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 a basic overview of the organization, powers, duties and relevant statutory and case law authority to make your service both more enjoyable and productive. I highly recommend the various materials made available to you through the New Hampshire Office of Energy and Planning, the New Hampshire Local Government Center, and the noted treatises of Portsmouth Attorney Peter Loughlin found in the New Hampshire Practice Guide Series, with Vol. 15 Land Use Planning and Zoning (4th Ed., 2000; Supp. 2011) (cited hereafter as "Loughlin") being particularly useful for more in depth discussions on the topics covered by this Article as well as many related topics beyond the scope of this Article. I strongly suggest that you consult with your municipality's legal counsel on any specific question 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. ORGANIZATION OF THE ZBA

1. Establishment and Organization

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

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

Upon appointment or election, the ZBA members must take the oath of office set forth in Part II, Article 84 of the New Hampshire Constitution per RSA 42:1; and the

municipal records should clearly state the dates of appointment/election and expiration of terms. While the provisions of RSA 673:3-a are not mandatory, it is recommended each member complete at least six (6) hours of training within six (6) months of assuming office for the first time.

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

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

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

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

2. Alternate Members

Up to five (5) alternate members may be provided for by the local legislative body to be either elected or appointed as the case may be. See, RSA 673:6. The terms of such alternate members shall also be three (3) years and staggered as with full members. Alternates serve in the absence of a "full" member and are appointed to sit on a particular case or meeting by the chairperson. RSA 673:11. If the "full" member is not just absent or disqualified for the meeting, then the procedures of RSA 673:12 concerning vacancies must be followed. Per RSA 673:6, V, alternate members of land use boards may participate in meetings of the board as a non-voting member, provided that the Board

establishes procedural rules to set the details of how and when the alternate may participate.

3. Filling Vacancies

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

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

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

4. Removal of Members

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

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

5. Rules of Procedure

Although RSA 676:1 does not prescribe the content of the ZBA's Rules of Procedure, this statute does mandate that the ZBA have such Rules. Such Rules must be adopted at a regular public meeting with a copy thereafter kept on file with the City,

Town or Village District Clerk to be available to the public. A copy should also be available on the municipality's website and to an applicant with the application packet.

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

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

A set of model Rules of Procedure can be found on the website of the New Hampshire Office of Energy and Planning as Appendix A to The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OEP revised November 2015): http://www.nh.gov/oep/planning/resources/documents/zoning-board-handbook.pdf

C. POWERS AND DUTIES

1. Separation from Other Municipal Boards

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

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

The express powers of the ZBA are set forth in RSA 674:33, and include the power to hear administrative appeals, to grant variances and special exceptions, and,

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

2. Appeals of Administrative Decisions

Pursuant to RSA 674:33, I(a) and RSA 676:5, the ZBA is charged with the duty to hear appeals "taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer" concerning the zoning ordinance. RSA 676:5, I. An "administrative officer" is defined as "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." RSA 676:5, II(a); see, e.g., Ouellette v. Town of Kingston, 157 N.H. 604 (2008)(ZBA properly conducted *de novo* review under RSA 674:33 of Historic District Commission denial of certificate for supermarket); and Sutton v. Town of Gilford, 160 N.H. 43 (2010)(challenges to building permit must first be made to ZBA). A "decision of the administrative officer" is further defined to include "any decision involving construction, interpretation or application of the terms of the [zoning] ordinance" but does not include "a discretionary decision to commence formal or informal enforcement proceedings". RSA 676:5, II(b).

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.

[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 has been pushed out to July 1, 2017.

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

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

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

The Supreme Court confirmed that a planning board decision regarding a zoning ordinance provision is ripe and appealable to the ZBA when such a decision is actually made. See, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) and Saunders, 160 N.H. at 564-565. The planning board need not complete its consideration of the planning issues involved in a site plan review for a zoning issue to be ripe and appealable to the ZBA. Id. at 510. Therefore, an appellant who waits to appeal the zoning issue to the ZBA until a final decision on the plan is made by the Planning Board runs the risk of filing an untimely appeal to the ZBA. But see, Accurate Transport, Inc. v. Town of Derry, 168 N.H. 108 (2015)(mere vote to accept a plan as complete for jurisdictional purposes is not enough to trigger requirement to file appeal of administrative decision – apparently distinguishing Atwater on the level of discussion of the zoning issue involved). However, an appellant does get a "second bite at the apple" when a developer comes in to amend their previously approved application. See, Harborside v. City of Portsmouth, 163 N.H. 439 (2012)(ZBA's decision to uphold Planning Board's amendment of site plan which allowed change of use within approved space from retail to conference center after parking regulations had been modified reversed on appeal.)

Additionally, ZBA has authority to determine that unappealed CEO's decision that variance is needed was error. See, Bartlett v. City of Manchester, 164 N.H. 634

(2013) ("contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance.")

