CHAPTER 207

HB 278 – FINAL VERSION

13Mar2013... 0790h

05/23/13 1622s

2013 SESSION

13-0677

03/10

HOUSE BILL ***278***

AN ACT relative to voluntary installation of fire suppression sprinklers.

SPONSORS: Rep. John Hunt, Ches 11

COMMITTEE: Commerce and Consumer Affairs

ANALYSIS

This bill authorizes an applicant to offer installation of fire suppression sprinklers as a condition of local permit approval.

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Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

13Mar2013... 0790h

05/23/13 1622s

13-0677

03/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to voluntary installation of fire suppression sprinklers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

207:1 Subdivision of Land; Sprinklers. Amend RSA 674:36, IV to read as follows:

IV. The planning board shall not require, or adopt any regulation requiring, the installation of a fire suppression sprinkler system in proposed one- or 2-family residences as a condition of approval for a local permit. Nothing in this paragraph shall prohibit a duly adopted regulation mandating a cistern, dry hydrant, fire pond, or other credible water source other than a fire suppression sprinkler system. ***Nothing in this paragraph shall prevent an applicant from offering to install fire suppression sprinkler systems in proposed one- or 2-family residences and, if the planning board accepts such offer, the installation of such systems shall be required and shall be enforceable as a condition of the approval. The applicant or the applicant's successor in interest may substitute another means of fire protection in lieu of the approved fire suppression sprinkler system provided that the planning board approves the substitution which approval shall not be unreasonably upheld or delayed.***

207:2 Building Code; Sprinklers. Amend RSA 674:51, V to read as follows:

V. No municipality or local land use board as defined in RSA 672:7 shall adopt any ordinance, regulation, code, or administrative practice requiring the installation of automatic fire suppression sprinklers in any new or existing detached one- or 2-family dwelling unit in a structure used only for residential purposes. Notwithstanding any provision of law to the contrary, no municipality or local land use board shall enforce any existing ordinance, regulation, code, or administrative practice requiring the installation or use of automatic fire suppression sprinklers in any manufactured housing unit as defined in RSA 674:31 situated in a manufactured housing park as defined in RSA 205-A:1, II. ***Nothing in this paragraph shall affect the ability of an applicant for a local land use permit to include the installation of fire suppression sprinklers pursuant to RSA 674:36, IV, or affect the validity or enforceability of such inclusion.***

207:3 Effective Date. This act shall take effect 60 days after its passage.

Approved: July 10, 2013

Effective Date: September 8, 2013

CHAPTER 179

SB 49 – FINAL VERSION

02/14/13 0240s

8May2013... 1264h

2013 SESSION

13-0836

03/04

SENATE BILL ***49***

AN ACT relative to appeals of planning board decisions.

SPONSORS: Sen. Boutin, Dist 16; Sen. Cataldo, Dist 6; Sen. Fuller Clark, Dist 21; Sen. Odell, Dist 8; Sen. Rausch, Dist 19; Sen. Reagan, Dist 17; Sen. Watters, Dist 4; Rep. Lockwood, Merr 9; Rep. Cooney, Graf 8; Rep. Ferrante, Rock 6

COMMITTEE: Public and Municipal Affairs

ANALYSIS

This bill provides for appeals of planning board decisions concerning a subdivision or site plan to the board of adjustment prior to appeal to the superior court.

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Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

02/14/13 0240s

8May2013... 1264h

13-0836

03/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to appeals of planning board decisions.

Be it Enacted by the Senate and House of Representatives in General Court convened:

179:1 New Paragraph; Appeal of Planning Board Decisions. Amend RSA 677:15 by inserting after paragraph I the following new paragraph:

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.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

179:2 Effective Date. This act shall take effect 60 days after its passage.

Approved: July 2, 2013

Effective Date: August 31, 2013

CHAPTER 189

SB 164 – FINAL VERSION

8May2013... 1366h

2013 SESSION

13-0330

03/09

SENATE BILL *164*

AN ACT authorizing coastal management provisions in master plans.

SPONSORS: Sen. Watters, Dist 4; Sen. Stiles, Dist 24; Sen. Fuller Clark, Dist 21; Rep. Khan, Rock 20; Rep. Reilly, Graf 9; Rep. Spang, Straf 6

COMMITTEE: Energy and Natural Resources

ANALYSIS

This bill authorizes coastal management provisions in master plans, which may address planning needs and property loss resulting from projected coastal risks due to increased frequency of storm surge, flooding, and inundation.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

8May2013... 1366h

13-0330

03/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT authorizing coastal management provisions in master plans.

Be it Enacted by the Senate and House of Representatives in General Court convened:

189:1 New Subparagraph; Master Plan; Coastal Management. Amend RSA 674:2, III by inserting after subparagraph (n) the following new subparagraph:

(o) A coastal management section which may address planning needs resulting from projected coastal property or habitat loss due to increased frequency of storm surge, flooding, and inundation.

189:2 Effective Date. This act shall take effect 60 days after its passage.

Approved: July 2, 2013

Effective Date: August 31, 2013

CHAPTER 153

HB 513 – FINAL VERSION

13Mar2013... 0590h

05/02/13 1393s

05/02/13 1482s

2013 SESSION

13-0418

06/05

HOUSE BILL ***513***

AN ACT relative to the shoreland protection act.

SPONSORS: Rep. Spang, Straf 6; Rep. Lovett, Graf 8; Rep. Beaulieu, Hills 45; Rep. Renzullo, Hills 37; Rep. Borden, Rock 24; Sen. Bradley, Dist 3; Sen. Fuller Clark, Dist 21; Sen. Odell, Dist 8

COMMITTEE: Resources, Recreation and Development

ANALYSIS

This bill modifies several provisions of the shoreland protection act relative to minimum shoreland protection standards.

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Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

13Mar2013... 0590h

05/02/13 1393s

05/02/13 1482s

13-0418

06/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to the shoreland protection act.

Be it Enacted by the Senate and House of Representatives in General Court convened:

153:1 Definition; Ground Cover. RSA 483-B:4, VII is repealed and reenacted to read as follows:

VII. "Ground cover" means any herbaceous plant or any woody seedling or shrub generally less than 3 feet in height. Ground cover shall not include lawns, landscaped areas, gardens, invasive species as listed by the department of agriculture, markets, and food in accordance with RSA 430:53, III, exotic species as designated by rule of the department of environmental services in accordance with RSA 487:24, VII, imported organic or stone mulches, or other artificial materials.

153:2 Definition; Unaltered State. Amend RSA 483-B:4,XXIV-b to read as follows:

XXIV-b. "Unaltered state" means ***native*** vegetation allowed to grow without cutting, limbing, trimming, pruning, mowing, or other similar activities except as needed for [~~plant health, normal maintenance, and~~] renewal ***or to maintain or improve plant health***.

153:3 Enforcement by Commissioner. Amend RSA 483-B:5, II to read as follows:

II. The commissioner or his or her designee may, for cause, enter upon any subject land or parcel at any reasonable time [~~after written notification~~], ***provided he or she has obtained the oral or written permission of the property owner, attempted to notify the property owner or his or her agent either orally or in writing 24 hours prior to entry, or has observed, or received credible evidence of, the occurrence of activities regulated by this chapter that may impact water quality,*** to perform oversight and enforcement duties provided for in this chapter.

153:4 Minimum Shoreland Protection Standards. Amend RSA 483-B:9, II(d) to read as follows:

(d) No fertilizer[~~, except limestone,~~] shall be applied to vegetation or soils located within 25 feet of the reference line of any public water. Beyond 25 feet, slow or controlled release fertilizer, as defined by rules adopted by department, may be used.

153:5 Minimum Shoreland Protection Standards; Maintenance of a Waterfront Buffer. Amend RSA 483-B:9, V(a)(2)(D)(i) and (ii) to read as follows:

(i) Tree and sapling diameters shall be measured at 4 1/2 feet above the ground for existing trees and saplings, or by caliper at a height consistent with established nursery industry

standards when nursery stock is to be used, and are scored as follows:

Diameter or Caliper--Score

1 to 3 inches--1

Greater than 3 to ***and including*** 6 inches--5

Greater than 6 to ***and including*** 12 inches--10

[~~12 to 24 inches--15~~]

Greater than [~~24~~] *12* inches - [~~25~~] *15*

(ii) ***For the purpose of planting under RSA 483-B:9, V(g)(3),*** shrubs and groundcover plants shall be scored as follows:

Four square feet of shrub area--1 point.

Ground cover [~~planted in the form of sod or mat~~], ***not including mowed lawn*** - one point for every 50 square feet.

Shrub and groundcover shall [~~not~~] count for ***at least 15 points and not*** more than 25 points in each full segment.

153:6 Maintenance of a Waterfront Buffer. Amend RSA 483-B:9,V(b)(2)(A) to read as follows:

(2)(A) Within the natural woodland buffer of a given lot the vegetation, except lawn, within at least 25 percent of the area outside the waterfront buffer shall be maintained ***in an*** unaltered ***state*** or improved with additional vegetation. Owners of lots legally developed or landscaped prior to July 1, 2008 that do not comply with this standard are encouraged to, but shall not be required to, increase the percentage of area to be maintained in an unaltered state. The percentage of area maintained in an unaltered state on nonconforming lots shall not be decreased. In addition, the commissioner of the department of resources and economic development may order vegetation on lands or properties owned by, leased to, or otherwise under the control of the department of resources and economic development within the protected shoreland to be cut when overgrowth of vegetation impairs law enforcement activities and endangers public safety. If such cutting will exceed that which is allowed under this subparagraph, the commissioner of the department of resources and economic development shall provide written notification to the department of environmental services identifying the areas to be cut and an explanation of the need for the cutting at least 2 weeks prior to the undertaking.

153:7 Impervious Surfaces. Amend RSA 483-B:9,V(g)(1) to read as follows:

(1) No more than 30 percent of the area of a lot located within the protected shoreland shall be composed of impervious surfaces, unless a stormwater management system designed

and certified by a professional engineer [~~that will not concentrate stormwater runoff or contribute to erosion~~] is implemented. ***Such system design shall demonstrate that the post-development volume and peak flow rate based on the 10-year, 24-hour storm event, shall not exceed the pre-development volume and peak flow rate for flow off the property within the protected shoreland.***

153:8 Penalties. Amend RSA 483-B:18, II to read as follows:

II. Any person who violates this chapter and any person who purchases land affected by a violation of this chapter who knew or had reason to know of the violation shall be liable for remediation or restoration of the land affected ***to bring it into compliance with the provisions of this chapter.***

153:9 Repeal. RSA 483-B:4, X-b, relative to the definition of "natural ground cover", is repealed.

153:10 Shoreland Advisory Committee Extended. Amend RSA 2010, 306:3, I to read as follows:

I. Section 2 of this act shall take effect December 31, [~~2013~~] ***2015.***

153:11 Effective Date. This act shall take effect 60 days after its passage.

Approved: June 28, 2013

Effective Date: August 27, 2013

CHAPTER 93

SB 50 – FINAL VERSION

02/14/13 0238s

2013 SESSION

13-0837

03/09

SENATE BILL ***50***

AN ACT relative to expiration of variances and special exceptions.

SPONSORS: Sen. Boutin, Dist 16; Sen. Carson, Dist 14; Sen. Cataldo, Dist 6; Sen. Fuller Clark, Dist 21; Sen. Rausch, Dist 19; Sen. Reagan, Dist 17; Sen. Watters, Dist 4; Rep. T. Walsh, Merr 24; Rep. Duarte, Rock 2; Rep. Kotowski, Merr 24; Rep. Todd Smith, Merr 24

COMMITTEE: Public and Municipal Affairs

ANALYSIS

This bill provides for expiration of variances and special exceptions granted by the zoning board of adjustment.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

02/14/13 0238s

13-0837

03/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to expiration of variances and special exceptions.

Be it Enacted by the Senate and House of Representatives in General Court convened:

93:1 New Paragraph; Zoning Variance; Expiration. Amend RSA 674:33 by inserting after paragraph I the following new paragraph:

I-a. Variances authorized under paragraph I 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 variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

93:2 Powers of Zoning Board of Adjustment; Special Exceptions. Amend RSA 674:33, IV to read as follows:

IV. A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance. ***Special exceptions authorized under this paragraph 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.***

93:3 Effective Date. This act shall take effect 60 days after its passage.

Approved: June 20, 2013

Effective Date: August 19, 2013

CHAPTER 76

SB 12 – FINAL VERSION

02/14/13 0235s

2013 SESSION

13-0370

03/09

SENATE BILL *12*

AN ACT relative to protection and preservation of significant archeological deposits.

SPONSORS: Sen. Stiles, Dist 24; Sen. Fuller Clark, Dist 21; Rep. Norelli, Rock 26; Rep. Cali-Pitts, Rock 30; Rep. Pantelakos, Rock 25

COMMITTEE: Public and Municipal Affairs

AMENDED ANALYSIS

This bill authorizes the adoption of optional provisions for the protection or preservation of archeological resources in master plans, subdivision regulations, and site plan review regulations.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

02/14/13 0235s

13-0370

03/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to protection and preservation of significant archeological deposits.

Be it Enacted by the Senate and House of Representatives in General Court convened:

76:1 Master Plan; Archeological Resources. Amend RSA 674:2, III(h) to read as follows:

(h) A section which identifies cultural, ***archeological,*** and historic resources and protects them for rehabilitation or preservation from the impact of other land use tools such as land use regulations, housing, or transportation. Such section may encourage the preservation or restoration of stone walls, provided agricultural practices, as defined in RSA 21:34-a, are not impeded.

76:2 New Subparagraph; Subdivision Regulations; Archeological Resources. Amend RSA 674:36, II by inserting after subparagraph (n) the following new subparagraph:

(o) As a condition of subdivision approval, where the subdivision requires an alteration of terrain permit under RSA 485-A:17, require that the applicant protect or document archeological resources in areas of archeological sensitivity that have been identified in the master plan in accordance with RSA 674:2, III(h).

76:3 New Subparagraph; Site Plan Review Regulations; Archeological Resources. Amend RSA 674:44, II by inserting after subparagraph (j) the following new subparagraph:

(k) As a condition of site plan approval, require that the applicant protect or document archeological resources in areas of archeological sensitivity that have been identified in the master plan in accordance with RSA 674:2, III(h).

76:4 Effective Date. This act shall take effect January 1, 2014.

Approved: June 7, 2013

Effective Date: January 1, 2014

CHAPTER 235

SB 19 – FINAL VERSION

02/03/11 0092s

4Jan2012... 2590h

06/06/12 2396CofC 11-0955

06/10

2012 SESSION

SENATE BILL ***19***

AN ACT relative to the definition and designation of "prime wetlands."

SPONSORS: Sen. Odell, Dist 8; Sen. Rausch, Dist 19

COMMITTEE: Energy and Natural Resources

AMENDED ANALYSIS

This bill modifies the definition of "prime wetlands."

This bill modifies the process for designating prime wetlands.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

02/03/11 0092s

4Jan2012... 2590h

06/06/12 2396CofC 11-0955

06/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twelve

AN ACT relative to the definition and designation of "prime wetlands."

Be it Enacted by the Senate and House of Representatives in General Court convened:

235:1 Administrative Provisions. Amend RSA 482-A:11, IV(a) and RSA 482-A:11, IV(b)(1) to read as follows:

IV.(a) The department shall not grant a permit with respect to any project to be undertaken in [~~or within 100 feet of~~] an area mapped, designated, and filed as a prime wetland pursuant to RSA 482-A:15, ***or within 100 feet of any prime wetland where a 100 foot buffer was required at the time of designation,*** unless the department first notifies the local governing body, the planning board, if any, and the conservation commission, if any, in the municipality within which the wetlands lie, either in whole or in part, of its decision. Any such permit shall not be issued unless the department is able, specifically, to find clear and convincing evidence on the basis of all information considered by the department, and after a public hearing, if a public hearing is deemed necessary under RSA 482-A:8, that the proposed project, either alone or in conjunction with other human activity, will not result in the significant net loss of any of the values set forth in RSA 482-A:1. This paragraph shall not be construed so as to relieve the department of its statutory obligations under this chapter to protect wetlands not so mapped and designated.

(b)(1) A property owner may request from the department a waiver from subparagraph (a), under rules adopted by the department, to perform forest management work and related activities in the forested portion of a prime wetland or its 100-foot buffer, ***where such buffer was required at the time of designation, that do not qualify under the notification of forest management or timber harvest activities having minimum wetlands impact process***. The request for the waiver shall include, but not be limited to:

(A) A sketch of the property depicting the best approximate location of each prime wetland and its 100-foot buffer, ***where such buffer was required at the time of designation,*** in which work is proposed and the location of proposed work, including access roads;

(B) A written description of the work to be performed and a copy of the notice of intent to cut, if applicable; and

(C) A list of the prime wetland values as identified by the municipality in designating each prime wetland under RSA 482-A:15.

235:2 Local Options; Prime Wetland. Amend RSA 482-A:15, I to read as follows:

I.***(a)*** Any municipality, by its conservation commission, or, in the absence of a conservation commission, the planning board, or, in the absence of a planning board, the local governing body, may undertake to designate, map, and document prime wetlands lying within its boundaries, or if such areas lie only partly within its boundaries, then that portion lying within its boundaries. ***The conservation commission, planning board, or governing body shall give written notice to the owner of the affected land and***

all abutters 30 days prior to the public hearing, before designating any property as prime wetlands.

(b) Prior to municipal vote under paragraph II, maps that depict wetland boundaries shall be prepared and landowners having proposed prime wetlands on their property shall be informed of the boundary delineation. The acceptance of any prime wetland designation by the department prior to the effective date of this paragraph shall remain in effect; however, any revision to the boundary shall be delineated using wetland delineation methods as adopted by the department and by the standards of this section.

I-a. For the purposes of this chapter, "prime wetlands" shall mean any ***contiguous*** areas falling within the jurisdictional definitions of RSA [~~482-A:3~~] ***482-A:2, X*** and RSA 482-A:4 [~~that possess one or more of the values set forth in RSA 482-A:1 and~~] that, because of their size, unspoiled character, fragile condition, or other relevant factors, make them of substantial significance. ***A prime wetland shall be at least 2 acres in size, shall not consist of a water body only, shall have at least 4 primary wetland functions, one of which shall be wildlife habitat, and shall have a width of at least 50 feet at its narrowest point. The boundary of a prime wetland shall coincide, where present, with the upland edge of any wetland, as defined in RSA 482-A:2, X, that is part of the prime wetland. On-site verification of proposed prime wetland boundaries shall be performed where landowner permission is provided.***

I-b. The commissioner shall adopt rules under RSA 541-A relative to the form, criteria, and methods that shall be used to designate, map, and document prime wetlands, determine boundaries in the field, and amend maps and designations once filed and accepted by the department under paragraph II.

235:3 Administrative Provisions. Amend RSA 482-A:11, IV(c) to read as follows:

(c) A property owner may request a waiver from the department, under rules adopted by the department under RSA 541-A, from the provisions of this chapter to perform work not addressed under subparagraph (b) within a portion of [~~the~~] ***any*** 100-foot buffer of a prime wetland on his or her property ***as provided in subparagraph (a)***. At the time of the waiver request, the property owner shall notify, by certified mail, the local governing body, the planning board, if any, and the conservation commission, if any, of the municipalities in which the waiver is being sought that a waiver is being sought from the department. Where a buffer associated with the application extends into an abutting property, the property owner requesting the waiver shall provide notice to the owner of that abutting property.

235:4 New Paragraph; Definitions; Wetland Functions. Amend RSA 482-A:2 by inserting after paragraph X the following new paragraph:

XI. "Wetland functions" means the practical measurable values of wetlands. The 12 primary wetland functions are ecological integrity, wetland-dependent wildlife habitat, fish and aquatic life habitat, scenic quality, educational potential, wetland-based

recreation, flood storage, groundwater recharge, sediment trapping, nutrient trapping/retention/transformation, shoreline anchoring, and noteworthiness.

235:5 Effective Date. This act shall take effect 60 days after its passage.

Approved: June 18, 2012

Effective Date: August 17, 2012

CHAPTER 174

HB 1415 – FINAL VERSION

7Mar2012... 0934h

04/25/12 1651s

30May2012... 2344EBA

2012 SESSION

12-2770

08/04

HOUSE BILL ***1415***

AN ACT relative to permits for repair or replacement of sewage and waste disposal system.

SPONSORS: Rep. Warden, Hills 7; Sen. Gallus, Dist 1; Sen. De Blois, Dist 18

COMMITTEE: Resources, Recreation and Development

AMENDED ANALYSIS

This bill creates a permit for the repair or replacement of certain sewage or waste disposal systems.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

7Mar2012... 0934h

04/25/12 1651s

30May2012... 2344EBA

12-2770

08/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twelve

AN ACT relative to permits for repair or replacement of sewage and waste disposal system.

Be it Enacted by the Senate and House of Representatives in General Court convened:

174:1 Permit by Rule Submissions. Amend RSA 485-A:30, I and I-a to read as follows:

I. Any person submitting plans and specifications for a subdivision of land shall pay to the department a fee of $300 per lot. Said fee shall be for reviewing such plans and specifications and making site inspections. Any person submitting plans and specifications ***or an application for a permit by rule as provided in RSA 485-A:33, IV*** for sewage or waste disposal systems shall pay to the department a fee of $290 for each system. Said fee shall be for reviewing such plans and specifications ***or application for permit by rule***, making site inspections, the administration of sludge and septage management programs, and [~~for~~] establishing a system for electronic permitting for waste disposal systems, subdivision plans, and [~~for~~] permits and approvals under the department's land regulation authority. The fees required by this paragraph shall be paid at the time said plans and specifications ***or application for permit by rule*** are submitted and shall be deposited in the subsurface systems fund established in paragraph I-b. For the purposes of this paragraph, the term "lot" shall not include tent sites or travel trailer sites in recreational parks which are operated on a seasonal basis for not more than 9 months per year.

I-a. In addition to fees required under paragraph I, any person submitting plans and specifications ***or an application for a permit by rule as provided in RSA 485-A:33, IV*** for sewage or waste disposal systems shall pay to the department a fee of $10 for each system for use in the septage handling and treatment facilities grant program to municipalities under RSA 486:3, III. [~~Until July 1, 2010, the fees required by this paragraph shall be paid at the time said plans and specifications are submitted and shall be deposited in the subsurface systems fund established in paragraph I-b. After July 1, 2010,~~] The fees required by this paragraph shall be paid at the time said plans and specifications ***or application for permit by rule*** are submitted and shall be deposited in the septage management fund established in paragraph I-c.

174:2 New Paragraph; Permit by Rule Submissions. Amend RSA 485-A:33 by inserting after paragraph III the following new paragraph:

IV.(a) The repair or replacement in-kind of a sewage effluent disposal area shall qualify for a permit by rule, provided all of the following criteria are met:

(1) The existing system receives only domestic sewage.

