases on what is or is not timely.
    - Consider when Planning Board made its "decision" under the Zoning Ordinance, which may be earlier than the Planning Board's ultimate vote to approve or deny the Site Plan/Subdivision Application. See, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) and Saunders v. Town of Kingston, 160 N.H. 560, 564-565 (2010).
        - 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).

- Appeal to ZBA may or may not be on "dual track" with Court case involving Planning Board decision. See, RSA 677:15.

- 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).

APPENDIX B

REQUIREMENTS FOR SPECIAL EXCEPTION APPLICATIONS (NHMA LAND USE CONFERENCE SEPTEMBER 18, 2021)

by

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- Confirm the applicable checklist of criteria within the Zoning Ordinance.

- Special exceptions are for allowed uses under the Zoning Ordinance.

- Applicant bears burden of proving each of the criteria listed in the Zoning Ordinance.

    - If met, Applicant gets Special Exception.
    - ZBA can't change the criteria
        - ZBA can consider an Application for a Variance for one or more of the Criteria, but then the Applicant has to meet the Variance Criteria for that issue.
        - Compare, Tidd v. Town of Alton, 148 N.H. 424 (2002); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991)(ZBA cannot ignore need for Special Exception clearly required under the circumstances); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988). with, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011)

- On issues of 2-year lifespan of granted Special Exceptions, review RSA 674:33, IV, RSA 674:33, I-a (b) and RSA 674:33, IV (c).

APPENDIX C

REQUIREMENTS FOR VARIANCE APPLICATIONS
(NHMA LAND USE CONFERENCE SEPTEMBER 18, 2021)

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, Perreault v. Town of New Hampton, 171 N.H. 183 (2018), 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.

The 2010 legislative change eliminated 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 to 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.

Whatever the decision, support the findings on the Criteria with "because statements".

APPENDIX D

REQUIREMENTS FOR EQUITABLE WAIVERS
(NHMA LAND USE CONFERENCE SEPTEMBER 18, 2021)

by

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- Confirm that the issue is one of dimensional violation (e.g. setbacks, height) not use. See, Schroeder v. Windham, 158 N.H. 187 (2008).

- Review the four statutory criteria set out in RSA 674:33-a, which are in shorthand below:
    - The violation of the structure was not noticed or discovered until after substantial completion (or if involving a subdivision issue, after conveyance to a bona fide purchaser for value);

    - The violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith, but was instead caused by either a good faith error in measurement or calculation by the owner/agent **or** by an error of ordinance interpretation or applicability by a municipal official in issuing a permit;

    - The 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; and

    - Due to the degree of construction or investment, the cost of correction outweighs any public benefit to be gained such that it would be inequitable to require a correction.

        - 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.

- Review **Dietz v. Town of Tuftonboro, 171 N.H. 614 (2019)**