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

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

Note also that appeals of administrative decisions may well include constitutional challenges against the applicable provisions of the zoning ordinance. See, Carlson's Chrysler v. City of Concord, 156 N.H. 399 (2007)(provisions of sign ordinance against auto dealer's moving, electronic sign found to be constitutional); see also, Community Resources for Justice, Inc. v. City of Manchester, 157 N.H. 152 (2008)(ban on private correctional facilities in all districts violated State constitutional rights to equal protection; intermediate scrutiny requires the government to prove that the challenged ordinance be substantially related to an important governmental objective); Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633 (2006)(overturning prior Metzger standard of review and redefining the "rational basis test" to require that the ordinance be only rationally related to a legitimate governmental interest without inquiry into whether the ordinance unduly restricts individual rights or into whether there is a lesser restrictive means to accomplish that interest); and Taylor v. Town of Plaistow, 152 N.H. 142 (2005)(ordinance provision requiring 1000 feet between vehicular dealerships upheld).

Additionally, such appeals may involve claims of municipal estoppel, the law of which has been in a considerable state of flux in light of recent 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). Accordingly, the ZBA should seek advice of municipal counsel before voyaging into these rough and ever changing waters.

3. Special Exceptions

Pursuant to RSA 674:33, IV, the ZBA has the power to make special exceptions to the terms of the zoning ordinance in accordance with the general or specific rules contained in the ordinance. Cf., Tonnesen v. Town of Gilmanton, 156 N.H. 813 (2008)(without referring to RSA 674:33, the Court upheld the Town's right to "regulate and control" via special exception aircraft takeoffs and landing under RSA 674:16, V). It is important to remember the key distinction between a special exception and a variance. A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5000 square feet is permitted in the zone so long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone (formerly termed a "use" variance), or to construct the new building partially within the side set-back line (formerly an "area" variance); and, as is set forth below in more detail, the standards for any variance without distinction are the subject of much judicial interpretation and flux.

A use permitted by special exception is also distinguishable from a non-conforming use. As described above, a special exception is a *permitted* use provided that the petitioner demonstrates to the ZBA compliance with the special exception requirements set forth in the ordinance. By contrast, a non-conforming use is a use existing on the land that was lawful when the ordinance prohibiting that use was adopted. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011)(Supreme Court held that ZBA did not err in ruling that office building permitted by special exception is not entitled to expand per doctrine of expansion of nonconforming use).

In the case of a request for special exception, the ZBA may not vary or waive any of the requirements set forth in the ordinance. See, Tidd v. Town of Alton, 148 N.H. 424 (2002); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988). Although the ZBA may not vary or waive any of the requirements set forth in the ordinance, the applicant may ask for a *variance* from one or more of the requirements. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011)(Court noted that petitioner was allowed to use its building for office space because it had a special exception and was allowed to devote 3,700 of its building's square footage for such a use because it obtained a variance from the special exception requirement that the building's foundation not exceed 1,500 square feet).

The applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002). Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Section 23.02, page 365. Finally, as with variances, special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958); see also, Loughlin, §23.05, page 369; but see, Garrison v. Town of Henniker, 154 N.H. 26 (2006)(Supreme Court noted without comment the restriction on the variance that it would terminate if the applicant transferred the property).

Note that effective September 22, 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.

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, municipalities should be working with their attorneys to be sure that appropriate amendments to the Zoning Ordinance are crafted in time for adoption during the 2017 Town Meeting cycle.

4. Variances

As ZBA members across the State are aware, the changes to the standards for variances begun with the Simplex decision in December 2001 and modified with the Boccia decision in May 2004, have continued to evolve through the intervening years. A

detailed analysis of the development of these standards is beyond the scope of this article; but I direct you to my articles on this subject from the 2005 LGC Lecture Series "A Brief History of Variance Standards" and the 2009 LGC Lecture Series "The Five Variance Criteria in the 21st Century" (co-authored with Attorney Cordell Johnston of the LGC), which are available at http://www.nh.gov/oep/resource-library/zoning/documents/the-five-variance-criteria-in-the-21st-century.pdf.

a. The "New" 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 language as signed by the Governor is as follows:

> 1 Powers of Zoning Board of Adjustment; Variance. RSA 674:33, I (b) is repealed and reenacted to read as follows:
>
> > (b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
> >
> > (1) The variance will not be contrary to the public interest;
> >
> > (2) The spirit of the ordinance is observed;
> >
> > (3) Substantial justice is done;
> >
> > (4) The values of surrounding properties are not diminished; and
> >
> > (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
> >
> > > (A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
> > >
> > > > (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
> > > >
> > > > (ii) The proposed use is a reasonable one.
> > >
> > > (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

> The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

RSA 674:33, I (b).