(2) There is no increase in sewage loading proposed for the repaired or replacement

system.

(3) The bottom of the bed is located no less than 24 inches above the seasonable high water table.

(4) The system is located 75 feet or more from an abutter's well unless there is a standard well release form recorded with the registry of deeds in accordance with RSA 485-A:30-b or there is an existing department waiver to the distance for the abutter's well.

(5) The system is located 75 feet or more from the owner's well unless there is an existing department waiver to the distance for the owner's well.

(6) The existing system received prior construction and operational approval from the department and the replacement or repaired system will conform to the provisions of such approval, provided the department may by rule require a minimum septic tank size of 1,000 gallons.

(7) The system is not within 75 feet of any surface water, water supply well, or very poorly drained soil unless authorized by the prior departmental approval described in subparagraph (6).

(8) No new waivers to the department's rules are requested.

(9) The system has not been previously repaired or replaced under a permit by rule in accordance with the provisions of this paragraph.

(b) Construction of the system may proceed upon the submission of an application to the department by a permitted designer under RSA 485-A:35 and receipt of the permit by rule from the department.

(c) The repaired or replacement system shall not be covered or placed in operation without final inspection and approval by an authorized agent of the department. All inspection by the department shall be accomplished within 7 business days after receipt of written notice from the installer that the system is ready for inspection. The installer shall provide the authorized agent of the department, at the time of the inspection, a copy of the previously approved plan bearing the state approval stamp and associated operational approval, and an existing conditions plan bearing the seal of the permitted designer performing work under the permit by rule.

(d) The applicant submitting the permit by rule application shall assume all liability and responsibility for the components of the design that are part of the system being repaired or replaced under the permit by rule.

(e) The installer constructing the system shall assume all liability and responsibility for the construction of the system components repaired or replaced under the permit by rule.

(f) For purposes of this paragraph, "in-kind" shall mean a repair or replacement of the

effluent disposal area in strict accordance with what is shown on the previously approved plan.

174:3 New Paragraph; Rulemaking. Amend RSA 485-A:41 by inserting after paragraph IV the following new paragraph:

V. Adopt rules relative to the application for and granting of permits by rule for repair or replacement of certain sewage or waste disposal systems under RSA 485-A:33, IV.

174:4 Effective Date. This act shall take effect upon its passage.

Approved: June 11, 2012

Effective Date: June 11, 2012

*162 N.H. 508, *; 34 A.3d 584, **;*
*2011 N.H. LEXIS 133, ****

HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC

No. 2010-782

SUPREME COURT OF NEW HAMPSHIRE

162 N.H. 508; 34 A.3d 584; 2011 N.H. LEXIS 133

June 9, 2011, Argued
September 22, 2011, Opinion Issued

SUBSEQUENT HISTORY: Released for Publication

PRIOR HISTORY: [*1]**
Rockingham.

DISPOSITION: Affirmed in part; reversed in part; and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: After a zoning board of adjustment (ZBA) granted variances to respondent applicant to install parapet and marquee signs on its hotel and conference center site, petitioner abutting landowner appealed. The Rockingham Superior Court (New Hampshire) upheld the ZBA's decision to grant respondent a variance for the marquee signs and reversed its decision to grant respondent a variance for the parapet signs. Both parties appealed.

OVERVIEW: The court stated that with regard to the parapet signs, because the ZBA used the correct test to determine whether the public interest and spirit-of-the-ordinance factors of RSA 674:33, I(b) (Supp. 2010) were met and because there was evidence to support the ZBA's findings, the trial court erred to the extent that it ruled that the ZBA acted unlawfully when it found that the factors were met. The proper test was whether allowing the signs would be contrary to the public interest or inconsistent with the ordinance, not whether

allowing the signs would serve the public interest. As for the substantial justice factor, the evidence supported the ZBA's finding that the general public would realize no appreciable gain from a denial of the parapet sign variance, and there was evidence to support the ZBA's finding that the parapet signs would not diminish property values. Next, the trial court properly upheld the grant of the marquee variance. Because the variance was to install a sign on the building, it was proper to focus upon the building's size to determine whether special conditions existed. Respondent did not have to establish that its signs were "necessary" to its operation.

OUTCOME: The court reversed the trial court's reversal of the grant of the parapet variance and remanded the case for the trial court to consider the criteria of unnecessary hardship. It affirmed the decision upholding the grant of the marquee variance.

CORE TERMS: variance, ordinance, public interest, parapet, unnecessary hardship, marquee, zoning, substantial justice, hotel, zoning board, property values, neighborhood, essential character, record to support, hardship, area variances, general public, quotation, visual, install, "reasonable use", diminish, outweigh, evidence supports, aggressive, clutter, overly, feet, public purposes, failed to prove

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Real Property Law > Zoning & Land Use > Judicial Review

HN1 An appellate court's review of zoning board decisions is limited. The appellate court will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. For its part, the trial court must treat all factual findings of the zoning board of adjustment (ZBA) as prima facie lawful and reasonable, and may not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 RSA 674:33, I(b) (Supp. 2010) allows a zoning board to grant a variance 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 unnecessary hardship. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN3 See RSA 674:33, I(b)(5)(A) (Supp. 2010).

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN4 RSA 674:33, I(b) (Supp. 2010) provides that if an applicant fails to satisfy the first definition of unnecessary hardship, then it may still obtain a variance if it satisfies the second definition. RSA 674:33, I(b)(5)(B). More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN5 See RSA 674:33, I(b)(5)(B) (Supp. 2010).

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN6 RSA 674:33, I(b) (Supp. 2010) provides that its definitions of unnecessary hardship apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance. The legislature's statement of intent indicates that the purpose of this provision was to eliminate the separate "unnecessary hardship" standard for area variances that the New Hampshire Supreme Court adopted in Boccia. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN7 The requirement that a variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance. The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, a court must determine whether to grant the variance would unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. Mere conflict with the terms of the ordinance is insufficient. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN8 The New Hampshire Supreme Court has recognized two methods for ascertaining whether granting a variance would violate an ordinance's basic zoning objectives. One way is to examine whether granting the variance would alter the essential character of the neighborhood. Another approach is to examine whether granting the variance would threaten the public health, safety or welfare. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN9 Perhaps the only guiding rule on the substantial justice factor used in determining whether to grant a variance is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. A court also looks at whether the proposed development is consistent with the area's present use. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN10 To establish unnecessary hardship under the first definition set forth in RSA 674:33, I(b)(5), an applicant merely had to show that its proposed use was a reasonable use of the property, given its special conditions. RSA 674:33, I(b)(5)(A). Whereas before Simplex, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, after Simplex, hardship exists when special conditions of the land render the use for which the variance is sought reasonable. The applicant does not have to demonstrate that its proposed use is "necessary." More Like This Headnote

Real Property Law > Zoning & Land Use > Administrative Procedure

HN11 It is for the zoning board of adjustment (ZBA) to resolve conflicts in evidence and assess the credibility of the offers of proof. The zoning board need not accept the conclusions of experts. In reaching its decision, the ZBA is entitled to rely upon its own knowledge, experience and observations. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

NH Supreme Court Brief(s)

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NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH(1) **1. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** The statute regarding variances provides that its definitions of unnecessary hardship apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance. The legislature's statement of intent indicates that the purpose of this provision was to eliminate the separate "unnecessary hardship" standard for area variances that the supreme court adopted in *Boccia*. RSA 674:33, I(b).

NH(2) **2. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** The requirement that a variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance. The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, a court must determine whether to grant the variance would unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. Mere conflict with the terms of the ordinance is insufficient. RSA 674:33, I(b).

NH(3) **3. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** The New Hampshire Supreme Court has recognized two methods for ascertaining whether granting a variance would violate an ordinance's basic zoning objectives. One way is to examine whether granting the variance would alter the essential character of the neighborhood. Another approach is to examine whether granting the variance would threaten the public health, safety or welfare. RSA 674:33, I(b).

NH(4) **4. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** Rather than examine whether there was evidence in the record to support the factual findings of the zoning board of adjustment (ZBA), and whether, therefore, the ZBA erred when it ruled that allowing signs would not be "contrary to the public interest" or inconsistent with

the spirit of the ordinance, the trial court appears to have examined whether allowing the signs would *serve* the public interest. To the extent that the trial court ruled that the public interest and spirit of the ordinance factors were not met because respondent failed to prove that granting the variance would serve the public interest, the trial court erred. RSA 674:33, I(b).

NH(5) **5. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** There was evidence in the record to support the factual findings of a zoning board of adjustment (ZBA) that a variance for parapet signs would not change the essential character of the neighborhood or cause harm to health, safety and welfare. For instance, there was evidence that the proposed signs were in keeping with others in the downtown area. There was also evidence that the signs would not be hazardous. RSA 674:33, I(b).

NH(6) **6. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** Perhaps the only guiding rule on the substantial justice factor used in determining whether to grant a variance is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. A court also looks at whether the proposed development is consistent with the area's present use. RSA 674:33, I(b).

NH(7) **7. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** The evidence supported the finding of the zoning board of adjustment (ZBA) that the general public would realize no appreciable gain from a denial of a parapet sign variance. The location for the signs was the least visually obtrusive; given the size of the building, it was reasonable to have a landmark sign capable of identifying the location to the public at large; and the assertion that the signs would have no effect on property values was uncontradicted. Thus, the ZBA reasonably concluded that the substantial justice factor for allowing a variance was met. RSA 674:33, I(b).

NH(8) **8. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** Since the variance at issue was to install a sign on a building, the zoning board of adjustment and the trial court did not err by focusing upon the building's size to determine whether the property had special conditions. RSA 674:33, I(b).

NH(9) **9. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** With regard to a variance application, the zoning board of adjustment properly found that the building was unique because of its size. There was evidence that there were very few buildings in the city of a similar size to the applicant's building. RSA 674:33, I(b).

NH(10) **10. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** To establish unnecessary hardship under the first definition set forth in the variance statute, the applicant merely had to show that its proposed signs were a "reasonable use" of the property, given its special conditions. Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought reasonable. The applicant did not have to demonstrate that its proposed signs were necessary to its hotel operation. RSA 674:33, I(b)(5).

NH(11) **11. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** With regard to respondent's variance application, petitioner's argument that respondent could have achieved the same results by installing slightly smaller, yet conforming marquee signs was misplaced. It was based upon the now defunct unnecessary hardship test for obtaining an area variance. RSA 674:33, I(b).

NH(12) **12. Zoning and Planning—Generally—Exceptions, Variances, and Nonconforming Uses** It is for the zoning board of adjustment (ZBA) to resolve conflicts in evidence and assess the credibility of the offers of proof. In reaching its decision, the ZBA is entitled to rely upon its own knowledge, experience and observations. Thus, the ZBA did not err

in finding that a variance applicant's signs would not diminish surrounding property values. RSA 674:33, I(b).

COUNSEL: *Springer Law Office, PLLC*, of Portsmouth (*Jonathan Springer* on the brief and orally), for the petitioner.

Shaines & McEachern, P.A., of Portsmouth (*Alec L. McEachern* on the brief and orally), for the respondent.

JUDGES: DALIANIS, C.J. DUGGAN, HICKS, CONBOY and LYNN, JJ., concurred.

OPINION BY: DALIANIS

OPINION

[*510] **[**586]** DALIANIS, C.J. The respondent, Parade Residence Hotel, LLC (Parade), appeals, and the petitioner, Harborside Associates, L.P. (Harborside), cross-appeals, the decision of the Superior Court (*McHugh*, J.), which partially affirmed and partially reversed the decision of the Portsmouth Zoning Board of Adjustment (ZBA) to grant Parade variances to install two parapet and two marquee signs on its hotel and conference center site. The trial court upheld the ZBA's decision to grant Parade a variance for the marquee signs and reversed its decision to grant Parade a variance for the parapet signs. We affirm in part, reverse in part and remand.

[*511] *I. Background*

The record reflects the following facts. Parade's property abuts Harborside's in downtown Portsmouth. Harborside has operated the Sheraton Portsmouth hotel on its site for many years. Parade intends to operate **[***2]** a Residence Inn by Marriott on its site.

On January 27, 2010, Parade applied to the ZBA for the sign variances. Portsmouth's zoning ordinance divides the city into sign districts "for the purpose of establishing standards for the number, type, size, location and illumination of **signs** in order to maintain and enhance the character of the city's commercial districts and residential neighborhoods and to protect the public from hazardous and distracting displays." Under the zoning ordinance, "[a]ny **sign** not specifically allowed in a sign district is not permitted." Parade's property is located in "Sign District 3."

Parapet signs are not permitted in Sign District 3. Where they are allowed, parapet signs "are permitted only for ground-floor uses and single-use buildings." The zoning ordinance defines a parapet sign as "[a] **sign** attached to a **parapet wall**, with **[**587]** its face parallel to the plane of the **parapet wall** and extending no more than 18 inches from such wall." A parapet is defined as "[a]n extension of a vertical **building** wall above the line of the structural roof."

Marquee signs are allowed in Sign District 3; however, the maximum sign area for an individual marquee sign is twenty square **[***3]** feet. The ordinance defines a marquee sign as "[a] **wall sign** that is mounted on or attached to a **marquee**." A marquee is defined as "[a] **structure** other than a roof that is attached to, supported by and projecting from a **building**, and that provides shelter for pedestrians."

Parade sought a variance to allow it to install two parapet signs on its property, even though such signs are not permitted in Sign District 3, and two marquee signs, each with a sign area of approximately thirty-five square feet, even though the maximum sign area allowed per marquee sign is twenty square feet. Following a hearing on Parade's application, the ZBA voted to grant Parade's variance requests for the following reasons:

- The parapet signs as placed do not feel like visual clutter or overreach as to height.
- The signs will not be contrary to the public interest, resulting in no change in the essential character of the neighborhood or harm to health, safety and welfare.
- The sheer mass of the building and the occupancy by a hotel create a special condition. Visitors to the hotel need to be able to identify their destination.
- [**5] proposal is reasonable and not overly aggressive.
- The marquee signs will not [***4] be disruptive to the visual landscape and may actually enhance the streetscape
- In the justice test, there is no benefit to the public that would outweigh the hardship on the applicant if the variance[s] were denied.
- There is no evidence that this well thought out design would negatively impact surrounding property values.

The ZBA later denied Harborside's timely motion for rehearing, and Harborside appealed the ZBA's decisions to the superior court. The trial court ruled that the ZBA erred when it granted the variance for the two parapet signs, but that its grant of the variance for the two marquee signs was not error. Both parties unsuccessfully moved for partial reconsideration of the trial court's order, and this appeal and cross-appeal followed.

HN1 Our review of zoning board decisions is limited. *1808 Corp. v. Town of New Ipswich*, 161 N.H. 772, 775, 20 A.3d 984 (2011). We will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. *Id.* For its part, the trial court must treat all factual findings of the ZBA as *prima facie* lawful and reasonable, and may not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on [***5] the evidence before it that the ZBA decision is unreasonable. *Id.*

II. Analysis

Because Parade's application was filed after January 1, 2010, RSA 674:33, I(b) (Supp. 2010) sets forth the standards Parade was required to meet in order to obtain a variance. *See* Laws 2009, 307:7, :8. HN2 RSA 674:33, I(b) allows a zoning board to grant a variance if: (1) "[t]he variance will not be contrary to the public interest"; (2) "[t]he spirit of the ordinance is observed"; (3) "[s]ubstantial justice is done"; (4) "[t]he values of surrounding properties are not diminished"; and (5) "[l]iteral enforcement of the provisions of the ordinance would result in unnecessary hardship."

[**588] RSA 674:33, I(b) contains two definitions of unnecessary hardship. *See* RSA 674:33, I(b)(5)(A), (B). Under the first definition:

> HN3 (A) ... "[U]nnecessary 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

[*513] (ii) The proposed use is a reasonable one.

RSA 674:33, I(b)(5)(A). The first definition **[***6]** of unnecessary hardship is similar, but not identical, to the test that we adopted in *Simplex Technologies v. Town of Newington*, 145 N.H. 727, 731-32, 766 A.2d 713 (2001). *See* Laws 2009, 307:5 (statement of legislative intent that first definition mirror *Simplex* test).

HN4 The statute provides that if an applicant fails to satisfy the first definition of unnecessary hardship, then it may still obtain a variance if it satisfies the second definition. *See* RSA 674:33, I(b)(5)(B). Under the second definition:

> HN5 [A]n 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 used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Id. This definition of unnecessary hardship is similar, but not identical, to the test for unnecessary hardship that we applied before *Simplex*. *See, e.g., Governor's Island Club v. Town of Gilford*, 124 N.H. 126, 130, 467 A.2d 246 (1983); *see also* Laws 2009, 307:5 (statement of legislative intent that second definition mirror pre-*Simplex* test for unnecessary hardship "as exemplified by cases such as *Governor's Island*").

NH(1) **[1]** HN6 The **[***7]** statute provides that these definitions 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). The legislature's statement of intent indicates that the purpose of this provision was to "eliminate the separate 'unnecessary hardship' standard for 'area' variances" that we adopted in *Boccia v. City of Portsmouth*, 151 N.H. 85, 92, 855 A.2d 516 (2004). Laws 2009, 307:5.

A. Parapet Signs

We first address Parade's appeal of the trial court's decision to reverse the ZBA's grant of a variance for the two parapet signs. The trial court ruled that Parade failed to satisfy its burden of demonstrating why the parapet sign variance should be granted. Specifically, the trial court found that "[t]he only apparent benefit to the public" from having the parapet signs installed "would be an ability to identify [Parade's] property from far away." This purpose, the trial court stated, "does not outweigh the clear provision of the ordinance." Although the trial court's ruling is somewhat unclear, we interpret it either to be a determination that the ZBA erred **[***8]** **[*514]** when it found that granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance, or that the ZBA erred when it found that granting the variance would work a substantial justice. *See* RSA 674:33, I(b)(1), (2), (3).

1. Public Interest and Spirit of the Ordinance

NH(2) **[2]** We first address the public interest and spirit of the ordinance factors. HN7 "The requirement that the variance not be contrary to the public interest is related to the requirement that [it] ... be consistent **[**589]** with the spirit of the ordinance." *Farrar v. City of Keene*, 158 N.H. 684, 691, 973 A.2d 326 (2009) (quotation omitted). The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. *See Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581, 883 A.2d 1034 (2005). "As the provisions of the ordinance represent a declaration of public interest, *any* variance would in some measure be contrary thereto." *Id.* (quotation omitted). Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an **[***9]** ordinance, we must determine whether to grant the variance would "unduly, and in a

marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." *Id.* (quotations omitted). Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's "basic zoning objectives." *Id.* (quotation omitted). Mere conflict with the terms of the ordinance is insufficient. *See id.*

NH(3) [3] HN8 We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's "basic zoning objectives." One way is to examine whether granting the variance would "alter the essential character of the neighborhood." *Id.* (quotation omitted). Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare." *Id.*

NH(4) [4] Here, the ZBA found that allowing Parade to install the parapet signs would not be contrary to the public interest because they would not "change ... the essential character of the neighborhood" or cause "harm to health, safety and welfare." Rather than examine whether there was evidence in the record to support these factual **[***10]** findings, and whether, therefore, the ZBA erred when it ruled that allowing the signs would not be "contrary to the public interest" or inconsistent with the spirit of the ordinance, the trial court appears to have examined whether allowing the signs would *serve* the public interest. To the extent that the trial court ruled **[*515]** that the public interest and spirit of the ordinance factors were not met because Parade failed to prove that granting the variance would serve the public interest, the trial court erred.

Ordinarily, we would end our analysis here. *See Lone Pine Hunters' Club v. Town of Hollis*, 149 N.H. 668, 670, 826 A.2d 582 (2003). However, because we have before us the same record that was available to the trial court, we will address whether it supports the ZBA's factual determinations that the parapet signs would not "change ... the essential character of the neighborhood" or cause "harm to health, safety and welfare." *See id.*

NH(5) [5] There is evidence in the record to support the ZBA's factual findings. For instance, there was evidence that the proposed signs were "in keeping with others" in downtown Portsmouth. This evidence supports the ZBA's finding that the signs would not change the essential **[***11]** character of the neighborhood. There was also evidence that the signs would not be hazardous. This supports the ZBA's finding that the signs would not cause harm to the public health, safety and welfare.

Because the ZBA used the correct test to determine whether the public interest and spirit of the ordinance factors were met and because there is evidence to support the ZBA's findings on these factors, to the extent that the trial court ruled that the ZBA acted unlawfully when it found that the factors were met, the trial court erred. We, therefore, reverse the trial **[**590]** court's implied rulings on these two factors.

2. Substantial Justice

NH(6) [6] We next address the substantial justice factor. HN9 "Perhaps 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." *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109, 920 A.2d 1192 (2007) (quotation and brackets omitted). We also look "at whether the proposed development [is] consistent with the area's present use." *Id.*

We have addressed this factor on just a few occasions. For instance, in *Malachy Glen Associates*, we upheld the trial court's conclusion that the proposed storage **[***12]** facility project worked a substantial justice because it "pose[d] no further threat to the wetlands[,] ... [was] appropriate for the area[,] and [did] not harm its abutters[;] [therefore,] the general public [would] realize no appreciable gain from denying this variance." *Id.* In *Harrington v. Town of Warner*, 152 N.H. 74, 85, 872 A.2d 990 (2005), we concluded that the applicant, who

sought to expand a manufactured housing park, showed that substantial justice would be done in granting the variance "because it would improve a dilapidated area of town and provide affordable housing in the area." In *Daniels v. Town of Londonderry*, 157 N.H. 519, 529, 953 A.2d 406 (2008), we **[*516]** concluded that the applicant, seeking to construct wireless communication towers in an agricultural-residential zone, had shown that substantial justice would be done in granting the variances because the project "was the only reasonable way to remedy an existing gap in coverage."

The ZBA found that this factor was met because "there is no benefit to the public that would outweigh the hardship on the applicant if the [parapet sign] variance were denied." Additionally, the ZBA found that "[t]he parapet signs as placed do not feel like visual clutter **[***13]** or overreach as to height." The ZBA also found that the signs would enable visitors to identify their destination and that Parade's proposal was "reasonable and not overly aggressive." The ZBA further determined that the parapet signs would not result in diminished property values.

In impliedly reversing these findings, the trial court ruled: "The only apparent benefit to the public would be an ability to identify [Parade's] property from far away; however that purpose does not outweigh the clear provision of the ordinance ... ." To the extent that the trial court intended this to be a determination that the ZBA's findings on the substantial justice factor were unlawful, the trial court erred. Contrary to the trial court's ruling, the ZBA correctly focused upon whether the general public stood to gain from a denial of the variance. *See Malachy Glen Assocs.*, 155 N.H. at 109.