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

While this new language has applied to all variance applications/appeals filed on or after January 1, 2010, there continues to be much discussion amongst members of the municipal/land use bar of whether this revision works a "simplification" or a "complication" of the variance standard. While the stated rationale for this legislation was to codify the Simplex criteria for "unnecessary hardship," the language of the statute does not track the three-prongs of Simplex (see below). "Special conditions" of the subject property are clearly emphasized; but both subparagraphs (A) and (B) rely in large part on the subjective determination of what is a "reasonable" use – a determination which could well retain the economic considerations many boards found difficult in applying the Boccia criteria. Additionally, while the opening clause of subparagraph (B), coupled with the Statement of Intent of SB 147, Sec. 5[2], clearly state that an applicant reaches this second standard if the first set of criteria in subparagraph (A) is not met, this second standard does not precisely mirror the language from Governor's Island[3].

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[2] 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)."

[3] 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.

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

The key decision to have been issued by the Supreme Court since this "new" standard has been adopted is Harborside Associates. The Supreme Court affirmed in part, reversed in part and remanded the Trial Court's partial affirmance and partial reversal of ZBA's grant of sign variances for Parade's new Marriot hotel (down the street from Harborside's Sheraton hotel). Parade sought variances for 2 parapet signs (which were not allowed in the district) and 2 marquee signs of 35 sq. ft. when only 20 sq. ft. are allowed in the district. ZBA voted to grant the requests with express statements of reasons including: placement of parapet signs did not "feel like visual clutter"; signs will not be contrary to public interest, result in no change to the neighborhood nor harm health, safety or welfare; sheer mass of the building and occupancy by a hotel create a special condition; proposal is reasonable and not overly aggressive; marquee signs will not disrupt visual landscape and will enhance streetscape; no benefit to public via denial; "no evidence that this well thought out design would negatively impact surrounding property values." Id., at 511-12. The Trial Court reversed the grant of the parapet sign variance but affirmed the grant of the marquee sign variance. Accordingly, both sides appealed.

The Supreme Court noted that this case was decided under the revised variance standard effective January 1, 2010; and in stating the text of the unnecessary hardship criteria, the Court noted that the two definitions of RSA 674:33, I (b)(5)(A) and (B) are "similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island. Id., at 513.

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

The Court similarly examined the substantial justice criterion and restated its position from Malachy Glen, Harrington and Daniels that "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general

public is an injustice." Id., at 515. The Court again chastised the Trial Court for its focus on "the only apparent benefit to the public would be an ability to identify [Parade's] property from far away" while the ZBA correctly focused on whether the public stood to gain from a denial of the variance. Id., at 516. The Court again considered the record to support the ZBA's factual findings so that the Trial Court's ruling on this criterion was reversed; but the Court remanded the parapet sign variances back to the Trial Court to "consider the unnecessary hardship criteria in the first instance." Id., at 517.

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

The Court similarly rejected Harborside's argument that Parade could not meet the public interest, spirit of the ordinance or substantial justice criteria because it could have achieved "the same results" by installing smaller signs: "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia. Id. Finally, the Court rejected Harborside's argument that there was no evidence on no diminution of surrounding property values other than the statement of Parade's attorney since "it is for the ZBA...to resolve conflicts in evidence and assess the credibility of the offers of proof' and that the ZBA was "also entitled to rely on its own knowledge, experience and observations." Id. Accordingly, the grant of the marquee sign variance was upheld.

c. Several "Old Chestnuts"

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

receives the next wave of variance appeals; but I believe that we can expect the following cases to remain viable, at least in part.

i. Simplex and "Unnecessary Hardship"

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

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

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

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

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

ii. Rancourt and "Reasonable Use"

The first decision to actually apply the new Simplex standard to a variance application on appeal was Rancourt v. City of Manchester, 149 N.H. 51 (2003). In Rancourt, the appeal was brought by abutters who had lost before the ZBA and the Hillsborough County Superior Court (Barry, J.) on the applicants' variance request to

stable horses on the applicants' three acre residential lot. In starting its analysis, the Supreme Court noted that variance applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land: "Rather, they must show that the use for which they seek a variance is 'reasonable,' considering the property's unique setting in its environment." Id., at 53 - 54.

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

iii. Vigeant and the Applicant's Reasonable Use

While Boccia v. City of Portsmouth, 151 N.H. 85 (2004), has been written out of the list of relevant case law as a result of SB 147 (at least for now),[4] many of the decisions that would have been considered progeny of Boccia may still be relevant for their discussions of the remaining four "non-hardship" criteria. One such case is Vigeant v. Town of Hudson, 151 N.H. 747 (2005), wherein the Court agreed in part with the Town's argument that the reasonableness of the proposed use must be taken into account and held that "it is implicit under the first factor of the Boccia test that the proposed use must be reasonable." Id., at 752. However, the Court limited that holding:

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

Id., at 752 – 753. An argument can be made that this logic still applies under the "new" hardship criteria since "reasonableness" expressly remains as an element to be proven by

[4] 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 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.

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.

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.[5]

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 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

[5] 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.

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

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

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

property was used entirely as offices, the traffic and intensity of usage would be greater. Id.

d. Disability Variances

An additional authority granted to the ZBA by RSA 674:33, V, concerns the ability to grant variances without a finding of unnecessary hardship "when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises." This statutory provision requires that the variance "shall be in harmony with the general purpose and intent" of the ordinance. RSA 674:33, V(a). Furthermore, the ZBA is allowed to include a finding in the variance such that the variances shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

5. Other Powers and Responsibilities

a. Equitable Waivers of Dimensional Requirements

Pursuant to the terms of RSA 674:33-a, the ZBA has the power to grant equitable waivers from physical layout, and mathematical or dimensional requirements imposed by the zoning ordinance (but not use restrictions – see, Schroeder v. Windham, 158 N.H. 187 (2008)) when the property owner carries his burden of proof on four (4) criteria:

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

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

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

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

Accordingly, this provision is sometimes considered an escape hatch for an "honest mistake." 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.

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

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

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

c. Staff and Finances

Per the terms of RSA 673:16, I, the ZBA is authorized to appoint "such employees as it deems necessary for its work who shall be subject to the same employment rules as other corresponding civil employees of the municipality." Additionally, this provision authorizes the ZBA to contract with "planners, engineers, architects and other consultants for such services as it may require." As a practical note, however, such employees or contractors can only be paid via funds allocated to the ZBA by the legislative body so that, in light of typically small ZBA budgets, such hiring must occur through the auspices of the Selectmen or Town/City Council. With the limited exception of when the ZBA and the Selectmen/Council are on opposite sides of a lawsuit, this usually means that ZBA will not have the ability to select its own counsel to handle ZBA issues. See, RSA 673:16, II; and Loughlin, §21.08, page 324. The ZBA is authorized, however, to expend fees collected from applicants for particular purposes (such as notice, mailings, and engineer review) on such purposes without approval of the local legislative body. RSA 673:16, II. This statute also mandates the procedures under which such funds are to be kept and disbursed.

D. PROCEDURES AND PROCESSES

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

As part of its responsibility to adopt Rules of Procedure, the ZBA should also adopt acceptable forms of applications so that both the applicant knows what information must be provided to the board and the board knows what it is being asked to consider. As with the model Rules of Procedure, the OEP has provided various forms as attachments to its The Board of Adjustment in New Hampshire – A Handbook for Local Officials, (OEP revised November 2015).

In addition to providing the basics of property location, identity of owner and applicant (if different), type of relief sought, and how the criteria for such relief are met in the eyes of the applicant, the application must also provide a complete and accurate mailing list of all abutters and conservation/preservation restriction holders who are to receive notice. In this way, the ZBA can comply with the statutory requirements of RSA 676:7, I(a) to provide written notice of the date, time and place of the hearing to such persons and the applicant by certified mail at least five (5) days before the date fixed for the hearing. Additionally, a public notice must be published in a paper of general circulation in the area not less than five (5) "clear" days before the date fixed for the hearing (i.e., not including the date of posting). RSA 676:7, I(b) and RSA 675:7, I.[6] The costs of such notices shall be paid by the applicant in advance; and failure to pay such costs constitutes valid grounds for the ZBA to terminate further consideration and to deny the appeal without public hearing. RSA 676:7, IV. Note that failure to provide proper notice to all appropriate persons or failure to properly describe the relief being sought invalidates the proceedings and requires a fresh hearing. See, Hussey v. Barrington, 135 N.H. 227 (1992); Sklar Realty, Inc. v. Merrimack, 125 N.H. 321 (1984); and Carter v.

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

Furthermore, RSA 675:7, II was amended by adding the following: "The notice of a hearing on a proposed amendment to a zoning ordinance to be sent electronically or by first class mail shall include a statement describing, to the greatest extent practicable and in easily understood language, the proposed changes to the zoning ordinance, the areas affected, and any other information calculated to improve public understanding of the proposal."

Nashua, 113 N.H. 407 (1973); cf., Weeks Restaurant Corp. v. Dover, 119 N.H. 541 (1979).

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

Two additional items that the ZBA may consider requiring in an application include: (i) the decision of the Zoning Administrator or Code Enforcement Officer from which the appeal is brought, and (ii) copies of all prior ZBA and/or Planning Board decisions affecting the subject property. In this way, the ZBA members can be assured that they know the context in which the appeal is brought and that there has been a significant change in circumstances or the application itself to warrant the ZBA's acceptance of any reapplications. See, Fisher v. Dover, 120 N.H. 187, 190 (1980)("When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition."); but see, The Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009)(Fisher could not be used as a "sword" to argue that a second variance application would be futile – especially where the ZBA invited the second application). Note also that if the file indicates that a variance was denied under the "old" variance criteria – especially prior to Simplex, then a "significant change of circumstance" may have occurred as a matter of law requiring the new application to be considered under the current variance criteria. See, Brandt Development Company of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553 (2011). See also, CBDA Development, LLC v. Town of Thornton, __ N.H.__(Docket No. 2014-0775; Issued April 7, 2016)(the Fisher Standard applies to Planning Board decisions as well).