NH(7) **[7]** Because we have before us the same record that was available to the trial court, we will address whether it supports the ZBA's finding that the general public would realize no appreciable gain from a denial of the parapet sign variance. *See Lone Pine Hunters' Club*, 149 N.H. at 670; *see also Malachy Glen Assocs.*, 155 N.H. at 109. **[***14]** There is evidence in the record to support the ZBA's findings on this factor.

Specifically, there is evidence in the record that the available locations for the parapet signs were limited by architectural considerations and that while another location existed, if the signs were placed there, they would "stick out and be much more obtrusive." Parade proposed that the signs be "set back a few feet from the main plane of the building in a recessed area of **[**591]** the building." This location for the signs "was the least visually obtrusive." This evidence supports the ZBA's finding about the lack of visual clutter from the signs.

There is also evidence in the record that given the size of the building, "it was reasonable to have a landmark sign capable of identifying the location to the public at large." Additionally, there is evidence that "[t]he parapet itself helped aesthetics by blocking rooftop units." This evidence supports the ZBA's finding that the signs would enable visitors to identify their destination and that Parade's proposal was reasonable and not overly **[*517]** aggressive. Finally, there is evidence in the record supporting the ZBA's finding that the signs would not "negatively impact surrounding **[***15]** property values." Parade's assertion that the signs "would have no effect on surrounding property values" was uncontradicted.

From these findings, which the evidence supports, the ZBA reasonably concluded that the substantial justice factor was met. To the extent that the trial court ruled to the contrary, it erred. We, therefore, reverse the trial court's ruling on the substantial justice factor.

Because the trial court appears to have limited its review to the public interest, spirit of the ordinance and substantial justice criteria, and because we have already concluded, as a matter of law, that there was evidence in the record to support the ZBA's finding that the parapet signs would not diminish property values, "we will not address the remaining variance criteria on appeal and will remand for the trial court to consider the unnecessary hardship ... criteria in the first instance." *Naser v. Town of Deering Zoning Bd. of Adjustment*, 157 N.H. 322, 328, 950 A.2d 157 (2008).

B. Marquee Signs

We next address Harborside's cross-appeal of the trial court's decision to uphold the grant of the marquee sign variance.

1. Unnecessary Hardship

Harborside first argues that the ZBA erred by finding that Parade **[***16]** met its burden of proving unnecessary hardship. With respect to the unnecessary hardship factor, the ZBA appears to have considered only the first definition of unnecessary hardship set forth in RSA 674:33, I(b)(5). Under that definition, unnecessary hardship exists if, "owing to special conditions of the property that distinguish it from other properties in the area," (1) there is "[n]o fair and substantial relationship" between the "general public purposes of the ordinance" and the "specific application" of the ordinance to the property at issue, and (2) "[t]he proposed use is a reasonable one." RSA 674:33, I(b)(5)(A).

The ZBA found that the special condition of the property was "[t]he sheer mass of the building and the occupancy by a hotel." The ZBA further impliedly found that the general public purpose of the ordinance was to reduce visual clutter and determined that the marquee signs would "not be disruptive to the visual landscape" and could "actually enhance the streetscape." The ZBA concluded as well that the marquee sign proposal was "reasonable and not overly aggressive."

The trial court upheld these findings and the ZBA's implied conclusion that Parade satisfied its burden **[***17]** of proving unnecessary hardship. As the **[*518]** trial court explained, "the ZBA could have reasonably concluded that the size of [Parade's building] was unique in comparison to the majority of the buildings located in the city's business district." The trial court determined that the ZBA "could have also reasonably concluded **[**592]** that safety to the public mandates a larger marquee sign on this building."

NH(8)**[8]** Harborside argues that both the ZBA and trial court erred by relying upon the size of Parade's building to determine whether Parade's property has "special conditions." Harborside argues that the size of the building is not a relevant factor for unnecessary hardship. Under the circumstances of this case, we disagree. Since the variance at issue is to install a sign on a building, we hold that the ZBA and trial court did not err by focusing upon the building's size to determine whether the property has "special conditions."

To support its assertion, Harborside relies upon the concurrence to *Bacon v. Town of Enfield*, 150 N.H. 468, 840 A.2d 788 (2004), which stated that a homeowner could meet the "special conditions" part of the *Simplex* unnecessary hardship test only by showing that her property was unique in its **[***18]** setting, not by showing that the shed for which she sought a variance to build would be unique in its setting. *Bacon*, 150 N.H. at 480 (Dalianis and Duggan, JJ., concurring specially).

Harborside's reliance upon this concurrence is misplaced for at least two reasons. First, the court has not adopted this part of the concurrence, and, thus, it lacks precedential value. More importantly, even if the court had adopted this analysis, the instant case is distinguishable from *Bacon*. Here, Parade is not attempting to meet the "special conditions" test by showing that its *signs* would be unique in their settings, but that its *property* — the hotel and conference center — has unique characteristics that make the signs themselves a reasonable use of the property. 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." *Cf. Farrar*, 158 N.H. at 689 (where variance sought to convert large, historical single use residence to mixed use of two residences and office space, size of residence was relevant to determining whether property was unique in its environment).

NH(9)**[9]** Harborside next asserts that the ZBA **[***19]** erred by finding that Parade's

building was unique because of its size. As there is evidence in the record to support this finding, we uphold it. There was evidence that there are "very few buildings" in Portsmouth of a similar size to Parade's building.

NH(10) **[10]** Harborside next contends that the ZBA erred by finding unnecessary hardship because Parade failed to prove that "the larger marquee **[*519]** signs are necessary in order to operate its hotel." "Clearly," Harborside argues, "the hotel could operate just fine with smaller marquee signs (or, indeed, without any marquee signs at all)." However, HN10 to establish unnecessary hardship under the first definition set forth in RSA 674:33, I(b)(5), Parade merely had to show that its proposed signs were a "reasonable use" of the property, given its special conditions. *See* RSA 674:33, I(b)(5)(A); *see also Rancourt v. City of Manchester*, 149 N.H. 51, 54, 816 A.2d 1011 (2003) ("Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'" (citation omitted)). Parade **[***20]** did not have to demonstrate that its proposed signs were "necessary" to its hotel operation.

2. Other Variance Criteria

Harborside next asserts that the ZBA erred by finding that Parade satisfied **[**593]** the other requisites for the marquee variance. Specifically, Harborside argues that the ZBA erred by determining that granting the marquee sign variance: (1) would not be contrary to the public interest; (2) would be consistent with the spirit of the ordinance; (3) would result in substantial justice; and (4) would not diminish the values of surrounding properties. *See* RSA 674:33, I(b)(1)-(4).

NH(11) **[11]** With respect to the public interest, spirit of the ordinance and substantial justice factors, Harborside argues that these factors were not met because Parade could have "achieve [d] the same results" by installing "slightly smaller, yet conforming marquee signs." Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance. *See Boccia*, 151 N.H. at 92 **[***21]** (to obtain area variance, applicant must prove that the benefit he seeks cannot be achieved by some method, other than area variance, which is reasonably feasible for applicant to pursue).

NH(12) **[12]** With respect to the property value factor, Harborside argues that there was no evidence before the ZBA to support its finding that the marquee signs would not diminish surrounding property values. While Harborside acknowledges that Parade's attorney represented this to be the case, Harborside argues that the attorney's statement did not constitute credible evidence. HN11 It was for the ZBA, however, to resolve conflicts in evidence and assess the credibility of the offers of proof. *See Continental Paving v. Town of Litchfield*, 158 N.H. 570, 575, 969 A.2d 467 (2009) (zoning board need not accept conclusions of experts); *cf. Appeal of Pennichuck Water Works*, 160 N.H. 18, 41, 992 A.2d 740 (2010) (duty of public utilities commission to resolve issues **[*520]** of fact and conflicts of opinion; public utilities commission may accept or reject such portions of evidence as it deems proper and was not required to accept even uncontroverted evidence). In reaching its decision, the ZBA was also entitled to rely upon its own knowledge, experience and **[***22]** observations. *See Continental Paving*, 158 N.H. at 576.

For all of the above reasons, therefore, we affirm the trial court's decision upholding the ZBA's grant of the marquee variance.

Affirmed in part; reversed in part; and remanded.

DUGGAN ▾, HICKS ▾, CONBOY ▾ and LYNN ▾, JJ., concurred.

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*163 N.H. 439, *; 42 A.3d 858, **;*
*2012 N.H. LEXIS 38, ****

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HARBORSIDE ASSOCIATES, L.P. v. CITY OF PORTSMOUTH

No. 2011-236

SUPREME COURT OF NEW HAMPSHIRE

163 N.H. 439; 42 A.3d 858; 2012 N.H. LEXIS 38

February 15, 2012, Argued
March 23, 2012, Opinion Issued

PRIOR HISTORY: [*1]**
Rockingham.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Intervenor applicant sought to amend its previously approved site plan. Respondent city's planning board approved the application, and the zoning board of adjustment (ZBA) upheld the approval. The Rockingham Superior Court (New Hampshire) vacated the ZBA's decision and remanded the case. The applicant appealed.

OVERVIEW: The trial court held that by seeking to replace a previously approved retail space with a conference center, the applicant presented a substantial change to its previously approved site plan, which did not qualify for the exemption under RSA 674:39 (2008) (amended 2011). The court stated that any development pursuant to a site plan amendment that substantially changed the plan was not "in accordance with the terms" of the original approval and clearly did not fall within the protection of the exemption. Thus, because there was no ambiguity in RSA 674:39, the court declined to apply the administrative gloss doctrine. Next, an amendment could no longer be said to be "in accordance" with the terms of a previously approved site plan if it substantially changed that plan. A conference center, which was designed to host large meetings, seminars, and other events, was qualitatively different from retail space, which was designed to provide a commercial environment where customers could purchase goods and services. Thus, the

amended site plan was not entitled to the exemption. The trial court was not required to show deference to the ZBA's decision, as its legal conclusion was at issue.

OUTCOME: The court affirmed the trial court's decision.

CORE TERMS: site plan, ordinance, zoning ordinances, exemption, zoning, exempt, space, retail, gloss, conference center, Planning, hotel, substantial change, "designated, ambiguity, site, planning board, certificate of occupancy, restaurant, arranged, replace, amend, plat, proposed amendment, "major change", existing uses, ambiguous, recorded", parking, exemption statute

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Real Property Law > Zoning & Land Use > Judicial Review

HN1 Appellate review of a superior court's decision vacating a zoning board of adjustment's decision is deferential. The court will uphold the decision unless it is unsupported by the evidence or legally erroneous. At the same time, the superior court must treat the factual findings of the planning board as prima facie lawful and reasonable, and cannot set aside its decision absent unreasonableness or an identified error of law. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Ordinances

HN2 The construction of a zoning ordinance's terms is a question of law, which is reviewed de novo. More Like This Headnote

Real Property Law > Subdivisions > Local Regulation

Real Property Law > Zoning & Land Use > Ordinances

HN3 See RSA 674:39 (2008) (amended 2011).

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation

Governments > Local Governments > Ordinances & Regulations

HN4 As a rule of statutory construction, an "administrative gloss" is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. A lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine. More Like This Headnote

Real Property Law > Subdivisions > Local Regulation

Real Property Law > Zoning & Land Use > Ordinances

HN5 While it does not directly address whether a site plan amendment is exempt from subsequently enacted zoning ordinances, RSA 674:39 (2008) (amended 2011) does provide that any development or building on the site must occur "in accordance with

the approved subdivision plat. or in accordance with the terms of the approval." RSA 674:39, I(a). Any development pursuant to a site plan amendment that substantially changes the plan is, by definition, not "in accordance with the terms" of the original approval and, therefore, clearly does not fall within the protection of the exemption. More Like This Headnote

Real Property Law > Subdivisions > Local Regulation

Real Property Law > Zoning & Land Use > Ordinances

HN6 While the terms of a site plan approval cannot sensibly be treated as absolute, as this would deprive developers of any flexibility to make even incidental changes, RSA 674:39 (2008) (amended 2011) exempts from subsequent changes to zoning ordinances only amendments to approved site plans that do not alter the development to such an extent that it is no longer in accordance with the terms of the original approval. Therefore, an amendment can no longer be said to be "in accordance" with the terms of a previously approved site plan if it substantially changes that plan. Whether an amendment constitutes a substantial change from the terms of the site plan's original approval necessarily turns upon the facts and circumstances of the particular case. More Like This Headnote

Real Property Law > Subdivisions > Local Regulation

HN7 Where an amendment to an approved site plan seeks to replace a previously approved use with a new, previously unapproved use, the resulting change is substantial, and inconsistent with the terms of the original approval for purposes of RSA 674:39 (2008) (amended 2011). More Like This Headnote

Real Property Law > Zoning & Land Use > Ordinances

HN8 Article 11, § 10.1115.61 of the 2010 Portsmouth, New Hampshire, zoning ordinance states that the requirements pertaining to off-street parking in the district where the project is located shall not apply to any existing uses on a lot, but shall apply to any change or expansion of existing uses that results in an increase in the number of off-street parking spaces required for the lot. More Like This Headnote

Real Property Law > Zoning & Land Use > Ordinances

HN9 In the "Definitions" section, Article 15 of the 2010 Portsmouth, New Hampshire, zoning ordinance, the term "use" is defined as any purpose for which a lot may be designated, arranged, or intended. More Like This Headnote

Real Property Law > Zoning & Land Use > Ordinances

HN10 The words used in a zoning ordinance will be given their ordinary meaning unless it appears from their context that a different meaning was intended. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

HN11 RSA 677:6 (2008) states that a superior court may set aside a zoning board of adjustment decision for errors of law. More Like This Headnote

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NH(1) **1. Statutes—Generally—Agency's Interpretation** As a rule of statutory construction, an "administrative gloss" is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. A lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine.

NH(2) **2. Zoning and Planning—Generally—Construction of Statutory Provisions** While it does not directly address whether a site plan amendment is exempt from subsequently enacted zoning ordinances, the five-year exemption statute does provide that any development or building on the site must occur "in accordance with the approved subdivision plat ... or in accordance with the terms of the approval." Any development pursuant to a site plan amendment that substantially changes the plan is, by definition, not "in accordance with the terms" of the original approval and, therefore, clearly does not fall within the protection of the exemption. In short, seeing no ambiguity in the statute, the court declined to apply the administrative gloss doctrine to it. RSA 674:39.

NH(3) **3. Zoning and Planning—Generally—Construction of Statutory Provisions** While the terms of a site plan approval cannot sensibly be treated as absolute, as this would deprive developers of any flexibility to make even incidental changes, the five-year exemption statute exempts from subsequent changes to zoning ordinances only amendments to approved site plans that do not alter the development to such an extent that it is no longer in accordance with the terms of the original approval. Therefore, an amendment can no longer be said to be "in accordance" with the terms of a previously approved site plan if it substantially changes that plan. Whether an amendment constitutes a substantial change from the terms of the site plan's original approval necessarily turns upon the facts and circumstances of the particular case. RSA 674:39.

NH(4) **4. Zoning and Planning—Generally—Construction of Statutory Provisions** Where an amendment to an approved site plan seeks to replace a previously approved use with a new, previously unapproved use, the resulting change is substantial, and inconsistent with the terms of the original approval for purposes of the five-year exemption statute. RSA 674:39.

NH(5) **5. Zoning and Planning—Generally—Conditional Approvals** An applicant's original approved site plan, which was for a hotel, a restaurant, and retail space, did not include the construction of a conference center. A conference center, which was designed to host large meetings, seminars, and other events, was qualitatively different from retail space, which was designed to provide a commercial environment where customers could purchase goods and services. Based on this substantial change to its previously approved site plan, the amended site plan was not entitled to the five-year exemption. RSA 674:39.

NH(6) **6. Zoning and Planning—Ordinances—Criteria** An ordinance defined "use" as "any purpose for which a lot may be designated, arranged, or intended." Such a "designated, arranged, intended" purpose "existed" for an applicant's site plan as of the date the applicant obtained the approval in 2008, not as of the date it received a certificate of occupancy.

NH(7) **7. Zoning and Planning—Ordinances—Construction** The words used in a zoning ordinance will be given their ordinary meaning unless it appears from their context that a

different meaning was intended.

NH(8) **8. Zoning and Planning—Judicial Review—Standard of Review** The trial court did not err in failing to defer to a decision of a zoning board of adjustment (ZBA). The ZBA's decision did not involve factual findings. Instead, what was at issue was the ZBA's legal conclusion that based upon the undisputed facts concerning the change of use proposed, an amended site plan did not have to meet the requirements of an ordinance.

COUNSEL: *Springer Law Office, PLLC*, of Portsmouth (*Jonathan S. Springer* on the brief and orally), for the petitioner, Harborside Associates, L.P.

Robert P. Sullivan and *Susan W. Chamberlin*, of Portsmouth, on the brief, and *Mr. Sullivan* orally, for the respondent, City of Portsmouth.

Shaines & McEachern, P.A., of Portsmouth (*Alec L. McEachern* on the brief and orally), for the intervener, Parade Residence Hotel, LLC.

JUDGES: LYNN, J. DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

OPINION BY: LYNN

OPINION

[860]** **[*440]** LYNN, J. The intervener, Parade Residence Hotel, LLC (Parade), appeals the order of the Superior Court (Lewis, J.) vacating and remanding the decision of the Zoning Board of Adjustment (ZBA) of the City of Portsmouth (City) that upheld the City Planning Board's (Board) approval of Parade's application to amend its previously approved site plan. We affirm.

I

The record reflects the following relevant facts. Parade's property abuts the property of the plaintiff, Harborside Associates, L.P. (Harborside), the **[*441]** operator of the Sheraton Portsmouth Hotel. On September 18, 2008, the Board approved Parade's application to construct a five-story building, consisting of a hotel, a restaurant, and ground floor retail **[***2]** space. Parade began construction in July of 2009.

On December 21, 2009, the City adopted a new zoning ordinance (the 2010 Ordinance), which became effective on January 1, 2010. Among other changes, the new ordinance adopted parking requirements different from those in effect in 2008 when the Parade project was first approved. On January 19, 2010, Parade submitted an application to the Board to amend its 2008 site plan, seeking to replace the previously approved retail space with a 300-person conference center. Harborside objected to the amendment, contending that Parade was required to comply with the 2010 Ordinance because of the change in plans. After a public hearing, the Board approved the application to amend without requiring Parade to comply with the new ordinance. Harborside appealed to the ZBA, which affirmed the Board's ruling. The ZBA determined that the amended site plan was exempt from the 2010 Ordinance under RSA 674:39 (2008). The ZBA subsequently denied Harborside's motion for rehearing.

Harborside appealed to the superior court pursuant to RSA 677:4 (2008). The superior court vacated the ZBA's decision, holding that by seeking to replace the previously approved retail **[***3]** space with a conference center, Parade presented a "major change" to its previously approved site plan, which did not qualify for the exemption under RSA 674:39. Parade appeals.

[861]** II

HN1 Our review of the superior court's decision is deferential. *Derry Senior Dev. v. Town of Derry*, 157 N.H. 441, 447, 951 A.2d 170 (2008). We will uphold the decision unless it is unsupported by the evidence or legally erroneous. *Id.* At the same time, the superior court must treat the factual findings of the planning board as *prima facie* lawful and reasonable, and cannot set aside its decision absent unreasonableness or an identified error of law. *Id.*; *see also* RSA 677:6 (2008). HN2 The construction of a zoning ordinance's terms, however, is a question of law, which we review *de novo. Sutton v. Town of Gilford*, 160 N.H. 43, 57, 992 A.2d 709 (2010).

Parade first argues that RSA 674:39 exempts its amended site plan from the 2010 Zoning Ordinance. When Parade submitted its application to amend, RSA 674:39 provided, in pertinent part:

> HN3 I. Every subdivision plat approved by the planning board and properly recorded in the **[*442]** registry of deeds and every site plan approved by the planning board and properly recorded in the registry of deeds ... shall be **[***4]** exempt from all subsequent changes in ... zoning ordinances ... for a period of 4 years after the date of approval; provided that:
>
> > (a) Active and substantial development or building has begun on the site ... in accordance with the approved subdivision plat within 12 months after the date of approval, or in accordance with the terms of the approval ... .

RSA 674:39 (2008) (amended 2011) [1]

FOOTNOTES

1 The statute, amended in 2011, now provides a five-year exemption to approved site plans from subsequent changes to zoning ordinances, provided that substantial development or building has begun within 24 months after the date of a site plan's approval.

Parade argues that because RSA 674:39 does not address whether an amendment to a site plan exempt under the statute is also exempt, the statute is on this point ambiguous. To resolve the ambiguity, Parade urges us to apply the doctrine of administrative gloss, and adopt the Board's policy of applying the RSA 674:39 exemption to amended site plans as long as the project is still under active construction and has not received a certificate of occupancy.

NH(1) **[1]** HN4 As a rule of statutory construction, "[a]n 'administrative gloss' is placed upon an ambiguous clause **[***5]** when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *DHB, Inc. v. Town of Pembroke*, 152 N.H. 314, 321, 876 A.2d 206 (2005). A lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 502, 926 A.2d 261 (2007).

NH(2) **[2]** HN5 While it does not directly address whether a site plan amendment is exempt from subsequently enacted zoning ordinances, RSA 674:39 does provide that any development or building on the site must occur "in accordance with the approved subdivision plat ... or in accordance with the terms of the approval." RSA 674:39, I(a). Any development pursuant to a site plan amendment that substantially changes the plan is, by definition, not "in accordance

with the terms" of the original approval and, therefore, clearly does not fall within the protection of the exemption. In short, seeing no ambiguity in RSA 674:39, we decline to apply the administrative gloss doctrine.

[862]** Next, Parade argues that the record does not support the superior court's conclusion that its amended site **[***6]** plan did not qualify for the RSA 674:39 **[*443]** exemption because it constituted a "major change." Parade and the City argue that because Parade's proposed amendment affects only a small physical area of the overall site plan, the superior court erred by concluding that it was a "major" change. We disagree.

NH(3) **[3]** *HN6* While we recognize that the terms of a site plan approval cannot sensibly be treated as absolute, as this would deprive developers of any flexibility to make even incidental changes, RSA 674:39 exempts from subsequent changes to zoning ordinances only amendments to approved site plans that do not alter the development to such an extent that it is no longer in accordance with the terms of the original approval. Therefore, we hold that an amendment can no longer be said to be "in accordance" with the terms of a previously-approved site plan if it substantially changes that plan. *Cf. Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H. 222, 228, 965 A.2d 1096 (2009) (holding that zoning ordinances prohibiting nonconforming uses "will apply to any alteration of a building or use for a purpose or in a manner which is substantially different from the use to which it was put before alteration" (citations and **[***7]** quotations omitted)). Whether an amendment constitutes a substantial change from the terms of the site plan's original approval necessarily turns upon the facts and circumstances of the particular case.