2. Public Hearings and Site Walks

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

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

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

It is advisable that the Chair maintain both order and decorum during the meetings. Speakers should neither be allowed to drone on without end nor directly argue with an opponent. Plans or drawings should be posted on an easel or bulletin board where they can be viewed by the participants; but reduced copies can and should be available to the board members to ease in their deliberations. Once the public hearing is concluded, no further public input should be allowed – from either the applicant or the other parties – unless in response to direct questions from the board.

There are frequently instances where the ZBA would benefit from a site walk of the subject property. Remember that such activities constitute a meeting of a quorum of the board so that all provisions of RSA 91-A must be complied with including notice and minutes. The notice provisions can be complied with by announcing the date and time of the site walk during the original public meeting; but an agenda for such site walk should

still be posted. If a significant portion of the interested parties have already left the original meeting by the time the board makes its determination to hold a site walk, a "best practice" is to mail notice of the walk to the same persons entitled to the original notice.

3. Joint Meetings/Hearings

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

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

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

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

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

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

In Thomas v. Town of Hooksett, 153 N.H. 717 (2006), the Supreme Court vacated the Trial Court's reversal of the ZBA's grant of a variance and remanded the matter for further proceedings. In part, the Trial Court's reversal had been based on the fact that the ZBA had made no finding as to why a departure from the ordinance was justified. In reviewing the decision, the Supreme Court noted that the applicant had addressed the five elements for a use variance in its application and that the ZBA "briefly discussed the variance and ruled unanimously in favor of granting it." Moreover, the Supreme Court held that "the ZBA's decision to grant the variance amounted to an implicit finding by the board that the Simplex factors were met." Id., at 724, *citing*, Pappas v. City of Manchester Zoning Board, 117 N.H. 622, 625 (1977). In concluding on this point, the Court noted the following:

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

Id., *again citing*, Pappas. The Court noted that, while it disagreed with the Trial Court's determination that the ZBA was required to set forth specific findings to support its decision to grant the variance, the matter should be remanded back to the ZBA since it gave only cursory consideration to the variance criteria in light of the companion appeal of administrative decision concerning a revoked building permit. See also, Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998)(ZBA denial reversed because it failed to support both its finding of adverse effect of pit access road and its finding that existing town road was on historic or natural landmark).

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

5. Requests for Rehearing

Under the provisions of RSA 677:2, a motion or request of rehearing must be filed with the ZBA within 30 days after any order or decision of the ZBA by "the selectmen, any party to the action or proceedings, or any person directly affected thereby…". See, e.g., Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013). The 30 day period is calculated in calendar days "beginning with the date following the date upon which the board voted to approve or disapprove the application." This avoids the "30 means 29" trap that has caught more than one applicant (and attorney) unaware. See, Ireland v. Town of Candia, 151 N.H. 69 (2004); and Pellitier v. City of Manchester, 150 N.H. 687 (2004). See also, Trefethen v. Town of Derry, 164 N.H. 754 (2013) (Deadline under 30 day rule of RSA 677:4 extended to following business day if deadline falls on a Saturday, Sunday or legal holiday per RSA 21:35, II.) If the minutes of the meeting, including the written decision, were not filed within 5 business day of the vote, then the applicant shall have the right to amend the motion/request and the grounds therefore within 30 days after the date the decision is filed; but this still requires that the original time line must have been met. See, DiPietro v. City of Nashua, 109 N.H. 174 (1968)(decided under former statute).

The motion or request for rehearing is required to set forth fully every ground upon which it is claimed that the decision or order is unlawful or unreasonable. RSA 677:3. This statute further provides that:

> No appeal from any order or decision…shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

Thus, the motion/request for rehearing is a jurisdictional prerequisite to an appellant's right to bring suit in Superior Court and a jurisdictional limitation on what claims the

Court can consider. See, Kalil v. Town of Dummer, 159 N.H. 725 (2010)(appeal brought in guise of inverse condemnation claim six months after ZBA's denial of variance application was barred); Cardinal Development Corporation v. Town of Winchester ZBA, 157 N.H. 710 (2008)(request for rehearing faxed to ZBA office after close of business on Monday following 30th day not timely filed where ZBA did not have procedural rule allowing faxed or after-hours filings); McNamara v. Hersh, 157 N.H. 72 (2008)(rejecting attempt to couch late filed appeal of administrative decision as a declaratory judgment action); Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642 (2000)(appeal correctly dismissed where plaintiff failed to file a request for rehearing on special exception); and, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010)(rejecting argument that the ZBA erred in concluding petitioners had only fifteen days to appeal the planning board's decision because petitioners failed to raise this argument in the motion for reconsideration filed with the ZBA); but see, Colla v. Town of Hanover, 153 N.H. 206 (2006)(reversing dismissal of Superior Court appeal where request for rehearing listing such grounds as "the decision is unreasonable", "the decision denies their constitutional rights to equal protection and due process", "the decision is contrary to Boccia", and "the decision is contrary to the ordinance" was deemed to be sufficient); The Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009)(regulatory taking claim considered – and denied on other grounds – despite no appeal of variance denial); and Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013)(issues raised by successful party before ZBA can be basis for affirmance of decision by Court).

Once a motion or request for rehearing has been filed, the ZBA is obligated to either grant or deny the application (or suspend the order or decision complained of pending further consideration) within 30 days. The purpose of a request for rehearing is to afford the ZBA the opportunity to correct its own mistakes; and a board is entitled to reconsider its prior ruling and upon reconsideration make the same decision for the same or different reasons. See, Fisher v. Town of Boscawen, 121 N.H. 438 (1981)(decided under former statute). The board's decision must be entered upon its records and should be communicated to the applicant in writing, but the board is not required by statute to state its reasons or to hold a public hearing on the subject (although the decision must be made at a public meeting). See, Loughlin, §21.16, page 334. .If the board takes no action within the 30 day period and does not request an extension of time, it may be assumed that the motion has been denied and that the applicant should proceed to Superior Court. Id., *citing*, Lawlor v. Salem, 116 N.H. 61 (1976)(town ordinance provided that if motion for rehearing was not acted upon within 10 days it was automatically considered to have been denied).

In McDonald v. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171 (2005), the Supreme Court addressed the issue of whether a second motion for rehearing is required when the ZBA ruled on a new issue in its denial of the motion for rehearing. The Court concluded that the statutory scheme does not anticipate that a zoning board will render new findings or rulings in the denial of a rehearing motion, and, accordingly, held that when a ZBA denies a motion for rehearing, the aggrieved party need not file a second motion for rehearing to preserve for appeal any new issues, findings or rulings

first raised by the ZBA in that denial order. Id., at 174-175. The Court did note that "a better practice for the ZBA to take when it identifies new grounds for its initial decision and intends to make new findings and rulings on them in response to a motion for rehearing would be for it to grant the rehearing motion without adding new grounds for denying the variance application." Id., at 176. In that way, after the rehearing and new order citing new grounds for denial, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon, at that time, to preserve them for appellate review. The Court also noted that the Superior Court may consider on appeal an issue not first set forth in a motion for rehearing under the "good cause" exception in RSA 677:3, I. Id. In so holding, the Court reversed the dismissal of McDonald's appeal and related claims and remanded the matter to the Superior Court.

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

6. Appeals to Superior Court

Under RSA 677:4, "any person aggrieved by any order or decision" of the ZBA may file a petition with the Superior Court within 30 days of the date upon which the board voted to deny the motion for rehearing. See, Trefethen v. Town of Derry, 164 N.H. 754 (2013).(Deadline under 30 day rule of RSA 677:4 extended to the following business day if deadline falls on a Saturday, Sunday or legal holiday per RSA 21:35, II). This statute provides that "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2; and while the use of the word "includes" implies that such list is not exhaustive, the Court has determined that such does not include all possible municipal boards. See, Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment, 149 N.H. 63 (2003). See also, Hannaford Brothers Company v. Town of Bedford, 164 N.H. 764 (2013) (Competitor 3+ miles away did not qualify.)

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

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

> The factual findings of the ZBA are deemed *prima facia* lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is

persuaded, based upon a balance of probabilities, on the evidence before it, that the ZBA's decision is unreasonable.

See, Pike Industries, Inc. v. Woodward, 160 N.H. 259, 262 (2010), *citing*, Harrington, 152 N.H. 74, 77 (2005); see also, Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, 164 N.H. 757 (2013), and Saviano v. Town of Atkinson, __ N.H.__ (Docket No. 2012-0818; Issued October 25, 2013 – *still not reported as of 5/20/16*), *both citing*, Brandt Dev. Co. of N.H. v. City of Somersworth, 162 N.H. 553, 555 (2011).

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

The Orders of Notice from the Court under the new Superior Court Rules effective October 1, 2013 will usually set forth two dates: (a) the date by which the Appearance, Answer and Certified Record must be filed; and (b) the date of the hearing on the merits. See, RSA 677:8 and RSA 677:12. The Appearance is a relatively benign form by which the municipality's attorney officially identifies himself/herself to the Court and the opposing parties. The Answer is a more detailed document wherein each paragraph of the petition is either admitted, denied, or further explained in some way. This document should be prepared by the attorney with the active participation of the ZBA Chair and Secretary who should have the requisite knowledge. The Certified Record should be prepared in the same way so as to contain a full and complete copy of the ZBA's file on the matter. The Certified Record should contain not only the underlying application and any documents received into evidence by the ZBA, but also all notices, minutes of meetings, decisions and the request for rehearing.

Sometimes the parties may decide to abate the Superior Court action to allow the ZBA to reconsider an issue. While this is frequently a cost effective move, the Board (and their attorney) should be cautious of how such abatement agreements are worded so that the applicant cannot contend that there was an "agreement to grant" their requested relief. See, Huard v. Town of Pelham, 159 N.H. 567 (2009)(agreement to have ZBA reconsider appeal of administrative decision concerning issues of "lapsed" variance vs. expansion of non-conforming use did not obligate ZBA to grant requested relief).