NH(4) **[4, 5]** In this case, we have no occasion to identify the precise degree of change to a site plan that is substantial enough to require compliance with new zoning ordinances passed after construction has begun; wherever that line may lie, Parade's proposed amendment crossed it. *HN7* Where, as here, an amendment to an approved site plan seeks to replace a previously approved use with a new, previously unapproved use, the resulting change is substantial, and inconsistent with the terms of the original approval. *Cf. Chasse v. Town of Candia*, 132 N.H. 574, 579, 567 A.2d 999 (1989) (holding that RSA 674:39 provides no exemption to a site plan that was "neither approved nor recorded"). Parade's original approved site plan, which was for a hotel, a restaurant, and retail space, did not include the construction of a conference center. A conference center, which is designed to host large meetings, seminars, and other events, is qualitatively different from retail space, which is designed to provide a commercial environment **[***8]** where customers may purchase goods and services. This difference is reflected in the Table of Uses, Section 10.440 of the 2010 Ordinance, where conference centers, retail space, hotels, and restaurants have different designated uses. With this substantial change to its previously-approved site plan, we agree with the superior court that Parade's amended site plan is not entitled to the exemption under RSA 674:39.

[*444] Parade next argues that even if its amendment is not entitled to the RSA 674:39 exemption, the 2010 Ordinance, by its terms, does not apply to Parade's amended site plan. Parade directs our attention to *HN8* Article 11, Section 10.1115.61 of the ordinance, which states: "The requirements [pertaining to off-street parking in the district where the project is located] shall not apply to any existing uses on a lot, but shall apply to any change or expansion of existing uses that results in an increase in the number of off-street parking spaces required for the lot ... ." According to Parade, because it has not yet received a certificate of occupancy for its site, the site has no "existing" uses and **[**863]** thus the 2010 Ordinance does not apply to Parade's proposed amendment of such uses. **[***9]** We disagree.

NH(6) **[6, 7]** *HN9* In the "Definitions" section, Article 15 of the 2010 Ordinance, the term "use" is defined as "Any purpose for which a lot ... may be designated, arranged, [or] intended ... ." Such a "designated, arranged, intended" purpose "exists" for Parade's site plan as of the date it obtained the approval in 2008, not as of the date it receives a certificate of occupancy.

Indeed, if one accepts Parade's argument that the original approval did not constitute an "existing use," there would be no basis whatsoever for exempting any aspect of the project (even those portions that were not to be changed) from the requirements of the 2010 Ordinance. *See Sutton*, 160 N.H. at 57 (HN10 [T]he words used in a zoning ordinance will be given their ordinary meaning unless it appears from their context that a different meaning was intended." (citations and quotations omitted)).

NH(8) **[8]** Finally, the City argues that the superior court "failed to show deference to the ZBA's finding that [Parade's] amendment could reasonably be reviewed under the ordinance in effect when the site plan application was approved." The ZBA's decision, however, did not involve factual findings; the facts regarding the change of use **[***10]** sought by Parade are not in dispute. Instead, what is at issue is the ZBA's *legal conclusion* that, based upon the undisputed facts concerning the change of use proposed, the amended site plan did not have to meet the requirements of the 2010 Ordinance. Nor can the doctrine of administrative gloss be stretched so far as to cover this case, since the ZBA's decision flatly contradicts the unambiguous terms of a newly-enacted ordinance concerning its applicability to the substantial change in use reflected in the site plan amendment submitted after the ordinance took effect. *See Anderson*, 155 N.H. at 502; *cf. Appeal of Stanton*, 147 N.H. 724, 728, 805 A.2d 419 (2002) ("[A]n agency's interpretation will not be given deference if it is contrary to the express statutory language."). The superior court, therefore, did not err by overturning the **[*445]** ZBA's erroneous legal ruling. *See* HN11 RSA 677:6 (2008) (superior court may set aside ZBA decision for errors of law).

Affirmed.

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

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*164 N.H. 634, *; 62 A.3d 855, **;*
*2013 N.H. LEXIS 17, ****

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STEPHEN **BARTLETT** & *a.* v. CITY OF **MANCHESTER**

No. 2012-176

SUPREME COURT OF NEW HAMPSHIRE

164 N.H. 634; 62 A.3d 855; 2013 N.H. LEXIS 17

January 10, 2013, Argued
~~**February 25, 2013**, Opinion Issued~~

PRIOR HISTORY: [*1]**
Hillsborough-northern judicial district.

DISPOSITION: Vacated and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner abutters appealed an order in which the Superior Court for the Hillsborough-Northern Judicial District (New Hampshire) vacated a decision of a zoning board of adjustment (ZBA) which granted intervenor applicant a variance. The applicant cross-appealed.

OVERVIEW: The applicant, a church, sought a variance to allow a nonprofit group to operate a self-help organization for adults with mental illness inside its carriage house. The court first held that the trial court had subject matter jurisdiction to consider whether this and other similar uses of the applicant's property were permitted as a matter of right under the accessory use provision of an ordinance. In deciding whether the variance application satisfied the criterion of unnecessary hardship under RSA 674:33, I(b)(5) (Supp. 2012), the trial court correctly determined that it had to consider the permissible uses of the property under the ordinance, including the accessory use provision. In the absence of contrary legislative intent, the court concluded that contained in every variance application was the threshold question whether the applicant's proposed use of property required a variance because the ZBA would invariably consider this issue in deciding whether unnecessary hardship existed. The trial court, however, lacked a sufficient factual record to decide the accessory use issue. It should have remanded the case to the ZBA to consider the issue in the first instance.

OUTCOME: The court vacated the trial court's decision. It remanded the case for the trial court to determine whether the proposed use was a lawful accessory use of the applicant's property and, if not, whether the applicant should receive a variance.

CORE TERMS: variance, accessory use, ordinance, unnecessary hardship, zoning, matter jurisdiction, matter jurisdiction, zoning board, zoning ordinances, church, proposed use, lawful, use of property, literal, hear, factual record, petitioners' argument, public hearing, adjudicate, accessory, quotation, judicial review, permit application, cross-appeal, matter of right, statutory scheme, particular use, private nuisance, pleading requirement, carriage house

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Real Property Law > Zoning & Land Use > Special Permits & Variances

HN1 Under RSA 674:33, I(b) (Supp. 2012), a zoning board of adjustment has the power to grant a variance 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 unnecessary hardship. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 See RSA 674:33, I(b)(5)(A) (Supp. 2012).

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN3 See RSA 674:33, I(b)(5)(B) (Supp. 2012).

Real Property Law > Zoning & Land Use > Judicial Review

HN4 Judicial review in zoning cases is limited. An appellate court will uphold the trial court's decision unless it is unsupported by the evidence or legally erroneous. For its part, the trial court must treat all factual findings of the zoning board of adjustment (ZBA) as prima facie lawful and reasonable, and may not set aside or vacate the ZBA's decision, except for errors of law, unless it is persuaded by the balance of probabilities, on the evidence before it, that the decision is unreasonable. RSA 677:6 (2008). More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN5 Subject matter jurisdiction refers to the court's statutory or constitutional power to adjudicate the case. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN6 Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. In other words, it is a tribunal's authority to adjudicate the type of controversy involved in the action. A court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction. A party may challenge

subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

HN7 RSA ch. 677 vests the superior court with jurisdiction to hear appeals of zoning board of adjustment (ZBA) decisions. To establish jurisdiction in the superior court, a party must both: (1) file a motion for rehearing with the ZBA within thirty days of its decision, RSA 677:2 (Supp. 2012), RSA 677:3 (2008); and (2) appeal the ZBA's decision to the court within thirty days of its denial of the motion for rehearing, RSA 677:4 (Supp. 2012). Failure to comply with either requirement divests the superior court of subject matter jurisdiction over the appeal. Moreover, no ground not set forth in the motion for rehearing shall be urged, relied on, or given any consideration by a court unless for good cause shown the court shall allow the appellant to specify additional grounds. RSA 677:3, I. The statutory scheme is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Ordinances

HN8 Manchester, N.H., Zoning Ordinance art. 3 defines an accessory use of property as a use which exists on the same lot as the principal use of the property to which it is related, and which is customarily incidental and subordinate to the principal use. More Like This Headnote

Real Property Law > Zoning & Land Use > Administrative Procedure

HN9 RSA 674:33, I(a) authorizes zoning boards of adjustment to hear and decide appeals of decisions of administrative officials enforcing zoning ordinances. More Like This Headnote

Real Property Law > Zoning & Land Use > Administrative Procedure

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN10 In the absence of contrary legislative intent, contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because the zoning board of adjustment (ZBA) will invariably consider this issue in deciding whether unnecessary hardship exists. Given the complexity of zoning regulation, the obligation of municipalities to provide assistance to all their citizens seeking approval under zoning ordinances, and the importance of the constitutional right to enjoy property, the New Hampshire Supreme Court cannot accept that the mere filing of a variance application limits the ZBA's or the superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview

Real Property Law > Torts > Nuisance > Defenses > General Overview

Real Property Law > Torts > Nuisance > Types > Private Nuisance

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN11 Considerations of fairness, convenience, and policy require a defendant in a private nuisance suit to plead reliance on the accessory use doctrine. These considerations, however, do not warrant the imposition of an affirmative pleading requirement in the variance context where the zoning board of adjustment must consider what uses of a property are allowed before it can decide whether unnecessary hardship exists. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

HN12 Under RSA 677:11 (2008), when vacating a zoning board of adjustment (ZBA) decision, a trial court may remand to the ZBA or local legislative body for further proceedings. More Like This Headnote

Real Property Law > Zoning & Land Use > General Overview

HN13 Although whether a particular use is an accessory use is a question of law, resolution of the inquiry still requires a sufficiently developed factual record. Prevailing on a claim of accessory use requires evidence of substantial customary association of the principal and subordinate uses, whereas evidence of the peculiar character of the property in question does not address this issue. More Like This Headnote

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HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH(1) **1. Courts—Jurisdiction—Subject Matter Jurisdiction** Subject matter jurisdiction refers to the court's statutory or constitutional power to adjudicate the case.

NH(2) **2. Courts—Jurisdiction—Subject Matter Jurisdiction** Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. In other words, it is a tribunal's authority to adjudicate the type of controversy involved in the action. A court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction. A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction.

NH(3) **3. Zoning and Planning—Judicial Review—Jurisdiction** The superior court is vested with jurisdiction to hear appeals of zoning board of adjustment (ZBA) decisions. To establish jurisdiction in the superior court, a party must both: (1) file a motion for rehearing with the ZBA within thirty days of its decision; and (2) appeal the ZBA's decision to the court within thirty days of its denial of the motion for rehearing. Failure to comply with either requirement divests the superior court of subject matter jurisdiction over the appeal. Moreover, no ground not set forth in the motion for rehearing shall be urged, relied on, or given any consideration by

a court unless for good cause shown the court shall allow the appellant to specify additional grounds. The statutory scheme is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal. RSA 677:2, :3, :4.

NH(4) **4. Zoning and Planning—Judicial Review—Particular Cases** In a variance case, the trial court had subject matter jurisdiction to consider whether the proposed use and other similar uses of the applicant's property were permitted as a matter of right under the accessory use provision of the ordinance. In deciding whether the variance application satisfied the variance criterion of unnecessary hardship, the trial court correctly determined that it had to consider the permissible uses of the property under the ordinance, including the accessory use provision. Without engaging in this analysis, the trial court could not determine whether literal enforcement of the provisions of the ordinance would result in an unnecessary hardship for the applicant. RSA 674:33, I(b)(5).

NH(5) **5. Zoning and Planning—Ordinances—Variance** In the absence of contrary legislative intent, contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because the zoning board of adjustment (ZBA) will invariably consider this issue in deciding whether unnecessary hardship exists. Accordingly, given the complexity of zoning regulation, the obligation of municipalities to provide assistance to all their citizens seeking approval under zoning ordinances, and the importance of the constitutional right to enjoy property, the mere filing of a variance application does not limit the ZBA's or the superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place. RSA 674:33.

NH(6) **6. Zoning and Planning—Ordinances—Variance** Considerations of fairness, convenience, and policy require a defendant in a private nuisance suit to plead reliance on the accessory use doctrine. These considerations, however, do not warrant the imposition of an affirmative pleading requirement in the variance context where the zoning board of adjustment must consider what uses of a property are allowed before it can decide whether unnecessary hardship exists. RSA 674:33.

NH(7) **7. Zoning and Planning—Judicial Review—Remand** Although whether a particular use is an accessory use is a question of law, resolution of the inquiry still requires a sufficiently developed factual record. Prevailing on a claim of accessory use requires evidence of substantial customary association of the principal and subordinate uses, whereas evidence of the peculiar character of the property in question does not address this issue. Thus, although the trial court in a variance case had subject matter jurisdiction to consider the issue of accessory uses, it lacked a sufficient factual record to decide the accessory use issue and should have remanded the case to the zoning board of adjustment to consider the issue in the first instance. RSA 674:33.

COUNSEL: *Cronin & Bisson, P.C.*, of Manchester (*John G. Cronin* and *Daniel D. Muller, Jr.* on the brief, and *Mr. Cronin* orally), for the petitioners.

Peter R. Chiesa, of Manchester, for the respondent, joined in part B of the intervenor's brief.

Sheehan, Phinney, Bass & Green, P.A., of Manchester (*Anna Barbara Hantz* and *Susan A. Manchester* on the brief, and *Ms. Hantz* orally), for the intervenor.

JUDGES: LYNN, J. DALIANIS, C.J., and HICKS, CONBOY and BASSETT, JJ., concurred.

OPINION BY: LYNN

OPINION

[*635] **[**856]** LYNN, J. The petitioners, Stephen Bartlett and others, appeal an order of the Superior Court (*Abramson*, J.) vacating a decision of the City of Manchester Zoning Board of Adjustment (ZBA), which granted the intervenor, Brookside Congregational Church (Brookside), a variance. Although the petitioners asked the trial court to reverse the ZBA's decision, they appeal the court's order because it rules that Brookside's proposed use and similar uses of its property are permitted as accessory uses under the Manchester Zoning Ordinance (ordinance) as a matter of right. Brookside cross-appeals, asking us to reinstate the ZBA's grant of the variance. We vacate the order of the superior **[***2]** court and remand with instructions to remand to the ZBA for further proceedings consistent with this opinion.

[*636] I

The following facts are drawn from the trial court's order and the record before the ZBA and the superior court. Brookside's property is a 10.04-acre parcel of land in a residential zoning district in the north end of Manchester. The property contains a sanctuary, chapel, cottage, residence building, carriage house, office **[**857]** space, parking lot, and green space. Formerly known as Franklin Street Congregational Church, Brookside has operated church facilities on its property since 1958 and operates such facilities as a non-conforming use. The petitioners are abutters to Brookside's property.

In April 2010, Brookside applied to the City of Manchester for a permit to allow a "work-based, self-help organization" to occupy a portion of its carriage house. The next day an administrative official of the City of Manchester Planning and Community Development Department denied the application, stating that Brookside's proposed use was prohibited by "Section(s) 5.10 (J) 8 Social service organization, District R-1B, of the Zoning Ordinance of the City of Manchester." (Emphasis omitted.) The **[***3]** denial letter informed Brookside that "[f]urther proceedings contemplated pertaining to this application must be pursuant to NH Revised Statutes Annotated 674:33 or other statutory provisions relative to Zoning Boards of Adjustment, as may be appropriate."

In response, Brookside applied to the ZBA for a variance to allow Granite Pathways, a non-profit corporation, to operate a work-based, self-help organization for adults with mental illness inside Brookside's carriage house.[1] According to the variance application, the organization would be the first of its kind in New Hampshire and would help members "find support in achieving their goals for employment, education, wellness, housing, and personal fulfillment." Membership in the organization would not be part of any clinical or mandated treatment program, but rather would be voluntary. Brookside's application stated that the organization "would be similar to other church activities that have benefitted many people and the neighborhood for 50 years," and would represent "the essence of what the church is." Like the trial court, we refer to the organization as the Granite Pathways Clubhouse.

FOOTNOTES

1 Although the parties have not supplied a copy **[***4]** of Brookside's permit application, because both its variance application and the letter denying its permit application refer to a "work-based, self-help organization," we assume that the organization referenced in the two applications is the same and that Brookside requested a variance because of the denial of its permit application.

Two weeks later the ZBA held a public hearing on Brookside's application. Representatives of Brookside and Granite Pathways attended the hearing, and Dawn Brockett, co-chair of Brookside's board of trustees, told **[*637]** the ZBA that the variance "application and supporting documents contain[ed] all of the necessary information." After a single parishioner

spoke in favor of granting Brookside the variance, several members of the community expressed reservations and opposition. Counsel for petitioner Bartlett voiced concern that granting the variance would raise safety, security, and transportation issues, and further argued that Brookside had neither demonstrated unnecessary hardship nor that granting the variance would not diminish surrounding property values. The ZBA then tabled Brookside's application and scheduled a second public hearing to be held the following **[***5]** month.

At the second public hearing, Brookside, now represented by counsel, informed the ZBA that, in response to concerns expressed at a recent neighborhood meeting, it would be willing to stipulate to the following variance conditions:

1. No more than 35 occupants, which includes staff, on site at any one time.
2. Occupants to utilize church parking lot for their cars. No on-street parking. **[**858]** (Some will have motor vehicles; some will use public transportation.)
3. Hours of operation: Monday-Friday-9:00 AM to 4:30 PM; Holidays; Occasional evenings and weekends; No later than 9:00 PM on any evening which is a church policy.
4. Variance terminates if Granite Pathways assigns or subleases its occupancy rights or changes its mission. (There were concerns that it would meld into a halfway house.)
5. Granite Pathways will undertake certain screening of potential club members with the intent that club members cannot include convicted pedophiles.
6. Granite Pathways will cause members under influence of alcohol or illegal drugs to be removed from the property.
7. Variance terminates when no longer used by Granite Pathways for its present purposes as described in the zoning application or December 31, **[***6]** 2015, whichever occurs first.

At the conclusion of the hearing, the ZBA granted Brookside its requested variance subject to the above conditions. The written notice of decision states that Brookside met its burden of proof in showing that: (1) the variance would not be contrary to the public interest; (2) the variance would not be contrary to the spirit of the zoning ordinance; (3) by granting the variance substantial justice would be done; (4) by granting the variance **[*638]** surrounding property values would not be diminished; and (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

After the ZBA granted timely motions for rehearing and held a third public hearing on the matter, it again granted Brookside the variance with the same conditions. The petitioners again moved for rehearing, arguing, among other things, that Brookside had not satisfied the criteria set forth in RSA 674:33, I(b) (Supp. 2012), and

> [t]hroughout the hearing, a supporting member of the ZBA spoke in favor of the variance based on the belief that the proposed use was an accessory church use. The belief is not supported by the facts or the law. If the use were an accessory use, **[***7]** no variance would be required. Since [Brookside] did not dispute that a variance was required, the ZBA acted outside of its jurisdiction to the extent it considered the accessory use issue rather than [Brookside's] satisfaction of variance criteria.

HN1 Under RSA 674:33, I(b), a zoning board of adjustment has the power to grant a variance if: (1) "[t]he variance will not be contrary to the public interest"; (2) "[t]he spirit of the ordinance is observed"; (3) "[s]ubstantial justice is done"; (4) "[t]he values of surrounding

properties are not diminished"; and (5) "[l]iteral enforcement of the provisions of the ordinance would result in unnecessary hardship." The statute contains two definitions of unnecessary hardship. *See* RSA 674:33, I(b)(5)(A), (B); *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508, 512-13, 34 A.3d 584 (2011). Under the first definition:

> HN2 "[U]nnecessary 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 **[***8]** one.

RSA 674:33, I(b)(5)(A). If the variance applicant fails to satisfy this first definition, the second definition may apply. Under the second definition:

> **[**859]** HN3 [A]n 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 **[*639]** used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

RSA 674:33, I(b)(5)(B).

After the ZBA denied the petitioners' motion for rehearing, they appealed to the superior court, which vacated the ZBA's decision. Focusing on unnecessary hardship, the court ruled that the ZBA had unlawfully found that literal enforcement of the provisions of the ordinance would cause Brookside unnecessary hardship. Notwithstanding this ruling, however, the court found that the Granite Pathways Clubhouse and similar uses of Brookside's property are lawful accessory uses under the ordinance and the accessory use doctrine. Thus, the court vacated the ZBA's decision granting Brookside a variance because it found that Brookside did not need a variance. This appeal and cross-appeal followed.

On appeal, **[***9]** the petitioners contend that the superior court lacked subject matter jurisdiction to consider whether the Granite Pathways Clubhouse and other similar uses of Brookside's property are permitted as accessory uses under the ordinance. The petitioners assert that Brookside failed to appeal the denial of its permit application, elected to apply for a variance, and did not rely on the accessory use doctrine before the ZBA. More broadly, the petitioners argue that the statutory scheme governing judicial review of ZBA decisions contemplates that the superior court address only issues first considered and decided by the ZBA.

In its cross-appeal, Brookside, joined by the respondent, the City of Manchester, argues that, even if we accept the petitioners' argument regarding accessory use, we should affirm the ZBA's decision granting a variance because there is sufficient evidence in the record to support it.

II

HN4 Judicial review in zoning cases is limited. *Brandt Dev. Co. of N.H. v. City of Somersworth*, 162 N.H. 553, 555, 34 A.3d 593 (2011). We will uphold the trial court's decision unless it is unsupported by the evidence or legally erroneous. *Id.* For its part, the trial court must treat all factual findings **[***10]** of the ZBA as *prima facie* lawful and reasonable, and may not set aside or vacate the ZBA's decision, except for errors of law, unless it is persuaded by the

balance of probabilities, on the evidence before it, that the decision is unreasonable. RSA 677:6 (2008).

NH(1)[1, 2] We first address the petitioners' argument that the superior court lacked jurisdiction to consider the accessory use issue. HN5Subject matter [*640] jurisdiction refers to the court's statutory or constitutional power to adjudicate the case. *State v. Ortiz*, 162 N.H. 585, 589, 34 A.3d 599 (2011) (quotation omitted).[2]

FOOTNOTES

2 As we explained in *Gordon v. Town of Rye*, 162 N.H. 144, 149, 27 A.3d 644 (2011):

> HN6Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. In other words, it is a tribunal's authority to adjudicate the type of controversy involved in the action. A court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction. A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction.

(Quotation omitted.)

[**860] NH(3)[3] HN7RSA chapter 677 [***11] vests the superior court with jurisdiction to hear appeals of ZBA decisions. To establish jurisdiction in the superior court, a party must both: (1) file a motion for rehearing with the ZBA within thirty days of its decision, see RSA 677:2 (Supp. 2012), :3 (2008); and (2) appeal the ZBA's decision to the court within thirty days of its denial of the motion for rehearing, *see* RSA 677:4 (Supp. 2012). Failure to comply with either requirement divests the superior court of subject matter jurisdiction over the appeal. *See Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. of Adjustment*, 157 N.H. 710, 712, 958 A.2d 996 (2008) (construing RSA 677:3); *Radziewicz v. Town of Hudson*, 159 N.H. 313, 316, 982 A.2d 415 (2009) (construing RSA 677:4). Moreover, "*no ground* not set forth in [the motion for rehearing] 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." RSA 677:3, I (emphasis added). The statutory scheme "is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing [***12] the appeal." *Atwater v. Town of Plainfield*, 160 N.H. 503, 511-12, 8 A.3d 159 (2010) (quotation omitted).

NH(4)[4] Against this statutory backdrop, we hold that the trial court had subject matter jurisdiction to consider whether the Granite Pathways Clubhouse and other similar uses of Brookside's property are permitted as a matter of right under the accessory use provision of the ordinance. In deciding whether Brookside's variance application satisfied the variance criterion of unnecessary hardship, the trial court correctly determined that it had to consider the permissible uses of Brookside's property under the ordinance, including the accessory use provision. *See* HN8MANCHESTER ZONING ORDINANCE, art. 3 (defining accessory use of property as "[a] use which exists on the same lot as the principal use of the property to which it is related, and which is customarily incidental and subordinate to the [*641] principal use"). We agree with the trial court that, without engaging in this analysis, it could not determine whether literal enforcement of the provisions of the ordinance would result in an unnecessary hardship for Brookside. *See* RSA 674:33, I(b)(5). Thus, the trial court had subject matter jurisdiction to consider [***13] the issue of accessory use in reviewing the ZBA's decision to grant Brookside a variance.

We disagree with the premise of the petitioners' argument that the trial court lacked jurisdiction to consider the accessory use issue because Brookside failed to appeal the denial of its permit application. The last sentence of the letter denying Brookside's application states merely that any "[f]urther proceedings contemplated pertaining to this application must be pursuant to NH Revised Statutes Annotated 674:33," without specifying a subsection of the statute. Thereafter, Brookside sought a variance under RSA 674:33, I(b). In this circumstance, and given the interconnectedness between the issues of permitted use and hardship, we are not persuaded that Brookside needed to file a separate appeal pursuant to RSA 674:33, I(a) (2008).[3]

FOOTNOTES

[3] HN9 RSA 674:33, I(a) authorizes zoning boards of adjustment to hear and decide appeals of decisions of administrative officials enforcing zoning ordinances.

NH(5) **[5]** Next, we reject the petitioners' argument that, by applying for a variance, "Brookside **[***14]** effectively waived any claim that its proposed use was permitted under the accessory use doctrine from the outset **[**861]** of the ZBA proceedings." We have found nothing in RSA 674:33, I(b) or our common law that compels this conclusion. HN10 In the absence of contrary legislative intent, we conclude that contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because, for the reasons discussed above, the ZBA will invariably consider this issue in deciding whether unnecessary hardship exists. Given the complexity of zoning regulation, the obligation of municipalities "to provide assistance to all their citizens seeking approval under zoning ordinances," *Richmond Co. v. City of Concord*, 149 N.H. 312, 314, 821 A.2d 1059 (2003) (quotation omitted), and the importance of the constitutional right to enjoy property, *see Simplex Technologies v. Town of Newington*, 145 N.H. 727, 731, 766 A.2d 713 (2001), we cannot accept that the mere filing of a variance application limits the ZBA or superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place. *Cf. In re Keeper of Records (XYZ Corp.)*, 348 F.3d 16, 23 (1st Cir. 2003) **[***15]** ("Claims of implied waiver must be evaluated in light of principles of logic and fairness.").

NH(6) **[6]** **[*642]** Similarly misplaced is the petitioners' reliance on *Town of Windham v. Alfond*, 129 N.H. 24, 523 A.2d 42 (1986), for the proposition that Brookside waived its right to benefit from the accessory use doctrine because it failed to plead the doctrine before the ZBA. *Alfond* is inapposite. In *Alfond* we held that a defendant in a private nuisance suit has the burden to plead the doctrine and produce evidence sufficient to permit a *prima facie* inference that the disputed use is an accessory one. *Alfond*, 129 N.H. at 29; *see also Treisman v. Kamen*, 126 N.H. 372, 377, 493 A.2d 466 (1985) ("We therefore hold that when the legality of a defendant's conduct is to be judged under a zoning ordinance, *the defendant who claims the benefit of the accessory use doctrine has the burden to raise it by his pleading*." (emphasis added)). We did not hold that a variance applicant must alternatively plead the accessory use doctrine. To the extent the petitioners argue that the pleading requirement of *Alfond* must apply in the present case, we disagree. In *Treisman*, which we relied upon in *Alfond*, we explained that HN11 considerations of fairness, convenience, **[***16]** and policy require a defendant in a private nuisance suit to plead reliance on the accessory use doctrine. *See Treisman*, 126 N.H. at 377. We conclude, however, that these considerations do not warrant the imposition of an affirmative pleading requirement in the variance context where the ZBA must consider what uses of a property are allowed before it can decide whether unnecessary hardship exists.[4]

FOOTNOTES

4 We note that the record refutes the petitioners' other objection — that they lacked notice that the trial court might apply the accessory use doctrine. The petitioners' motion for rehearing of the ZBA's decision, petition of appeal to the superior court, and subsequent requests for findings of fact and rulings of law all reference the issue of accessory use.

III

Our rejection of the petitioners' jurisdictional argument does not end our analysis. We must still determine whether the trial court correctly ruled that the Granite Pathways Clubhouse and other similar uses of Brookside's property are lawful accessory uses.

We conclude that the trial court lacked a sufficient factual record to decide the accessory use issue, and that it should have remanded the case to the ZBA to consider the issue **[***17]** in the first instance. *See* HN12 RSA 677:11 (2008) (when vacating ZBA decision **[**862]** trial court may remand to the ZBA or local legislative body for further proceedings); *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 311, 922 A.2d 672 (2007) (trial court may remand to the ZBA for clarification). While there were isolated references before the ZBA regarding the uses of Brookside's property that are reasonably allowed, the evidence and arguments submitted to the ZBA focused almost exclusively on whether Brookside had satisfied the variance criteria of RSA 674:33, I(b), **[*643]** not whether the Granite Pathways Clubhouse and other similar uses of the property are lawful accessory uses under the ordinance.

NH(7) [7] HN13 Although we have held that whether a particular use is an accessory use is a question of law, *see KSC Realty Trust v. Town of Freedom*, 146 N.H. 271, 273, 772 A.2d 321 (2001), resolution of the inquiry still requires a sufficiently developed factual record. *See Alfond*, 129 N.H. at 30 (prevailing on claim of accessory use "requires evidence of substantial customary association of the principal and subordinate uses, whereas evidence of the peculiar character of the property in question does not address this issue"); 15 **[***18]** P. LOUGHLIN, NEW HAMPSHIRE PRACTICE, LAND USE PLANNING AND ZONING § 9.03, at 174 (4th ed. 2010) ("Whether a particular use is an accessory use is generally a question of both law and fact."). Accordingly, remand is appropriate because the ZBA is the proper forum for the development of such a record. *See Chester Rod and Gun Club v. Town of Chester*, 152 N.H. 577, 583, 883 A.2d 1034 (2005) ("When reviewing a decision of a zoning board of adjustment, the superior court acts as an appellate body, not as a fact finder."). Of course, in cases where the record demonstrates, as a matter of law, that the variance applicant's proposed use is a lawful accessory use, remand is unnecessary and the trial court may decide the issue in the first instance. *Cf. Lawrence v. Philip Morris USA*, 164 N.H. 93, 101, 53 A.3d 525 (2012) (no need to remand if reasonable fact finder would necessarily reach certain conclusion). But that is not the situation here.

On remand, the ZBA should thoroughly explore the accessory use issue, giving all interested parties, including the City's Planning and Community Development Department, an opportunity to present evidence and arguments as to whether the Granite Pathways Clubhouse is a lawful accessory **[***19]** use of Brookside's property and, if not, whether Brookside should receive a variance.

IV

The foregoing discussion also disposes of Brookside's cross-appeal. Given that, on remand, the ZBA must determine whether the Granite Pathways Clubhouse is a lawful accessory use of Brookside's property under the ordinance, we reject Brookside's claim that sufficient evidence in the record establishes its entitlement to a variance.

Vacated and remanded.

DALIANIS, C.J., and HICKS, CONBOY and BASSETT, JJ., concurred.

Source: **Legal > / . . . / > NH State Cases, Combined**
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*164 N.H. 754, *; 64 A.3d 959, **;*
*2013 N.H. LEXIS 39, ****

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STEVE **TREFETHEN** & *a.* v. TOWN OF **DERRY**

No. 2012-394

SUPREME COURT OF NEW HAMPSHIRE

164 N.H. 754; 64 A.3d 959; 2013 N.H. LEXIS 39

February 7, 2013, Submitted
~~**April 12, 2013**, Opinion Issued~~

NOTICE:

THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

PRIOR HISTORY: [*1]**
Rockingham.

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner property owners appealed from a ruling of a town zoning board of adjustment (ZBA). The Rockingham Superior Court (New Hampshire) dismissed the appeal for lack of jurisdiction based on untimely filing under RSA 677:4 (Supp. 2012). Petitioners appealed.

OVERVIEW: The trial court found that the appeal was not timely because it was filed 32 days after the ZBA's vote. It held that RSA 21:35, II (2012) did not extend the time for filing an appeal. The court noted that RSA 21:1 (2012) stated that the rules set forth in RSA ch. 21 were to apply to the construction of all statutes unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. RSA 677:4 did not contain language manifesting the legislature's intent to exclude it from the operation of RSA 21:35, II, nor was RSA 21:35, II repugnant to the context of RSA 677:4. Accordingly, under the plain language of RSA 21:35, II, if the 30-day

filing deadline set forth in RSA 677:4 fell on a weekend or legal holiday, the deadline was extended to the next business day. Here, the 30-day deadline fell on Saturday, February 5. Therefore, by operation of RSA 21:35, II, the deadline was extended until Monday, February 7, and the filing was timely. The case relied upon by the town was distinguishable because at the time that it was decided, RSA 21:35, II had not yet gone into effect.

OUTCOME: The court reversed the decision. It remanded the case.

CORE TERMS: deadline, matter jurisdiction, filing deadline, zoning board, legislative history, legal holiday, timely filed, unambiguous, zoning, voted, repugnant, planning, weekend, vest, computation, procedural rules", person aggrieved, legislative body, plain language, petitioners filed, petitioners' filing, different result, petitioning, manifesting, construing, timeliness, paying, gone

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Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN1 A question of law is reviewed de novo. In matters of statutory interpretation, the New Hampshire Supreme Court is the final arbiter of the legislature's intent as expressed in the words of a statute considered as a whole. When examining the language of a statute, the court ascribes the plain and ordinary meaning to the words used. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

HN2 RSA 677:4 (Supp. 2012) provides in part that any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing. In construing RSA 677:4, the New Hampshire Supreme Court has held that a petitioning party must comply with the thirty-day filing deadline to vest subject matter jurisdiction in the superior court. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Time Limitations > Computation

HN3 See RSA 21:35, II (2012).

Governments > Legislation > Interpretation

HN4 RSA 21:1 (2012) states that the rules set forth in RSA ch. 21 shall apply to the construction of all statutes unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Time Limitations > Computation

Real Property Law > Zoning & Land Use > Judicial Review

HN5 RSA 677:4 (Supp. 2012) does not contain language manifesting the legislature's intent to exclude it from the operation of RSA 21:35, II (2012). Nor is RSA 21:35, II repugnant to the context of RSA 677:4. Accordingly, under the plain language of RSA 21:35, II, if the thirty-day filing deadline set forth in RSA 677:4 falls on a weekend or legal holiday, the deadline is extended to the next business day. More Like This Headnote

Governments > Legislation > Interpretation

HN6 When a statute's language is plain and unambiguous, a court need not examine its legislative history. More Like This Headnote

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HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH(1) **1. Zoning and Planning—Judicial Review—Time Limits** By statute, any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing. In construing the statute, the court has held that a petitioning party must comply with the thirty-day filing deadline to vest subject matter jurisdiction in the superior court. RSA 677:4.

NH(2) **2. Zoning and Planning—Judicial Review—Time Limits** The statute regarding appeal from a zoning board of adjustment's decision on motion for rehearing does not contain language manifesting the legislature's intent to exclude it from the operation of the statute regarding computation of time. Nor is the time computation statute repugnant to the context of the zoning appeals statute. Accordingly, under the plain language of the time computation statute, if the thirty-day filing deadline set forth in the zoning appeals statute falls on a weekend or legal holiday, the deadline is extended to the next business day; thus, a filing was timely when the 30-day deadline fell on Saturday, February 5, because the deadline was extended until Monday, February 7. RSA 21:35, II; 677:4.

NH(3) **3. Statutes—Generally—Unambiguous Statutes and Plain Meaning** When a statute's language is plain and unambiguous, a court need not examine its legislative history.

COUNSEL: Steve and Laura Trefethen, self-represented parties, by brief.

Boutin & Altieri, P.L.L.C., of Londonderry (*Edmund J. Boutin* and *Lynne Gulmond Sabean* on the brief), for the Town of Derry.

JUDGES: BASSETT, J. DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

OPINION BY: BASSETT

OPINION

[*754] **[**960]** BASSETT, J. The petitioners, Steve and Laura Trefethen, appeal an order of the Superior Court (*Wageling*, J.) dismissing their appeal from a ruling of the Town of Derry Zoning Board of Adjustment (ZBA) for lack of subject matter jurisdiction. *See* RSA 677:4 (Supp. 2012). We reverse and remand.

The trial court's order and the appellate record support the following relevant facts. The petitioners own property in Derry. On November 18, 2010, the ZBA granted a special exception to the lessee of abutting property permitting the property to be used as a day care facility. The petitioners timely moved for rehearing, which the ZBA denied on January 6, 2011.

[*755] On Monday, February 7, the petitioners filed an appeal in the superior court. The superior court dismissed the petitioners' appeal for lack of subject matter jurisdiction, ruling that RSA 677:4 required the petitioners to file their appeal no later than **[***2]** Saturday, February 5, thirty days after the ZBA voted to deny the motion for rehearing. The court concluded that the petitioners' appeal was not timely because it was filed thirty-two days after the ZBA's vote. The court relied upon *Radziewicz v. Town of Hudson*, 159 N.H. 313, 982 A.2d 415 (2009), in ruling that RSA 21:35, II (2012) did not extend the time for filing an appeal under RSA 677:4, and, therefore, it did not have jurisdiction over the petitioners' appeal. A motion to reconsider was denied, and this appeal followed.

On appeal, the petitioners argue that their appeal to the superior court was timely filed, and the trial court erred in dismissing their action. They contend that RSA 21:35, II allowed them to file their appeal on Monday, February 7, since the thirty-day filing deadline under RSA 677:4 fell on Saturday, February 5. We agree.

The interpretation and application of RSA 677:4 and RSA 21:35, II is HN1 a question of law, which we review *de novo*. *See Radziewicz*, 159 N.H. at 316. In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of a statute considered as a whole. *Id*. When examining the language of a statute, we ascribe **[***3]** the plain and ordinary meaning to the words used. *Id*. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id*. **[**961]**

NH(1) **[1]** HN2 RSA 677:4 provides, in pertinent part: "Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing." In construing RSA 677:4, we have held that a petitioning party must comply with the thirty-day filing deadline to vest subject matter jurisdiction in the superior court. *See Radziewicz*, 159 N.H. at 316-17; *cf. Dermody v. Town of Gilford*, 137 N.H. 294, 296, 627 A.2d 570 (1993) (RSA 677:15 requires petitioner to adhere to thirty-day deadline in order to vest superior court with subject matter jurisdiction over a planning board appeal).

NH(2) **[2]** RSA 21:35, II provides: HN3 "If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the **[***4]** next business day." HN4 RSA 21:1 (2012) states that the rules set forth in RSA chapter 21 shall apply to the "construction of *all* statutes ... unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same **[*756]** statute." (Emphasis added.) HN5 RSA 677:4 does not contain language manifesting the legislature's intent to exclude it from the operation of RSA 21:35, II. Nor is RSA 21:35, II repugnant to the context of RSA 677:4. Accordingly, under the plain language of RSA 21:35, II, if the thirty-day filing deadline set forth in RSA 677:4 falls on a weekend or legal holiday, the deadline is extended to the next business day. Here, the thirty-day deadline fell on Saturday, February 5. Therefore, by operation of RSA 21:35, II, the deadline was extended until Monday, February 7.

NH(3)[3] The Town argues that we should consider the legislative history of RSA 21:35, II because the statute is ambiguous, and the legislative history makes it clear that the statute was intended to apply only to "filing corporate documents with the state and paying any corresponding fees." However, because the statute's language is plain and unambiguous, we decline the **[***5]** Town's invitation. *Sutton v. Town of Gilford*, 160 N.H. 43, 54, 992 A.2d 709 (2010) (HN6"When a statute's language is plain and unambiguous, we need not examine its legislative history.").

The Town also asserts that our decision in *Radziewicz* compels a different result, arguing that *Radziewicz* "stands for the ... proposition that the clear language of RSA 677:4 does not allow for a ZBA appeal after 30 days, because the jurisdictional window has closed." However, *Radziewicz* is distinguishable because, at the time that it was decided, RSA 21:35, II had not yet gone into effect. In that case, the petitioners filed an appeal to the superior court thirty-two days after the ZBA voted to deny a rehearing. *Radziewicz*, 159 N.H. at 315. As in this case, the thirty-day deadline fell on a weekend. *Id.* In upholding the superior court's dismissal for lack of subject matter jurisdiction, we held that Superior Court Rule 12(1), which extends a deadline to the next business day if the deadline falls on a Saturday, Sunday, or legal holiday, could not be used to establish jurisdiction under RSA 677:4. *Id.* at 316-17. We stated that "statutory time requirements relative to the vesting of jurisdiction must be distinguished **[***6]** from the superior court's own procedural rules" and that the court's procedural rules could not be used to "establish jurisdiction that did not exist in the first instance." *Id.* at 317 (quotation, brackets, and ellipses omitted). In *Radziewicz*, we noted that RSA 21:35, II had been recently enacted by the **[**962]** legislature but had not yet gone into effect. *Id.* at 318. We further observed that "in deciding the case before us, we are bound by the statute in effect at the time of the petitioners' filing deadline." *Id.* Here, we are again bound by the statute in effect at the time of the petitioners' filing deadline. The statute in effect in February 2011 was RSA 21:35, II; thus, a different result obtains, and we hold that the appeal was timely filed.

[*757] Finally, the Town argues that pursuant to *Bosonetto v. Town of Richmond*, 163 N.H. 736, 48 A.3d 973 (2012), subject matter jurisdiction may not attach where there has not been compliance with filing requirements under RSA chapter 677. *Bosonetto*, however, is inapposite. *Bosonetto* addressed the timeliness of a motion for rehearing filed with the ZBA pursuant to RSA 677:2 (2008). *Bosonetto*, 163 N.H. at 741. Not only did the deadline in that case fall on a weekday, **[***7]** rather than a Saturday, as in this case, but the dispositive issue was when the statutory thirty-day period *began* to run, rather than when the statutory thirty-day period ended. *Id.* at 741-42.

Because we hold that the petitioners' appeal was timely filed in the superior court, we need not address the petitioners' remaining arguments regarding the timeliness of the ZBA's issuance of the notice of decision and the meeting minutes.

Reversed and remanded.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

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*164 N.H. 764, *; 64 A.3d 951, **;*
*2013 N.H. LEXIS 41, ****

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HANNAFORD BROTHERS COMPANY v. TOWN OF **BEDFORD** & *a.*

No. 2011-611

SUPREME COURT OF NEW HAMPSHIRE

164 N.H. 764; 64 A.3d 951; 2013 N.H. LEXIS 41

January 10, 2013, Argued
April 25, 2013, Opinion Issued

NOTICE:

THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

PRIOR HISTORY: [*1]**
Hillsborough-northern judicial district.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner supermarket owner appealed from the decision of a town board of adjustment (ZBA) granting a variance to intervenor applicant. The Superior Court for the Hillsborough-Northern Judicial District (New Hampshire) granted the town and the applicant's joint motion to dismiss for lack of standing under RSA 677:4 (Supp. 2012). Petitioner appealed.

OVERVIEW: The applicant received a variance to exceed the 40,000 square foot restriction in order to construct a 78,332 square foot supermarket. The applicant's proposed supermarket was 3.8 miles from petitioner's supermarket. The court held that the trial court properly dismissed the appeal for lack of standing because petitioner was not a "person directly affected" by the ZBA's decision under RSA 677:2 (2012). With regard to the Weeks factors, petitioner had not shown proximity or immediacy of injury. The fact that the ZBA drew a comparison between petitioner's location and the applicant's location when considering the "spirt of the ordinance" under RSA 674:33, I(b) (Supp. 2012) did not give petitioner more

than a generalized interest in the outcome of the proceedings. Furthermore, granting the variance did not make the applicant's competition unfair or illegal. As for other factors, merely alleging violations of the state Equal Protection Clause and RSA 674:20 (2008) did not confer standing upon petitioner, which had to prove that its own rights had been or would be directly and specifically affected. Petitioner's concern with only possible future action did not confer standing upon it.

OUTCOME: The court affirmed the trial court's decision.