Note that unlike the effect of filing the original appeal to the ZBA, there is no automatic stay of any enforcement proceeding via the filing of a petition with the Superior Court. RSA 677:9. This statute does authorize, however, the Court, "on application and notice, for good cause shown" to grant a restraining order against such enforcement pending the outcome of the case. If such relief is requested by an appealing

party, the Orders of Notice will also include a date for a preliminary hearing on whether the restraining order is warranted, which will usually include a requirement of a showing of irreparable harm.

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

The judgment of the Superior Court shall either dismiss the appeal, vacate the order or decision in whole or in part, and, if so vacated, remand the matter back to the ZBA for further proceedings not inconsistent with the decree. RSA 677:11. Costs are not to be awarded against the municipality unless the ZBA is found to have "acted in bad faith or with malice or gross negligence" in making its decision. RSA 677:14. From such decree, the as-yet-unsatisfied party may still bring a further appeal to the Supreme Court by filing a Notice of Appeal within 30 days of the date of the Superior Court Clerk's Notice of Decision; but such proceedings are beyond the scope of this article.

7. RSA 91-A

The ZBA, by definition found in RSA 91-A:1-a, VI(d), is a "public body" and any meeting of a quorum of its members is thus subject to the provisions of this statute pursuant to RSA 91-A:2, I. See also, RSA 673:17. Accordingly, all meetings must be properly noticed at least 24 hours in advance and be open to the public unless qualified as either a "non-meeting"[7] under RSA 91-A:2, I, or as a "non-public session" under RSA 91-A:3. While a detailed discussion of this statute is beyond the scope of this article, it is important to remember that there is a presumption that the meeting is to be open to the public unless the session qualifies under one of the express statutory exceptions (which will be strictly construed by the Court on review). Orford Teachers Ass'n v. Watson, 121 N.H. 118 (1981); see also, N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003)(concerning presumption of public records). Additionally, minutes of each land use board meeting must be available for public inspection not more than five (5) business days after the public meeting per RSA 91-A:2, II and within 72 hours of any non-public session (unless sealed by vote of two-thirds of the board) per RSA 91-A:3, III.

[7] See, Ettinger v. Town of Madison Planning Board, 162 N.H. 785 (2011)(Board could not go into "non-meeting" to discuss Town Attorney's opinion letter and communications with Town staff without Attorney being present in person or by phone.)

A "business day" is defined by RSA 91-A:2, II as "the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays." In light of the negative ramifications of a violation of RSA 91-A, ZBA's should err on the side of caution and limit "non-public" sessions to those "non-meetings" with counsel present in person or by phone to discuss legal matters. It has been suggested that where an "*ex parte*" communication occurs in violation of the statute, such a contact could theoretically be cured by disclosing the substance of the contact to all interested parties and allowing them an opportunity to respond. See, Paul G. Sanderson, *Ex Parte Communications and Land Use Boards*, New Hampshire Town and City, Oct. 2007, at 34; but this concept has not yet been the subject of Court scrutiny. A word of caution, however: when the Court has been asked to scrutinize a municipal board's conduct under RSA 91-A, the relief sought is sweeping and expensive. See, e.g., Professional Firefighters of NH v. Local Government Center, Inc., 159 N.H. 699 (2010); ATV Watch v. New Hampshire Department of Resources and Economic Development, 155 N.H. 434 (2007). Note that this statute is the subject of much on-going debate in the State Legislature so particular attention should be paid to amendments that may/will be made in each session.

8. Disqualification of Members

RSA 673:14, I states the following:

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

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

Thus, when the board members are acting in their "quasi-judicial" capacity, potential disqualification rests upon an analysis of two distinct but basically "common sense" areas: (a) is the member directly interested in the outcome of the board's decision

in a personal or financial way, and (b) would the member be "stricken for cause" from serving as a juror if the matter was before the Court.

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

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

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

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

As Attorney Peter Loughlin states in his treatise:

> Common sense must be applied because, unlike a jury pool which may be drawn from a county of more than 100,000 persons, the board of adjustment may be composed of volunteers from a town of less than 1,000 persons. Board members are going to know the applicant and the abutters. They may gain or lose from the

> decision in a particular case in that the granting or denying of relief may affect the tax rate of the community or they may have advised a potential applicant of the proper procedure for applying to the board. Board members may well have expressed an opinion on a very similar application during deliberations on a previous application. In such case, they are acting in a capacity which is more akin to that of a judge who has previously ruled on a similar case than a juror who will normally never have seen a similar fact situation....The key element ...is whether or not the board member can be indifferent.

Loughlin, §20.08, page 313. Note, however, that even individuals who have formed opinions are not necessarily disqualified if they can set aside their opinions and decide the case impartially on the evidence before them. This is true even where the person is sitting as a juror in a criminal prosecution. State v. Aubert, 118 N.H. 739 (1978); State v. Laaman, 114 N.H. 794 (1974).