CORE TERMS: variance, zoning, ordinance, planning, confer, standing to appeal, definite interest, zoning board, supermarket, appealing, square foot, challenging, site, zoning ordinances, similarly situated, locality", unfair, petitioner's argument, right to claim, administrative action, particular property, generalized, proximity, "immediacy, square, weigh, standing to challenge, petitioner contends, person aggrieved, zoning district

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Civil Procedure > Justiciability > Standing > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

HN1 When a motion to dismiss challenges a petitioner's standing to sue, the trial court must look beyond the petitioner's allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated its right to claim relief. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN2 Under RSA 677:4 (Supp. 2012), "any person aggrieved" by an order of a zoning board of adjustment may petition the superior court for review. A "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2 (Supp. 2012). RSA 677:4. Under RSA 677:2, a person entitled to apply for rehearing includes any party to the action or proceedings, or any person directly affected thereby. More Like This Headnote

Civil Procedure > Justiciability > Standing > General Overview

HN3 To prove that it is a "person directly affected" for standing purposes, the appealing party must show some direct, definite interest in the outcome of the action or proceeding. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN4 Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis. When evaluating whether an appealing party has standing in a zoning context, the court considers the following factors: (1) the proximity of the challenging party's property to the subject site; (2) the type of change proposed; (3) the immediacy of the injury claimed; and (4) the challenging party's participation in the administrative hearings. This list is not exhaustive; the court also considers any other relevant

factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding. An appellate court generally reviews the trial court's factual findings deferentially; however, where the underlying facts are not in dispute, the appellate court reviews the trial court's standing determination de novo. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN5 In evaluating any petition for a variance, a zoning board of adjustment (ZBA) is required to determine whether the proposal complies with the spirit of the ordinance. RSA 674:33, I(b)(2) (Supp. 2012). For a variance to be inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. Thus, one of the accepted ways for the ZBA to accomplish its task of evaluating the merits of a variance petition is to consider the character of the locality. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

HN6 When the issue of standing is raised, the party challenging the administrative action must sufficiently demonstrate his or her right to claim relief by demonstrating some direct, definite interest in the outcome of the action or proceeding. Standing will not be extended to all persons in the community who might feel that they are hurt by a local administrator's decision. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN7 A generalized interest in the outcome of zoning board of adjustment proceedings is insufficient to confer standing to challenge the proceedings. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN8 To have standing to appeal in a zoning case, a party is required to identify an injury that its particular property would incur as a result of the administrative decision. A petitioner's claimed injury that is, at most, speculative does not give rise to a definite interest in the outcome of the appeal. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN9 Increased business competition is not a type of harm sufficient to confer standing to appeal in a zoning case. Injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in the free enterprise economy. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN10 A variance by definition grants authority to the owner to use its property in a manner that otherwise contravenes generally applicable zoning ordinances. More Like This Headnote

Civil Procedure > Appeals > General Overview

Civil Procedure > Appeals > Reviewability > Adverse Determinations

HN11 Whether an appealing party is a proper party is a question separate from the merits of the appeal. More Like This Headnote

Real Property Law > Zoning & Land Use > Judicial Review

HN12 An appeal of a zoning board of adjustment decision is not a weapon to be used to stifle business competition. More Like This Headnote

Constitutional Law > Equal Protection > General Overview

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning & Land Use > Ordinances

HN13 An equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner. Similarly, RSA 674:20 (2008) provides that all regulations shall be uniform for each class or kind of buildings throughout each district. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Constitutional Law > Equal Protection > General Overview

Real Property Law > Zoning & Land Use > Judicial Review

HN14 Merely alleging violations of New Hampshire's Equal Protection Clause and RSA 674:20 (2008) does not confer standing to challenge a zoning board of adjustment's decision. There is no provision in RSA 674:20 relieving a petitioner from its burden to prove standing under RSA 677:4 (Supp. 2012). Even when a constitutional challenge is alleged, an appealing party must prove that its own personal rights have been or will be directly and specifically affected. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Ordinances

HN15 So long as an appealing party can establish a direct injury to its own property or rights, that party will have standing to assert a challenge to a zoning ordinance. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Real Property Law > Zoning & Land Use > Judicial Review

HN16 An indefinite interest in possible "future action" does not support standing to appeal a zoning board of adjustment's determination. More Like This Headnote

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HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH(1)**1. Parties—Generally—Standing** When a motion to dismiss challenges a petitioner's standing to sue, the trial court must look beyond the petitioner's allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated its right to claim relief.

NH(2)**2. Parties—Generally—Standing** To prove that it is a "person directly affected" for standing purposes, the appealing party must show some direct, definite interest in the outcome of the action or proceeding.

NH(3)**3. Zoning and Planning—Judicial Review—Standing** Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis. When evaluating whether an appealing party has standing in a zoning context, the court considers the following factors: (1) the proximity of the challenging party's property to the subject site; (2) the type of change proposed; (3) the immediacy of the injury claimed; and (4) the challenging party's participation in the administrative hearings. This list is not exhaustive; the court also considers any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding. An appellate court generally reviews the trial court's factual findings deferentially; however, where the underlying facts are not in dispute, the appellate court reviews the trial court's standing determination *de novo*.

NH(4)**4. Zoning and Planning—Judicial Review—Particular Cases** A supermarket owner that challenged the grant of a variance allowing an applicant to exceed the 40,000 square foot restriction in order to construct a 78,332 square foot supermarket had not shown the "immediacy of the injury claimed" necessary for it to have standing as a "person directly affected" by the decision. The fact that the zoning board of adjustment drew a comparison between petitioner's location and the applicant's location when considering the "spirit of the ordinance" did not give petitioner more than a generalized interest in the outcome of the proceedings; furthermore, granting the variance did not make the applicant's competition unfair or illegal. RSA 674:33, I(b); 677:2, :4.

NH(5)**5. Zoning and Planning—Ordinances—Variance** In evaluating any petition for a variance, a zoning board of adjustment (ZBA) is required to determine whether the proposal complies with the spirit of the ordinance. For a variance to be inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. Thus, one of the accepted ways for the ZBA to accomplish its task of evaluating the merits of a variance petition is to consider the character of the locality. RSA 674:33, I(b)(2).

NH(6)**6. Administrative Law—Judicial Review—Standing** When the issue of standing is raised, the party challenging the administrative action must sufficiently demonstrate his or her right to claim relief by demonstrating some direct, definite interest in the outcome of the action or proceeding. Standing will not be extended to all persons in the community who might feel that they are hurt by a local administrator's decision.

NH(7)**7. Zoning and Planning—Judicial Review—Standing** A generalized interest in the outcome of zoning board of adjustment proceedings is insufficient to confer standing to challenge the proceedings.

NH(8)**8. Zoning and Planning—Judicial Review—Standing** To have standing to appeal in a zoning case, a party is required to identify an injury that its particular property would incur as a result of the administrative decision. A petitioner's claimed injury that is, at most, speculative does not give rise to a definite interest in the outcome of the appeal.

NH(9)**9. Zoning and Planning—Judicial Review—Standing** Increased business competition is not a type of harm sufficient to confer standing to appeal in a zoning case. Injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in the free enterprise economy.

NH(10)**10. Zoning and Planning—Ordinances—Variance** A variance by definition grants authority to the owner to use its property in a manner that otherwise contravenes generally applicable zoning ordinances.

NH(11)**11. Zoning and Planning—Ordinances—Validity** An equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner. Similarly, all zoning regulations shall be uniform for each class or kind of buildings throughout each district. RSA 674:20.

NH(12)**12. Zoning and Planning—Judicial Review—Standing** Merely alleging violations of New Hampshire's Equal Protection Clause and the statute requiring uniformity of zoning regulations does not confer standing to challenge a zoning board of adjustment's decision; thus, petitioner did not have standing when it asserted only that it had a right to ensure that all owners in a district "stood on an equal footing." There is no provision relieving a petitioner from its burden to prove standing under the statute regarding appeals from board decisions. Even when a constitutional challenge is alleged, an appealing party must prove that its own personal rights have been or will be directly and specifically affected. RSA 674:20; 677:4.

NH(13)**13. Zoning and Planning—Judicial Review—Standing** An indefinite interest in possible "future action" does not support standing to appeal a zoning board of adjustment's determination.

COUNSEL: *Cleveland, Waters and Bass, P.A.*, of Concord (*David W. Rayment* and *Mark S. Derby* on the brief, and *Mr. Rayment* orally), for the petitioner.

Upton & Hatfield, LLP, of Concord (*Barton L. Mayer* and *Matthew R. Serge* on the joint brief, and *Mr. Mayer* orally), for the Town of Bedford and Town of Bedford Zoning Board of Adjustment.

Gallagher, Callahan & Gartrell, PC, of Concord (*Ari B. Pollack* and *Samantha D. Elliott* on the joint brief, and *Ms. Elliott* orally), for the intervenor, Retail Management and Development, Inc.

JUDGES: CONBOY, J. DALIANIS, C.J., and HICKS, LYNN and BASSETT, JJ., concurred.

OPINION BY: CONBOY

OPINION

[*766] [954]** CONBOY, J. The petitioner, Hannaford Brothers Company, appeals an order of the Superior Court (*Tucker*, J.) dismissing its appeal from a decision of the Town of Bedford Zoning Board of Adjustment (ZBA) for lack of standing. *See* RSA 677:4 (Supp. 2012). We affirm.

The following facts are undisputed. The petitioner owns and operates a 36,541 square foot supermarket on Route 101 in Bedford's commercial district. The petitioner obtained planning board approval for its supermarket in November 2006, shortly after the Town of Bedford (Town) enacted a zoning ordinance **[***2]** amendment restricting the size of any single building in the commercial district to 40,000 square feet. Retail Management and Development, Inc. (RMD), the intervenor in this case, develops supermarkets for Demoulas Super Markets, Inc. In November 2010, RMD filed an application with the ZBA seeking a variance to exceed the 40,000 square foot restriction in order to construct a 78,332 square foot supermarket on Route 114 in the commercial district. The location of RMD's proposed supermarket is 3.8 miles from the petitioner's supermarket.

Although the petitioner objected to the variance application, the ZBA granted it. The ZBA found, among other things, that the "spirit of the ordinance" was intended to limit the size of buildings on Route 101, but not on Route 114, where RMD sought to build. In doing so, it accepted RMD's arguments that: the area on Route 101 where the petitioner's property is located cannot support buildings with a footprint larger than 40,000 square feet due to the limited depth of the commercial zone along Route 101; there was a desire to maintain the "rural character" of the area and to avoid "massing," or visual takeover of the area; and RMD's seventeen-acre parcel **[***3]** on Route 114 is a "unique piece" of commercially zoned land surrounded by industrial properties. The ZBA denied the petitioner's motion for rehearing, finding that the petitioner was not a "person directly affected" by its decision and, thus, lacked **[**955]** standing to move for rehearing. *See* RSA 677:2 (Supp. 2012).

The petitioner appealed to the superior court under RSA 677:4, which allows appeal by "[a]ny person aggrieved by any order or decision of the zoning board of adjustment." The Town and RMD moved to dismiss the petitioner's appeal, arguing that the petitioner lacked standing under RSA 677:4. The trial court granted the motion, and this appeal followed.

NH(1) **[1, 2]** The petitioner argues that the trial court erred in dismissing its appeal based upon a lack of standing. HN1 When a motion to dismiss challenges a petitioner's standing to sue, the trial court must look beyond the **[*767]** petitioner's allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated its right to claim relief. *Johnson v. Town of Wolfeboro Planning Bd.*, 157 N.H. 94, 96, 945 A.2d 13 (2008). HN2 Under RSA 677:4, "[a]ny person aggrieved" by an order of a zoning board of adjustment may petition the superior court for **[***4]** review. A "'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2." RSA 677:4. Under RSA 677:2, a person entitled to apply for rehearing includes "any party to the action or proceedings, or any person directly affected thereby." Here, the petitioner does not argue that it has standing as a "party to the action"; thus, we consider whether the petitioner is a "person directly affected" by the ZBA's decision. HN3 To prove that it is a "person directly affected" for standing purposes, the appealing party must show "some direct, definite interest in the outcome of the action or proceeding." *Golf Course Investors of NH v. Town of Jaffrey*, 161 N.H. 675, 680, 20 A.3d 846 (2011).

NH(3) **[3]** HN4 Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." *Id.* When evaluating whether an appealing party has standing in this context, we consider the following factors: (1) the proximity of the challenging party's property to the subject site; (2) the type of change proposed; (3) the immediacy of the injury claimed; and (4) the challenging party's participation in the administrative hearings. **[***5]** *See Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 545, 404 A.2d 294 (1979). This list is not exhaustive; we also consider any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding. *See id.* at 544-45. We generally review the trial court's factual findings deferentially, *see Richmond v. Hutchinson*, 149 N.H. 749, 751, 829 A.2d 1075 (2003); however, where, as here, "the underlying facts are not in dispute, we review the trial court's [standing] determination *de novo*." *Johnson*, 157 N.H. at 96.

We begin by evaluating the undisputed facts in light of the *Weeks* factors. First, the petitioner concedes that because it is located 3.8 miles away from RMD's development site, it lacks proximity. Regarding the "type of change proposed" by RMD, there is no question that it is substantial: it seeks to construct a building nearly double the 40,000 square foot restriction. Thus, the second factor weighs in the petitioner's favor. Further, because the petitioner actively participated in the initial ZBA hearings, the fourth factor weighs in its favor. *See Weeks*, 119 N.H. at 545.

NH(4)[4] The petitioner focuses its argument on the third *Weeks* factor — "immediacy **[***6]** of the injury claimed," *id.* — as to which it advances two arguments. The petitioner first argues that the ZBA and RMD conferred standing upon it by "directly referencing and implicating [the petitioner's] **[*768]** **[**956]** business interests, property interests and development rights." Specifically, the petitioner points out that when considering the "spirit of the ordinance" requirement for granting a variance, *see* RSA 674:33, I(b) (Supp. 2012), the ZBA drew a comparison between the petitioner's location on Route 101 and RMD's proposed location on Route 114, finding that the ordinance was intended to limit the size of buildings on Route 101 but not on Route 114. The petitioner argues that "because this comparison occurred in the context of the 'spirit of the ordinance'" analysis (rather than the "unnecessary hardship" analysis based upon the property's unique physical conditions, *see Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580, 883 A.2d 1034 (2005)), the ZBA created a policy-setting and precedential interpretation that "will form the basis of future determinations about variances from the 40,000 square foot requirement," thereby limiting the petitioner's "operations and future expansion options."

NH(5)[5] We **[***7]** disagree that the ZBA's comparison of the petitioner's location in the district to RMD's proposed location establishes sufficient injury to confer standing. To accept the petitioner's argument would disregard our statutory mandate to limit standing to persons "directly affected" by the ZBA's decision. *See* RSA 677:2, :4. HN5 In evaluating any petition for a variance, the ZBA is required to determine whether the proposal complies with the "spirit of the ordinance." *See* RSA 674:33, I(b)(2). "[F]or a variance to be ... inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives." *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508, 514, 34 A.3d 584 (2011) (quotation omitted). "[O]ne way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality." *Farrar v. City of Keene*, 158 N.H. 684, 691, 973 A.2d 326 (2009) (quotation omitted). Thus, one of the accepted ways for the ZBA to accomplish its task of evaluating the merits of RMD's variance petition is to consider the character of the locality.

NH(6)[6, 7] Under the petitioner's rationale, *any* property owner within the zoning district **[***8]** whose property is considered in the ZBA's evaluation of the "character of the locality" would have standing to appeal. This is not the state of our law. HN6 "[W]hen the issue of standing is raised, the party challenging the administrative action ... must sufficiently demonstrate his or her right to claim relief" by demonstrating "some direct, definite interest in the outcome of the action or proceeding." *Golf Course Investors*, 161 N.H. at 680. "Standing will not be extended to all persons in the community who might feel that they are hurt by a local administrator's decision." *Goldstein v. Town of Bedford*, 154 N.H. 393, 395, 910 A.2d 1158 (2006) (brackets and quotation omitted). The ZBA identified a characteristic of RMD's property **[*769]** that it found made a variance consistent with the spirit of the ordinance: its location on Route 114. In the process, the ZBA also identified a feature of the petitioner's property that may make it less likely to obtain a variance should it apply for one in the future: its location on Route 101. At most, the petitioner had only HN7 a generalized interest in the outcome of the ZBA proceedings. Such generalized interest is insufficient to confer standing. *See, e.g., Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450, 451-52, 656 A.2d 407 (1995) **[***9]** (rejecting petitioners' argument "that their status as citizens of the town, property owners, taxpayers, and owners of a business within the commercial district gave them standing to raise issues concerning **[**957]** the proper application and use of zoning districts," concluding that the

only adverse impact on petitioners was increased business competition).

NH(8) [8] Indeed, HN8 to have standing, a party is required to identify an "injury that [its] particular propert[y] would incur" as a result of the administrative decision. *See Golf Course Investors*, 161 N.H. at 683; *see also Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 203, 761 A.2d 426 (2000) ("In order to have standing to appeal a decision of an administrative agency denying a motion for rehearing, an appellant must demonstrate that the appellant has suffered or will suffer an injury in fact."). The petitioner argues that the ZBA's interpretation will directly affect its operations and *future* expansion options; yet, it does not specify when or even if it actually intends to expand its supermarket beyond 40,000 square feet. Thus, the petitioner's claimed injury is, at most, "speculative," and "does not give rise to a 'definite' interest in the outcome **[***10]** of th[e] appeal." *Joyce v. Town of Weare*, 156 N.H. 526, 530, 937 A.2d 919 (2007).

NH(9) [9] The petitioner also argues that it has suffered a direct injury because the ZBA's decision allows for "unfair or illegal" competition. The petitioner acknowledges that HN9 "increased" business competition is not a type of harm sufficient to confer standing. *See Nautilus*, 139 N.H. at 452; *see also Weeks*, 119 N.H. at 545 ("[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy."). In arguing that this case presents an issue of unfair or illegal competition, the petitioner draws the following distinction: increased competition from a conforming 40,000 square foot business in the district would not confer standing; however, competition from a 78,332 square foot supermarket under an illegally-granted variance from a generally-applicable zoning restriction does confer standing.

NH(10) [10] The petitioner's argument is unavailing. The petitioner contends that its injury stems from unfair or illegal competition by RMD. What makes the competition unfair or illegal, according to the petitioner, is that **[*770]** the ZBA granted RMD a variance from a "generally-applicable" **[***11]** zoning ordinance. Yet, HN10 a variance by definition grants authority to the owner to use its property in a manner that otherwise contravenes generally-applicable zoning ordinances. *See New London v. Leskiewicz*, 110 N.H. 462, 466, 272 A.2d 856 (1970). In effect, the petitioner argues that any business should be permitted to challenge the validity of any ZBA decision to grant a variance to a competitor. This argument improperly conflates the merits of an appeal with the standing requirement: according to the petitioner, because it alleges that the ZBA's decision is unlawful, it has standing to appeal. We reject such a standard. *See Weeks*, 119 N.H. at 545 (HN11 whether an appealing party is a "proper party" is a question "separate from the merits of the appeal"). HN12 An appeal of a ZBA decision is not a weapon to be used to stifle business competition. *See Nautilus*, 139 N.H. at 452. Thus, the petitioner fails to allege any concrete injury to its particular property, and the third *Weeks* factor weighs against standing.

Although the second and fourth *Weeks* factors weigh in favor of standing, we conclude that because the petitioner lacks proximity and has failed to allege any concrete injury to its particular property **[***12]** as a result of the ZBA's determination, the *Weeks* factors, on balance, do not support the petitioner's standing to appeal.

[958]** In addition to the *Weeks* factors, we also consider any other factors relevant to evaluating whether the petitioner has a direct, definite interest in the outcome. *See Weeks*, 119 N.H. at 544-45. Here, the petitioner asserts two additional grounds in support of its standing argument. First is its claim under the State Constitution's Equal Protection Clause and RSA 674:20 (2008). The petitioner argues that under these provisions, it has a direct interest in seeing that zoning regulations relating to the commercial district are applied even-handedly, so that all property owners in the commercial district stand on equal footing. We disagree.

NH(11) [11] HN13 "An equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly situated

individuals in a different manner." *Taylor v. Town of Plaistow*, 152 N.H. 142, 146, 872 A.2d 769 (2005) (brackets omitted). Similarly, RSA 674:20 provides, "All regulations shall be uniform for each class or kind of buildings throughout each district." The trial court rejected the **[***13]** petitioner's argument on the ground that the petitioner was not "similarly situated" to RMD because "it never applied for a variance from the limitation on square footage." The petitioner argues that it need not show that it applied for a variance to be "similarly situated."

NH(12) **[12]** Whether the petitioner is "similarly situated," however, is relevant only to the merits of the petitioner's claim and does not address the **[*771]** threshold issue of standing. In other words, *HN14* merely alleging violations of the Equal Protection Clause and RSA 674:20 does not confer standing to challenge the ZBA's decision. There is no provision in RSA 674:20 relieving the petitioner from its burden to prove standing under RSA 677:4. Even when a constitutional challenge is alleged, an appealing party must prove that its "own personal rights have been or will be *directly and specifically affected*." *Appeal of Richards*, 134 N.H. 148, 154, 590 A.2d 586 (1991) (emphasis added); *see also Joyce*, 156 N.H. at 529.

The petitioner has failed to show how the ZBA's decision has directly and specifically affected its own rights. It asserts only that it has a right to ensure that all owners in the district "stand on an equal footing." In *Golf* **[***14]** *Course Investors*, we rejected a similarly broad argument, finding that residents do not have standing to prevent an administrative body from approving plans on the basis that, in the residents' view, the plans would violate a Town ordinance. *See Golf Course Investors*, 161 N.H. at 684.

The petitioner contends that if it does not have standing to appeal under the Equal Protection Clause or RSA 674:20, then "no person within a zoning district could challenge a zoning ordinance which was applied in a discriminatory manner." We disagree. Simply because the petitioner fails to sustain its burden to prove standing does not mean that others in the district would not be able to challenge ordinances applied in a discriminatory manner. *HN15* So long as an appealing party can establish a direct injury to its own property or rights, that party will have standing to assert a challenge. *See Appeal of Richards*, 134 N.H. at 154.

NH(13) **[13]** Finally, the petitioner contends that it has standing because the ZBA acted in a "quasi-judicial capacity" when it granted RMD a variance. It distinguishes a zoning board of adjustment's role in considering a variance request from a planning board's role in evaluating site plans. It **[***15]** maintains that "when granting a variance, a zoning board is by definition **[**959]** establishing the relative rights of similarly-situated parties in the same zone, and setting precedent for future action." Assuming that there is any meaningful distinction, for standing purposes, between a zoning board of adjustment's role in considering variance requests and a planning board's role in evaluating site plans, *but see Weeks*, 119 N.H. at 544 ("The interests of the parties and the type of issues presented in a site plan review do not differ substantially from those present in the granting of a special exception or a variance, and no rationale appears for a different definition of persons entitled to appeal."), the petitioner again has not identified any direct interest in the outcome of the ZBA's decision. By its own admission, **[*772]** the petitioner is concerned only with possible "future action." *HN16* This indefinite interest does not support standing to appeal the ZBA's determination. *See Joyce*, 156 N.H. at 530.

Based upon the foregoing, we conclude that the petitioner has failed to demonstrate that it has a "direct, definite interest in the outcome of the [ZBA's] action," *Golf Course Investors*, 161 N.H. at 680; **[***16]** thus, it lacks standing to appeal the ZBA's decision under RSA 677:4. Accordingly, we hold that the trial court did not err in granting the joint dismissal motion of the Town and RMD.

Affirmed.

DALIANIS, C.J., and HICKS, LYNN and BASSETT, JJ., concurred.

Source: **Legal > / . . . / > NH State Cases, Combined**
Terms: **name(hannaford and bedford) and date(geq (01/01/2010) and leq (09/23/2013))** (Suggest Terms for My Search)
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Date/Time: Wednesday, September 25, 2013 - 12:05 PM EDT

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In

CHAPTER 270

SB 124-FN – FINAL VERSION

03/14/13 0875s

8May2013... 1501h

5June2013... 1863h

06/23/13 2178EBA

2013 SESSION

13-0509

08/10

SENATE BILL *124-FN*

AN ACT establishing an integrated land development permit.

SPONSORS: Sen. Odell, Dist 8; Sen. Hosmer, Dist 7; Sen. Watters, Dist 4; Sen. Carson, Dist 14; Sen. Reagan, Dist 17; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Sen. Fuller Clark, Dist 21; Sen. Woodburn, Dist 1; Sen. Boutin, Dist 16; Sen. Bradley, Dist 3; Sen. Pierce, Dist 5; Rep. Grenier, Sull 7; Rep. Sad, Ches 1; Rep. Gottling, Sull 2; Rep. Renzullo, Hills 37

COMMITTEE: Energy and Natural Resources

AMENDED ANALYSIS

This bill establishes a permit process for applicants seeking one or more land development permits from the department of environmental services.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

3/14/13 0875s

8May2013... 1501h

5June2013... 1863h

06/23/13 2178EBA

13-0509

08/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT establishing an integrated land development permit.

Be it Enacted by the Senate and House of Representatives in General Court convened:

270:1 New Chapter; Integrated Land Development Permit. Amend RSA by inserting after chapter 488 the following new chapter:

CHAPTER 489

INTEGRATED LAND DEVELOPMENT PERMIT

489:1 Purpose. This chapter is intended to:

I. Establish an integrated land development permit option that may be sought, at the discretion of the applicant, as an alternative to seeking one or more individual land development permits or approvals issued by the department of environmental services.

II. Provide a coordinated approach and holistic perspective in regulating land development activities to protect the quality and functions of New Hampshire's natural environment.

III. Establish an alternative project review and permitting process to improve communication and coordination between multiple organizations and entities involved in the permitting of proposed projects.

IV. Establish a structured pre-application process to provide enhanced guidance earlier in the project design process to facilitate compliance and improved environmental performance.

V. Encourage and facilitate implementation of environmentally superior projects.

VI. Recognize that the degree of relatedness of the affected programs presents a unique opportunity to achieve efficiencies and savings that are not possible to achieve by similar means within the other programs administered by the department.

489:2 Definitions. In this chapter:

I. "Abutter" means any person who owns land immediately contiguous to the subject property or who owns flowage rights on such land. The term does not include the owner of any land that is separated by a public road or public waterway from the subject property or, in the absence of a public road or waterway, is more than ¼-mile from the limits of the proposed work. If any land that is immediately contiguous to the subject property is owned in whole or in part by the person who is proposing the work or is necessary to meet any frontage requirement, the term includes the person owning the next contiguous property.

II. "Affected programs" means the following programs implemented by the department:

(a) The terrain alteration program established under RSA 485-A:17 and rules adopted pursuant thereto;

(b) The subdivision and individual sewage disposal systems program established under RSA 485-A:29 through RSA 485-A:44 and rules adopted pursuant thereto;

(c) The wetlands program established under RSA 482-A and rules adopted pursuant thereto; and

(d) The shoreland water quality protection program established under RSA 483-B and rules adopted pursuant thereto.

III. "Applicant" means the person who initiates the application process for an integrated land development permit. If the applicant is not the owner of the property on which the project is proposed to occur, the applicant shall be authorized in writing by the property owner to undertake all actions and representations required under this chapter.

IV. "Department" means the department of environmental services.

V. "Integrated land development permit" means a single permit issued by the department in lieu of issuing separate permits or approvals under one or more of the affected programs.

VI. "Permittee" means a person who obtains an integrated land development permit under this chapter.

VII. "Subject property" means the property on which a project is proposed or, after issuance of a permit, is undertaken.

489:3 Authorization.

I. There is hereby established an integrated land development permit, for which application may be made as an alternative to applying for separate, individual permits or approvals under the affected programs.

II. Municipalities may review materials, engage in discussions with the department, conduct independent site visits with the consent of the property owner and the applicant,

if other than the property owner, and provide written comment to the department during any or all phases of the integrated land development permit process. Municipalities may attend site visits, attend meetings or participate in discussions between the applicant and the department in accordance with the following:

(a) Municipalities may participate in meetings or other discussions between the department and the applicant during the conceptual and pre-application phases of the integrated land development permit process under RSA 489:5 and RSA 489:6 with the consent of the applicant.

(b) Municipalities may participate in site visits conducted by state or federal regulatory agencies during the conceptual and pre-application phases of the integrated land development permit process under RSA 489:5 and RSA 489:6 with the consent of the property owner and the applicant, if other than the property owner.

(c) If the department concludes that it would promote the efficient and timely consideration of a final application under RSA 489:7, the department may invite the municipality in which the subject property is located to participate in meetings or other discussions between the department and the applicant or attend site visits conducted by state or federal regulatory agencies.

(d) To the extent practicable, site visits by municipalities for the purposes of commenting on a permit application or permit issued under this chapter shall be coordinated with entry upon the property by state or federal regulatory agencies under RSA 489:3, VI.

III. If administrative requirements or procedures contained in this chapter, or adopted by rule to execute this chapter, conflict with administrative requirements or procedures of any other statute or rule implemented by the department, the provisions under this chapter shall apply.

IV. The time limits prescribed in this chapter, or adopted by rule to execute this chapter, shall supersede any time limits provided in any other applicable provision of law.

V. Electronic communications and electronic document management may be employed to facilitate correspondence, application, notification, and coordination under this chapter.

VI. Submission of materials for the pre-application technical review under RSA 489:6, II or for final application under RSA 489:7 shall constitute express authorization by the property owner and the applicant, if other than the property owner, for the department and other participating regulatory agencies, through their respective agents or employees, to enter upon the subject property for purposes of evaluating site conditions and the application made under this chapter at reasonable times and with reasonable notice except under exigent circumstances.

489:4 Applicability.

I. Any person who wishes to conduct an activity requiring a permit or other approval from

the department under 2 or more of the affected programs may choose to apply for an integrated land development permit from the department in lieu of all individual program permits or approvals otherwise required under the affected programs, subject to the following conditions and limitations:

(a) All permits or approvals otherwise required under the applicable affected programs shall be included in the application for an integrated land development permit and in any permit issued based on the application.

(b) No person shall be eligible under this chapter if the person is the subject of a state administrative, civil, or criminal enforcement action for violating this chapter or any of the affected programs at the time of initiating the application process.

(c) No person shall be eligible under this chapter if the person was the subject of a state administrative, civil, or criminal enforcement action for violating this chapter or any of the affected programs within the 5 years prior to initiating the application process, unless the action was withdrawn or overturned on appeal.

(d) No property shall be eligible under this chapter if the property is or has been the subject of an administrative enforcement action for violations of this chapter or any of the affected programs, unless the violations have been remediated or will be remediated as part of the proposed project and any outstanding fees, fines, and penalties assessed against the same person who owns the property at the time of the application have been paid in full.

(e) No property shall be eligible under this chapter without the prior consent of the attorney general if the property is, at the time of initiating the application process, or has been, within the 5 years prior to initiating the application process, the subject of a civil or criminal enforcement action for violations of this chapter or any of the affected programs. This subparagraph shall not apply to any action that was withdrawn or overturned on appeal.

(f) This chapter shall not apply if any of the work that is part of the project, other than preliminary site evaluation activities such as surveys or test pits not requiring a permit from the department, has been initiated or completed prior to the application process being initiated.

(g) This chapter shall not apply to permits for shoreline structures unless they are part of a larger project.

(h) This chapter shall not apply to emergency authorizations.

II. For projects that would otherwise require only a single permit from the department under the affected programs, the applicant may request a waiver of the requirement for 2 or more permits provided the project incorporates low-impact or minimum-impact design practices and the applicant demonstrates that the proposed project will achieve a superior overall environmental outcome in accordance with the requirements and procedures

specified in RSA 489:9.

489:5 Conceptual Preliminary Discussions. Any person interested in pursuing an integrated land development permit may consult with the department regarding the applicable procedures and requirements. Applicants may request and participate in conceptual pre-application discussions with the department prior to initiating the formal pre-application technical review process under RSA 489:6. Such conceptual pre-application discussions shall not replace the formal pre-application technical review process.

489:6 Pre-Application Technical Review.

I. An applicant shall initiate the integrated land development permit process by conducting certain activities, as specified by the department in rules adopted under this chapter, in preparation for pre-application technical review by the department. These activities shall include the following:

(a) Inquiry or consultation with the department of resources and economic development's natural heritage bureau and the fish and game department;

(b) Notification of and provision of materials on the proposed project to the governing body, the planning department, the planning board, and conservation commission of the municipality or municipalities in which the proposed project is located;

(c) Notification of and provision of materials on the proposed project to the local river management advisory committee, when the project is in the corridor of a designated river or river segment under RSA 483;

(d) Notification of and consultation with federal regulatory entities, when applicable;

(e) Notification of, and, when requested, provision of materials on the proposed project to the New Hampshire division of historic resources;

(f) Assessment of site characteristics and location, as defined by the department in rules adopted under this chapter; and

(g) Other assessments, inquiries, notifications, and consultations as defined by the department in rules adopted under this chapter.

II. After conducting the activities required under paragraph I, the applicant shall submit to the department such materials as the department requires under rules adopted pursuant to RSA 541-A. The department may require the applicant to pay up to 30 percent of the expected final application fee under RSA 489:7, I to cover departmental costs associated with the pre-application technical review. Any payment made shall be applied towards the final application fee. Such payment shall not be refundable or transferable to another project should a final permit application not be submitted.

III. The applicant shall participate in a pre-application technical review with the

department.

IV. As part of the pre-application technical review, the department shall review preliminary design plans, supporting information, and advisory input from state or federal entities notified or consulted pursuant to paragraph I and comments received from other persons notified pursuant to paragraph I to identify critical issues regarding site development and design, any requested waivers, and any mitigation that may be needed, and review the final permit application requirements with the applicant.

V. The department may invite any state or federal entities notified under paragraph I to participate in pre-application technical review discussions. Other persons or entities may be included at the request of the applicant.

VI. The pre-application technical review process shall not establish any presumption as to whether the department will approve the final application.

489:7 Submission and Review of Final Application.

I. Following the pre-application technical review, the applicant shall submit a complete application, as defined by the department in rules, together with the application fee, which shall be equal to the total of the permit fees specified in statute and in rules for each of the individual permits or approvals being replaced by the integrated land development permit, to the department. The proposed activities shall not be undertaken unless and until the applicant receives a permit from the department.

II. Within 14 days of receipt of the application, the department shall notify the applicant whether the application is complete or not. Incomplete applications shall not be accepted and shall be returned, along with the fee, to the applicant to be made complete and resubmitted to the department.

III. Concurrent with the submission of the final application to the department, the applicant shall:

(a) Provide a complete copy of the final application and all supporting materials, by certified mail or other delivery method that provides proof of receipt, to the municipality, or if applicable, municipalities in which the project is located and, when applicable, the local river management advisory committee or committees.

(b) Notify all abutters by certified mail or other delivery method that provides proof of receipt regarding the application. If any question arises as to whether all abutters were notified, the burden shall be on the applicant to show that notification was made.

IV. The department shall apply the technical criteria established in the affected programs.

V. The department may waive, in accordance with RSA 489:9, any technical criteria established by statute or rule under the affected programs, if such waiver is necessary to achieve a superior overall environmental outcome, or achieve an equivalent overall

environmental outcome at reduced cost.

VI. Within 45 days of receiving a complete application, the department shall:

(a) Approve the application and issue a permit, which shall include such conditions as the department deems necessary to comply with this chapter or rules adopted under this chapter;

(b) Deny the application and issue written findings in support of the denial;

(c) Identify the need for and schedule a public hearing on the proposed project, and within 30 days of the public hearing approve or deny the application in accordance with subparagraph (a) or (b); or

(d) Extend the time for rendering a decision on the application for good cause and with the written agreement of the applicant.

VII. If the department fails to act within the applicable time frame established in this section, the applicant may ask the department to issue the permit by submitting a written request. If the applicant has previously agreed to accept communications from the department by electronic means, a request submitted electronically by the applicant shall constitute a written request.

(a) Within 14 days of the date of receipt of a written request from the applicant to issue the permit, the department shall:

(1) Approve the application, in whole or in part, and issue a permit; or

(2) Deny the application and issue written findings in support of the denial.

(b) If the department does not issue either a permit or a written denial within the 14-day period, the applicant shall be deemed to have a permit by default and may proceed with the project as presented in the application. The authorization provided by this subparagraph shall not relieve the applicant of complying with all requirements applicable to the project, including but not limited to requirements established in or under this chapter and any chapter relating to the applicable affected programs.

(c) Upon receipt of a written request from an applicant, the department shall issue written confirmation that the applicant has a permit by default pursuant to subparagraph (b), which authorizes the applicant to proceed with the project as presented in the application and requires the work to comply with all requirements applicable to the project, including but not limited to requirements established in or under this chapter and any chapter relating to the applicable affected programs.

VIII. Undertaking any activity authorized by a permit issued pursuant to VI(a), VII(a), or VII(c) shall constitute express authorization by the property owner and the permittee, if other than the property owner, for the department and other participating regulatory

agencies, through their respective agents or employees, to enter upon the subject property for purposes of determining compliance with the permit and other applicable requirements at reasonable times and with reasonable notice except under exigent circumstances.

489:8 Rulemaking. The commissioner of the department shall adopt rules under RSA 541-A relative to:

I. Requirements and procedures for the pre-application process and technical review, including requirements for notification of and coordination with municipalities, other state and federal agencies, local river management advisory committees, and other entities.

II. Application requirements and procedures for processing a final application for an integrated land development permit, including requirements for notification of and coordination with municipalities, other state and federal agencies, local river management advisory committees, and other entities.

III. Applicability of technical criteria of the affected program.

IV. Time extensions and duration of a permit, and procedures and requirements for amending a permit issued pursuant to this chapter.

V. Procedures and requirements for projects requiring a public hearing.

VI. Terms and conditions for permits issued under this chapter to ensure compliance with this chapter and affected programs.

489:9 Waivers.

I. No waiver from any affected program's requirement in rule or statute shall be granted unless the applicant requesting the waiver demonstrates that:

(a) There will be no substantial loss of wetland functions and values;

(b) Water quality will be protected to the maximum extent practicable and in compliance with the anti-degradation requirements of the federal Clean Water Act and departmental rules; and

(c) A superior overall environmental outcome will be achieved or an equivalent overall environmental outcome at reduced cost.

II. The demonstration required by paragraph I shall be made based on project design, mitigation, submission of modeling results, engineering calculations, relevant scientific studies, or such other documentation the applicant believes supports the requested waiver.

III. No waiver shall be granted if doing so results in a violation of any state statute or regulation outside those governing the affected programs, unless the statute or regulation

expressly provides that the provisions may be waived.

IV. No waiver shall be granted if doing so results in a violation of any federal requirement, unless the federal requirement expressly provides that its provisions may be waived and the federal agency charged with enforcing the requirement agrees with the waiver.

V. Municipalities may adopt an innovative land use control ordinance pursuant to RSA 674:21, authorizing the planning board to allow a project that does not fully conform to the local zoning ordinance to proceed as approved by the department under this chapter, provided the planning board makes a finding that such a project meets the criteria of paragraph I.

489:10 Appeals.

I. Any person aggrieved by a decision made under RSA 489:7, V, VI(a) or (b), or VII, and any person subject to an order of the department under RSA 489:11 who wishes to appeal shall, within 30 days of the decision, file a notice of appeal with the appeals clerk for a hearing before a joint water-wetland council described in paragraph II. At the time the notice of the appeal is filed, the person shall send a copy of the appeal to the commissioner. If the appeal is of a decision to issue a permit, the person shall also send a copy of the appeal to the permittee. The notice of appeal shall clearly state that it is being filed pursuant to this paragraph.

II. Upon receipt of a notice of appeal filed pursuant to paragraph I, the appeals clerk shall notify the chairperson of the water council established under RSA 21-O:7 and the chairperson of the wetlands council established under RSA 21-O:5-a. The chairperson shall each designate 4 members of their respective councils to sit with a hearing officer appointed under RSA 21-M:3, VIII as a joint council for purposes of the appeal. The interests represented by members of the joint council shall be as diverse as possible based on the council members available to be designated after any recusals are considered.

III. The appeal shall set forth fully every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the appeal shall be considered by the joint council.

IV. The joint council shall conduct an adjudicative proceedings as provided in RSA 21-M:3, IX and X, RSA 21-O:14, RSA 541-A, and rules to be adopted by both of the councils for appeals to be heard by the joint council. Until both of the councils have adopted the same rules, the rules of the wetlands council shall apply to any appeal. The burden of proof shall be on the party seeking to set aside the department's decision to show that the decision is unlawful or unreasonable. All findings of the department upon all questions of fact properly before it shall be prima facie lawful and reasonable.

V. If the appeal is of a decision to issue a permit, the permittee may appear and become a party to the appeal as a matter of right. Requests by any other person to intervene in any appeal shall be made and decided upon as provided in RSA 541-A:32.

VI. On appeal, the joint council may affirm the decision of the department or may remand to the department with a determination that the decision complained of is unlawful or unreasonable. In either case, the council shall specify the factual and legal basis for its determination and shall identify evidence in the record created before the council that supports its decision.

VII. Any party aggrieved by a decision of the joint council may appeal to the supreme court as specified in RSA 541.

VIII. In the case of a remand to the department by the joint council, the department shall consider the council's determination and may either reissue the subject decision or order or appeal as provided in paragraph VII.

489:11 Compliance.

I. The following shall constitute noncompliance with this chapter:

(a) Failure to comply with this chapter or any rule adopted or permit issued under this chapter.

(b) Failure to comply with an order of the commissioner issued relative to this chapter or any rule adopted or permit issued under this chapter.

(c) Misrepresentation by any person of a material fact made in connection with any application filed under this chapter or any permit issued under this chapter.

II. The permittee shall be responsible for ensuring that all work done under the permit complies with the permit and all other applicable requirements. Any person who performs work under an integrated land development permit shall comply with the permit and all other applicable requirements.

III. The department may issue a written order to any person in noncompliance with this chapter as specified in paragraph I to cease any continuing noncompliance and to remediate or restore any land or water areas affected by the noncompliance.

IV. Any noncompliance with this chapter as specified in paragraph I may be enjoined by the superior court upon application of the attorney general.

V. Any person who knowingly fails to comply with this chapter as specified in paragraph I shall be subject to all remedies available under law in the applicable affected programs. For purposes of this paragraph, a permit issued under this chapter shall constitute a permit issued under each of the applicable affected programs.

270:2 Planning Board Procedures. Amend RSA 676:4, I(b) to read as follows:

(b) The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application

means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. A completed application sufficient to invoke jurisdiction of the board shall be submitted to and accepted by the board only at a public meeting of the board, with notice as provided in subparagraph (d). An application shall not be considered incomplete solely because it is dependent upon the ***submission of an application to or the*** issuance of permits or approvals from other ***state or federal*** governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i). The applicant shall file the application with the board or its agent at least 15 days prior to the meeting at which the application will be accepted. The application shall include the names and addresses of the applicant, all holders of conservation, preservation, or agricultural preservation restrictions as defined in RSA 477:45, and all abutters as indicated in the town records for incorporated towns or county records for unincorporated towns or unorganized places not more than 5 days before the day of filing. Abutters shall also be identified on any plat submitted to the board. The application shall also include the name and business address of every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the board.

270:3 New Paragraph; Powers of the Zoning Board of Adjustment. Amend RSA 674:33 by inserting after paragraph V the following new paragraph:

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

270:4 New Paragraph; Powers of the Commission. Amend RSA 36-A:4 by inserting after paragraph IV the following new paragraph:

V. The conservation commission, in reviewing an application to provide input to any other municipal board, shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or providing such input.

270:5 New Subparagraph; Innovative Land Use Controls. Amend RSA 674:21, I by inserting after subparagraph (n) the following new subparagraph:

(o) Integrated land development permit option.

270:6 New Paragraph; Innovative Land Use Controls. Amend RSA 674:21 by inserting after paragraph VI the following new paragraph:

VII. In this section, "integrated land development permit option" means an optional land use control to allow a project to proceed, in whole or in part, as permitted by the department of environmental services under RSA 489.

270:7 Effective Date.

I. Sections 1, 5, and 6 of this act shall take effect January 1, 2015.

II. Sections 2-4 of this act shall take effect 60 days after its passage.

III. The remainder of this act shall take effect upon its passage.

Approved: July 24, 2013

Effective Date: I. Sections 1, 5 and 6 shall take effect January 1, 2015.

II. Sections 2-4 shall take effect September 22, 2013.

III. Remainder shall take effect July 24, 2013.

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2012-039

TOWN OF NEWBURY

v.

STEVEN P. LANDRIGAN & a.

Argued: April 11, 2013
Opinion Issued: August 21, 2013

Upton & Hatfield, LLP, of Concord (Barton L. Mayer on the brief and orally), for the petitioner.

D'Amante, Couser, Pellerin, & Associates, P.A., of Concord (Bruce J. Marshall on the brief and orally), for the respondents.

BASSETT, J. The respondents, Steven and Philomena Landrigan, appeal an order of the Superior Court (McNamara, J.) finding that they unlawfully subdivided their property and granting the request of the petitioner, the Town of Newbury (Town), for injunctive relief and the imposition of a $2,000 fine. See RSA 674:35 (2008) (amended 2012); RSA 676:15 (2008); RSA 676:16 (2008). The respondents argue that the trial court erred in finding that their conduct and that of their predecessors had merged two non-conforming parcels into a single lot. We affirm.

The trial court found, or the record supports, the following facts. In 1935, the Town deeded two contiguous lots, known as lot 3 and lot 4, to a private party (the original owner). Thereafter, the Town also deeded to the original owner four small "cottage lots" adjacent to lots 3 and 4.

In 1961, the original owner recorded a plan depicting lots 3, 4 and the cottage lots. The plan identifies boundary lines separating the "cottage lots"; however, it does not show an internal boundary line between lots 3 and 4. In 1972, the original owner deeded the southern portion of lot 4 to an abutter. In 1973, the Town deeded to the original owner an adjacent triangular parcel of land. Around this time, the Town began assessing lot 3, the remaining portion of lot 4, the "cottage lots," and the triangular parcel of land as a single lot (the property).

Subsequently, the property was transferred by deed three times. Each deed contained an identical metes and bounds description that encompassed the remaining portion of lot 4, lot 3, the four "cottage lots," and the triangular parcel. The property description did not refer to any internal boundary lines. Each deed in the chain of title contained a "meaning and intending" clause that referred to the previous deed.

In 2004, the property was transferred by deed to the respondents. That deed contained the same metes and bounds description as the three prior deeds and a "meaning and intending" clause referring to the immediately preceding deed. At the time the respondents purchased the land, they understood that they were buying a single lot. Later that year, they applied for a building permit. In that application, they described setbacks measured from the property's exterior boundaries and not from the 1935 lot line between lots 3 and 4.