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

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

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

expert in architecture" found to have violated the plaintiff's right to a fair and impartial hearing so as to warrant remand of the matter back to the commission).

E. CONCLUSION

The law which land use board members are asked to apply in their volunteer capacities is constantly changing – more so than in possibly any other area of municipal activity. While the job of the board members is not necessarily to say "yes" to every application coming before them, the members are charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the "bureaucratic maze" of regulations, ordinances and hearings, while not expressly advising them. See, Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 (1992); compare with, Kelsey v. Town of Hanover, 157 N.H. 632 (2008)(no constitutional duty to take initiative to educate abutters about project and permit/appeal process). Moreover, the ZBA is charged via the Simplex line of cases with being the "constitutional safety valve" to protect both the municipality as a whole and the individual applicant's property rights (and this obligation still applies now that the "new" variance criteria has become law); and more and more, the ZBA will have to be conscious of legislative and regulatory changes that impact their quasi-judicial activities, e.g., RSA 91-A and the Comprehensive Shoreland Protection Act to name but two. These can be daunting tasks to say the least.

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

APPENDIX A

REQUIREMENTS FOR VARIANCE APPLICATIONS

by

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1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

As before, the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005) and its progeny continues to control this issue after January 1, 2010 – namely that the criteria of whether the variance is "contrary to the public interest" should be construed together with whether the variance "is consistent with the spirit of the ordinance". Id., at 580; see also, Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. Chester Rod & Gun Club, at 581; and Harborside at 514. "Mere conflict with the terms of the ordinance is insufficient." Harborside at 514. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

2. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

See, Criteria 1, above.

3. SUBSTANTIAL JUSTICE IS DONE.

As before, the Supreme Court reference in Malachy Glen, 155 N.H. at 109 to the Peter J. Loughlin, Esq., treatise will continue to apply. See, Loughlin, Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 4th ed., and its reference to the Office of State Planning Handbook, which indicates as follows:

> "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the

granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Id. at § 24.11.

See also, Farrar v. City of Keene, 158 N.H. 684, 692 (2009); and, Harborside at 515.

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

This variance criterion has not been the focus of any extensive Supreme Court analysis to date. That said, in considering whether an application will diminish surrounding property values, it is appropriate for ZBAs to consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. See, Malachy Glen, 155 N.H. at 107.

5. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

(A) FOR PURPOSES OF THIS SUBPARAGRAPH, "UNNECESSARY HARDSHIP" MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

(i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY; AND
(ii) THE PROPOSED USE IS A REASONABLE ONE.

(B) IF THE CRITERIA IN SUBPARAGRAPH (A) ARE NOT ESTABLISHED, AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

THE DEFINITION OF "UNNECESSARY HARDSHIP" SET FORTH IN SUBPARAGRAPH (5) SHALL APPLY WHETHER THE PROVISION OF THE ORDINANCE FROM WHICH A VARIANCE IS SOUGHT IS A RESTRICTION ON USE, A DIMENSIONAL OR OTHER LIMITATION ON A PERMITTED USE, OR ANY OTHER REQUIREMENT OF THE ORDINANCE.

This is the crux of the legislative change wrought by SB 147 effective January 1, 2010. This removes the "use" vs. "area" distinction created by the Boccia decision but

ostensibly leaves in place the post-Simplex court interpretations of the various criteria. Also, as listed in the statement of intent attached to the statute, Criteria 5(B) is meant to clarify that the pre-Simplex standard for unnecessary hardship remains as an alternative; however, the Supreme Court has noted that the language used "is similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island cases. See, Harborside at 513.

The dual references of the property being "distinguished from other properties in the area" solidifies the repeated Court statements that the "special conditions" are to be found in the property itself and not in the individual plight of the applicant. See, e.g., Harrington v. Town of Warner, 152 N.H 74, 81 (2005); and Garrison v. Town of Henniker, 154 N.H. 26, 30 (2006). Depending upon the variance being sought, those "special conditions" can include the "as built" environment. See, Harborside at 518 (special conditions include the mass of the building and its use as a hotel in case for sign variances).

This statutory revision does contain a fair amount of uncertainty – most particularly with the issue of who is the fact finder (ZBA or applicant) of what is reasonable under either (A) or (B), above. The Court's prior opinions containing the phrases that a use is "presumed reasonable" if it is allowed in the district and that the ZBA's desires for an alternate use are "not material" were all in the context of "area" variances and made with respect to the "public interest" and "spirit of the ordinance" criteria, above. See, Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 53 (2005); and Malachy Glen, 155 N.H. at 107; but see, Harborside at 518-519 (applicant did not need to show signs were "necessary" rather only had to show signs were a "reasonable use"). Thus the determination of "reasonableness" is likely within the ZBA's purview so that the ZBA must have both the evidentiary basis and the clear findings to support its decision on this issue. Boards should expect to see a variety of arguments and evidentiary presentations, including economic arguments, by both applicants and abutters as to what is or is not reasonable concerning a given site. Be on the lookout for more Supreme Court opinions interpreting this criterion.