In 2006, the respondents recorded a survey plat of the property, which shows lots 3 and 4 separated by a dotted line labeled "Old Line." In 2008, they recorded two more survey plats, each of which showed a solid line separating lots 3 and 4, which was not labeled. In 2010, the respondents executed two deeds purporting to transfer the property to themselves as separate lots. At no time did the respondents seek or obtain subdivision approval, nor were the survey plats recorded by the respondents approved by the planning board.

In response to the deeding of the property as separate lots, the Town filed an action in superior court claiming that the respondents had subdivided their property without prior planning board approval in violation of RSA 676:16. The Town argued that the conduct of the prior owners caused lots 3 and 4 to merge, and that consequently, when the respondents separately conveyed lots 3 and 4 to themselves without planning board approval, they unlawfully subdivided the property. The respondents countered that they did not need

planning board approval to subdivide the property because the lots had never merged.

Following an evidentiary hearing, the court ruled that the respondents had unlawfully subdivided their property in violation of RSA 674:35 and RSA 676:16, finding that "[g]iven the manner in which the current and former owners have treated the property, it has been merged and treated as a single lot for 50 years or more." The trial court reasoned that "[t]he deeds involving the property do not support the [respondents'] position that they currently own 2 lots" and noted that "[a]t the time the [respondents] purchased the property, they believed they were securing a single parcel of land." Alternatively, the trial court relied upon the doctrine of estoppel to find that treating the property as separate lots would be inequitable because "[s]ince the early [1970s] the [respondents] and their predecessors have [allowed] the Town of Newbury to tax their property as a single building lot."

On appeal, the respondents argue that the trial court erred by: (1) applying the doctrine of merger by conduct; (2) concluding that they had improperly subdivided their property; (3) determining that their chain of title did not support their contention that the property consisted of separate lots of record; (4) relying upon the testimony of the Town's expert to construe a survey prepared by the respondents' expert; (5) finding that the historical lots comprising their property had been merged for fifty years or more; and (6) ruling that they were estopped from treating, and that it would be inequitable to treat, the property as separate lots.

We construe the respondents' first five arguments as challenging the trial court's application of the merger by conduct doctrine and the weight and sufficiency of the evidence to support its decision. "In a land use case, we will uphold the decision of the superior court unless it is not supported by the evidence or is legally erroneous." Town of Windham v. Lawrence Sav. Bank, 146 N.H. 517, 519 (2001) (quotation and brackets omitted). For the reasons that follow, we conclude that the trial court's determination was neither unsupported by the evidence nor legally erroneous.

Pursuant to RSA 674:35, the Town has granted its planning board power to regulate the subdivision of property. See RSA 674:35, I, II. Therefore, under RSA 676:16, any person who transfers land in the Town without first obtaining any required subdivision approval from the planning board is subject to a penalty of $1000 for each lot transferred. The respondents did not obtain such approval. They contend that subdivision approval was not necessary because the property always has been and continues to be two lots. They assert that the trial court erred in ruling that their conduct and that of their predecessors merged the lots because the common law of merger by conduct has been abolished. We disagree.

The doctrine that landowners' conduct can result in the merger of adjacent lots is well established in New Hampshire. In Town of Seabrook v. Tra-Sea Corp., 119 N.H. 937 (1979), we stated that an owner of adjacent non-conforming grandfathered lots may lose that grandfathered status and cause the merger of the non-conforming lots "by abandoning the property or abolishing individual lot lines," although we concluded that the owner in that case had not done so. Tra-Sea Corp., 119 N.H. at 942-43. In Robillard v. Town of Hudson, 120 N.H. 477 (1980), we held that an owner's conduct had resulted in the merger of two non-conforming lots. Robillard, 120 N.H. at 479. That owner had obtained a building permit for a duplex relying on the combined frontage and area of the two contiguous, non-conforming lots. Id. at 478. We held that such conduct "effectively erased the individual lot lines" and resulted in the merger of the two prior non-conforming lots. Id. at 480.

The respondents read Sutton v. Town of Gilford, 160 N.H. 43 (2010), to overrule our prior cases and to establish that the only way lots can be merged is when "either the present or former owners [apply] to the local planning board for a voluntary merger or the lots [are] merged pursuant to a local ordinance specifying the conditions of merger." In Sutton, however, we addressed a related but distinct issue – whether RSA 674:39-a, which gives property owners the right to merge contiguous lots, precludes a town from automatically merging lots pursuant to its zoning ordinance. Sutton, 160 N.H. at 54-55. We did not address, nor did the facts implicate, the doctrine of merger by conduct. See id. at 46-50, 53-58. Therefore, Sutton does not abrogate the longstanding rule that owners can effectuate a merger of contiguous, non-conforming lots, independent of any town ordinance, "by behavior which results in an abandonment or abolition of the individual lot lines." Robillard, 120 N.H. at 479 (quotation omitted).

The respondents also argue that the evidence before the trial court was insufficient to find that their conduct and that of their predecessors in title had resulted in the merger of lots 3 and 4. We disagree. "We will affirm the trial court's factual findings unless they are unsupported by the evidence and will affirm the trial court's legal rulings unless they are erroneous as a matter of law." Sutton, 160 N.H. at 55 (quotation omitted). "[W]e defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence," id., mindful that in evaluating evidentiary weight and credibility, the trial court is "not required to believe even uncontroverted evidence," Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 67 (2012). "It is within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented, including that of the expert witnesses." Cook v. Sullivan, 149 N.H. 774, 780 (2003). Here, the record contains ample support

for the trial court's conclusion that the respondents and their predecessors abandoned the lot line described in the 1935 deed.

Beginning in 1975, the deeds in the respondents' chain of title uniformly describe the property by metes and bounds as a single "tract or parcel of land." The respondents argue that these property descriptions should be read in light of "meaning and intending clauses" contained in the deeds, which, they contend, refer back to the 1935 deed and show that the property is comprised of two lots. We agree with the Town, however, that an unambiguous metes and bounds description will prevail over a general reference to a prior deed in a "meaning and intending clause." See Finlay v. Stevens, 93 N.H. 124, 129 (1944). Moreover, as the trial court observed, "lot 4 as it existed in the 1935 conveyance from the Town to [the original owner], no longer exist[s]." Part of lot 4 was sold in 1972, and, as the respondents' expert admitted at trial, the "cottage lots" and the triangular parcel have since been incorporated into the subject property.

Furthermore, at least three plans were filed at the registry of deeds depicting the property as a single lot. The first plan, recorded in 1961, does not show a boundary line between lots 3 and 4. A second plan, filed in 1972, identifies the internal boundary between lots 3 and 4 with a dashed line while designating the perimeter with a solid line. In 2006, the respondents recorded a survey plat that again depicts the original internal boundary with a dashed line, labeled "Old Line," bisecting a larger single lot. The Town's expert testified that "[w]hen you have a plan that shows solid lines around the perimeter of the property with internal dash lines, the internal lines indicate that they've been abandoned as to the property being separate parcels." In addition, the 2006 plat refers to the entire property as a single parcel and states its acreage as a whole.

The respondents correctly note that the 1961 plan contains inaccuracies and, argue that, therefore, the trial court should not have relied upon it. However, the inaccuracies are not material, and the 1961 plan is probative of the original owner's intention to abandon the internal boundary lines. Further, it was the province of the trial court to determine the weight to give this evidence. Cook, 149 N.H. at 780. Similarly, we reject the respondents' argument that the trial court erred in not adopting the opinion of their expert, who drafted the 2006 survey plat, as to the meaning of the dashed line. The trial court is free to accept or reject expert testimony and to determine the weight accorded to it. Id. It is "not required to believe even uncontroverted testimony." Malborn Realty Trust, 164 N.H. at 67. Upon this record, we cannot say that the trial court erred when it chose not to credit the testimony of the respondents' surveyor.

Additional evidence in the record demonstrates that for many decades the respondents and their predecessors treated the property as a single lot. The record shows that a driveway accessing a house on the property crosses both of the lots described in the 1935 deed. See Roberts v. Town of Windham, 165 N.H. __ (decided July 16, 2013). Moreover, not only did the respondents admit that when they purchased the property they believed that they were purchasing one lot, they treated the property as a single lot when they applied to the Town for building permits. The respondents argue that, because the Town drafted the building permit application form, it would be "unreasonable and unconscionable" for the court to rely on the representations made in applications. We are not persuaded; the fact remains that, regardless of the origin of the form itself, the respondents described the setbacks measured from the external boundary of their property, and not from the 1935 line between lots 3 and 4.

Thus, we conclude that the evidence supports the trial court's finding that, as early as 1961, when the plot plan showing no boundary line between lots 3 and 4 was recorded, the respondents and their predecessors, through their conduct, abolished the line between the two lots described in the 1935 deed. While the respondents are correct that the trial court's order is inconsistent regarding the precise date of the merger, there is ample support in the record for the court's finding that the lots had been merged for at least several decades. Accordingly, we uphold the trial court's ruling that the respondents owned a single parcel in 2008 when they conveyed lots 3 and 4 separately, thereby subdividing their property in violation of RSA 674:35 and RSA 676:16.

Having found that the trial court properly ruled that the former and present owners' conduct resulted in the merger of the subject parcels, we need not address the respondents' arguments that the trial court erred in its ruling on estoppel.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2012-428

CHARLES A. ROBERTS

v.

TOWN OF WINDHAM

Argued: May 9, 2013
Opinion Issued: July 16, 2013

Bernstein, Shur, Sawyer & Nelson, P.A., of Manchester (Gregory E. Michael and Christopher G. Aslin on the brief, and Mr. Michael orally), for the petitioner.

Beaumont & Campbell Prof. Ass'n., of Salem (Bernard H. Campbell on the brief and orally), for the respondent.

CONBOY, J. The petitioner, Charles A. Roberts, appeals an order of the Superior Court (Delker, J.) affirming a decision of the Town of Windham Zoning Board of Adjustment (ZBA) denying his request under RSA 674:39-aa (Supp. 2012) to reverse the administrative merger of certain lots by the respondent, Town of Windham (Town). We affirm.

The following facts are supported by the record or are otherwise undisputed. The petitioner owns an approximately one-acre parcel of land on

Cobbetts Pond Road with frontage on Cobbetts Pond in Windham (the Property). The Property is identified as a single lot on the Town's tax map and has apparently been so identified since the Town developed its tax maps in the 1960s. The Property originated, however, from seven separate lots as shown on the 1913 "Plan of Horne Heirs" recorded in the Rockingham County Registry of Deeds (the Horne plan): five full lots (9 through 13) and two partial lots (8 and 14). The Horne plan was recorded by Clara B. Horne in 1913, and depicts her approximately 12.5-acre, nineteen-lot subdivision along the shore of Cobbetts Pond.

In 1918, Horne conveyed lots 9 through 11, by a single deed, to the petitioner's grandfather, George E. Lane. Specifically, the deed conveyed "[a] certain tract or parcel of land situate on the shore of Cobbetts Pond in Windham . . . meaning and intending to convey lots #9, #10, and #11." In 1920, Horne also deeded lot 12 to Lane. In 1926, Lane also obtained a portion of lot 8 (for ease of reference, partial lot 8 is hereinafter referred to simply as "lot 8").

Lane built structures on all of the lots except lot 12. On lot 10, Lane built a seasonal cottage, a garage/workshop, a screen room, and a dock. The seasonal cottage extends across the boundary line onto lot 11. The garage is two inches from the boundary line between lots 10 and 9 and faces toward lot 9. Thus, one must traverse lot 9 to access the garage. On lot 9, Lane built a "multi-use building" (the bunkhouse), woodshed, privy, dog house, and another dock. The bunkhouse straddles the boundary line between lots 9 and 8. A single driveway provides access from Cobbetts Pond Road to lot 10 over lot 9.

In 1927, Lane conveyed all of the lots to Alice Lane, who subsequently conveyed them to Ruth Lane Roberts. In 1962, Ruth Roberts acquired title to lot 13 and one half of lot 14 (for ease of reference, partial lot 14 is hereinafter referred to simply as "lot 14"). Thus, as of 1962, Ruth Roberts owned the Property as it exists today, consisting of lots 8 through 14. In 1995, the Property was conveyed to the petitioner.

In the 1960s, the Town apparently administratively merged the lots into a single lot: they were designated as a single lot for tax purposes and given a single street address. Neither the petitioner nor any previous owner in the chain of title applied to the Town to merge the lots. See, e.g., RSA 674:39-a (Supp. 2012) (allowing an owner of two or more contiguous and preexisting approved lots to merge them by application to a town planning board).

In 2011, the legislature enacted RSA 674:39-aa, which provides that lots that were "involuntarily merged prior to September 18, 2010," shall be "restored to their pre-merger status" upon request of the owner, subject to certain conditions. RSA 674:39-aa, II. "'Involuntary merger' . . . mean[s] lots

merged by municipal action for zoning, assessing, or taxation purposes without the consent of the owner." RSA 674:39-aa, I(a). An owner is not entitled to such restoration if "any owner in the chain of title voluntarily merged his or her lots." RSA 674:39-aa, II(b). "Voluntary merger" means a merger expressly requested under RSA 674:39-a, or "any overt action or conduct that indicates an owner regarded said lots as merged such as, but not limited to, abandoning a lot line." RSA 674:39-aa, I(c). The municipality bears the burden to prove voluntary merger. See RSA 674:39-aa, II(b).

Following the statute's passage, the petitioner applied to the Windham Board of Selectmen (Selectboard) seeking to "unmerge" the lots from their single lot designation on the Town's zoning and tax maps and to create four lots consisting of: lots 8 and 9; lots 10 and 11; lot 12; and lots 13 and 14. The Selectboard held a meeting to consider the application and determined that the Town had involuntarily merged lots 12-14. The Selectboard, however, concluded that lots 8 through 11 had been voluntarily merged and, thus, denied the petitioner's request to unmerge the four lots.

The Selectboard's decision denying the petitioner's request to unmerge lots 8 through 11 rested upon two grounds. First, the Selectboard relied upon the fact that lots 9 through 11 were conveyed to Lane as one "tract" in a single deed. Second, the Selectboard determined that the Town proved overt owner action to merge the lots based upon the physical layout of the structures. Specifically, the Selectboard noted that lots 8 through 11 are served by a single driveway, that construction of ancillary buildings such as the bunkhouse is a common and typical practice on a "waterfront estate," and that the garage on lot 10 is close to the lot 9 boundary line and is accessed from lot 9.

The petitioner appealed the decision regarding lots 8 through 11 to the ZBA. See RSA 674:39-aa, III; RSA 676:5 (Supp. 2012). The ZBA affirmed the Selectboard's decision for the reasons found by the Selectboard, as well as an additional reason: that by accepting the Town's taxation of the lots as a single lot, the owners voluntarily merged the lots.

The petitioner moved for a rehearing, see RSA 677:3 (2008), which the ZBA denied. The petitioner then appealed the ZBA's decision to the superior court, see RSA 677:4 (Supp. 2012), which affirmed the ZBA's decision. This appeal followed.

The petitioner first argues that the superior court applied an incorrect standard of review. Typically, judicial review in zoning cases is limited. Brandt Dev. Co. of N.H. v. City of Somersworth, 162 N.H. 553, 555 (2011). The factual findings of a zoning board are deemed prima facie lawful and reasonable, and a zoning board's decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence

before it, that the zoning board decision is unlawful or unreasonable. Id.; see RSA 677:6 (2008). The superior court applied this standard to the ZBA's decision. The petitioner contends, however, that the enactment of RSA 674:39-aa altered the deferential standard of review with respect to the issue of proving the voluntary merger of lots.

Resolving this issue requires that we engage in statutory interpretation. We are the final arbiters of the legislature's intent as expressed in the words of a statute considered as a whole. Radziewicz v. Town of Hudson, 159 N.H. 313, 316 (2009). When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We also presume that the legislature knew the meaning of the words it chose, and that it used those words advisedly. See DaimlerChrysler Corp. v. Victoria, 153 N.H. 664, 667 (2006). The interpretation of a statute is a question of law, which we review de novo. See Radziewicz, 159 N.H. at 316.

In 2010, the legislature amended RSA 674:39-a to prohibit municipalities from merging "preexisting subdivided lots or parcels except upon the consent of the owner." Laws 2010, 345:1. In addition, RSA 674:39-aa, II entitles an owner of involuntarily merged lots, at the owner's request, to restore the lots to their premerger status. However, RSA 674:39-aa prohibits restoration of lots if "any owner in the chain of title voluntarily merged his or her lots." RSA 674:39-aa, II(b). The municipality has the burden to prove voluntary merger. See id.

The petitioner contends that by prohibiting municipalities from involuntarily merging lots under RSA 674:39-a and allowing owners of merged lots to request restoration under RSA 674:39-aa, the legislature sought to balance the right of municipalities to regulate land use and the constitutional right of land owners to use their land for reasonable purposes. He argues that by placing the burden of proof on municipalities to prove voluntary merger, the legislature sought to prohibit municipalities from "inventing" mergers based upon inconclusive facts in order to block unpopular applications. He concludes that by "shifting the burden of proof to municipalities," the legislature "necessarily also altered the deferential standard of review on appeal to the [superior court]." We disagree.

The petitioner's argument conflates two concepts: a party's burden of proof and an appellate tribunal's standard of review. A burden of proof is "[a] party's duty to prove a disputed assertion or charge," Black's Law Dictionary 223 (9th ed. 2009), whereas a standard of review is "[t]he criterion by which an appellate [tribunal] . . . measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower [tribunal]," id. at

1535. That a party bears the burden of proof at trial does not dictate the standard of review applied on appeal. As the superior court aptly noted, the State in a criminal case bears the highest burden of proof at trial: beyond a reasonable doubt. See RSA 625:10 (2007). Yet, if the State carries its burden, the standard of review on appeal is often deferential to the State. See, e.g., State v. Hull, 149 N.H. 706, 712 (2003) ("To prevail on a challenge to the sufficiency of the evidence, the defendant must prove that no rational fact finder at trial, viewing all of the evidence presented in the light most favorable to the State, could have found guilt beyond a reasonable doubt.").

Here, RSA 674:39-aa expressly places the burden of proof on the municipality to prove voluntary merger; however, the statute makes no provision for an alternate standard of review. Because we presume the legislature understood the meaning of the words it chose and used those words advisedly, see DaimlerChrysler Corp., 153 N.H. at 667, and we do not add words to a statute that the legislature did not see fit to include, see Radziewicz, 159 N.H. at 316, we do not construe the plain language of RSA 674:39-aa, II(b) to alter the deferential standard of review applicable in zoning cases under RSA 677:6.

The fact that one of the goals of the statute may be to protect individual property rights does not change our interpretation. Although we interpret a statute in light of its overall purpose, see Atwater v. Town of Plainfield, 160 N.H. 503, 508 (2010), in so doing, we do not ignore the statute's plain language, cf. 2A N. Singer & J.D. Singer, Statutes and Statutory Construction § 46:1, at 148-49 (7th ed. 2007) ("Where the words of the statute are clear and free from ambiguity, the letter of the statute may not be disregarded under the pretext of pursuing its spirit." (Quotation omitted)). Here, we will not read into RSA 674:39-aa an alternate standard of review merely because to do so might benefit the petitioner's property rights. Thus, we conclude that the superior court did not err in applying our usual deferential standard of review to the ZBA's decision. See RSA 677:6.

Next, the petitioner argues that the superior court erred by upholding the ZBA's decision to affirm the Selectboard's finding of "voluntary merger" of lots 8 through 11 because the evidence before the Selectboard was insufficient to satisfy the Town's burden. Our review of the superior court's decision, like its review of the ZBA's decision, is limited: we will uphold the court's decision unless the evidence does not support it or it is legally erroneous. Brandt Dev. Co., 162 N.H. at 555. When, as here, the appealing party challenges the sufficiency of the evidence, we consider "whether a reasonable person could have reached the same decision as the trial court based on the evidence before it." Mt. Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 647 (2000) (quotation omitted).

As noted above, the Selectboard found that the Town satisfied its burden of proving "overt action or conduct" to merge lots 8 through 11 based upon the original conveyance by Horne of lots 9 through 11 as one tract in a single deed, and the physical characteristics of the lots and their structures. The ZBA affirmed based upon those two factors and the owners' acquiescence to taxation of the Property as a single lot. In upholding the ZBA's decision, the superior court relied upon the physical characteristics of the lots and their structures and upon the owners' acquiescence to taxation, but concluded that "[t]he fact that [Horne] conveyed separate parcels of land in one deed does not, in itself, indicate an intent to ignore the separate lot designations."

We agree that Horne's conveyance of lots 9 through 11 as one tract in a single deed does not, standing alone, support a finding of voluntary merger. The deed specifically provided that Horne was "meaning and intending to convey lots #9, #10, and #11." We also acknowledge that the acquiescence to taxation as a single lot does not, standing alone, support a finding of voluntary merger. See Hill v. Town of Chester, 146 N.H. 291, 294 (2001) ("[T]he method by which a town taxes its land is not dispositive in determining zoning questions."). As the petitioner notes, lots 8 through 14 were all taxed as a single lot; the Selectboard nonetheless "unmerged" lots 12-14.

The lots' physical characteristics, however, were central to the superior court's decision. It upheld the finding that the garage on lot 10 was constructed within two inches of lot 9 and faces toward lot 9; that the lots share a driveway; and that ancillary buildings, such as the bunkhouse, are common and typical of a "waterfront estate." The petitioner argues that these facts do not support a finding of voluntary merger and that only through conjecture and speculation could the Town demonstrate the prior owners' intent. For example, although he concedes that the placement of the garage near the lot line may be consistent with an intent to merge the lots, the petitioner argues that it is also consistent with an intent to maintain the property as separate lots because Lane – the owner who constructed the garage – may have believed that the garage was farther from the lot line than shown on the survey. Thus, he argues that such evidence is insufficient to support a finding of voluntary merger. We disagree.

Lane constructed the garage on lot 10 not only within two inches of lot 9, but also so that it faced toward lot 9. To access the garage, one must traverse lot 9. Further, a single driveway leads from Cobbetts Pond Road over lot 9 to lot 10. A reasonable interpretation of the placement of the garage is that Lane did not regard the lots as separate. See RSA 674:39-aa, I(c). We disagree with the petitioner that the possibility that Lane may have believed the garage was farther from the lot line renders the evidence inconclusive. Our role on appeal is not to determine whether any contrary conclusions could possibly be drawn

from the evidence; instead, we determine whether the conclusions so drawn are reasonable. See Mt. Valley Mall Assocs., 144 N.H. at 647.

Additionally, the superior court relied on more than the placement of the garage. The "seasonal cottage" sits on both lots 10 and 11, and Lane built a "multi-use" structure known as the "bunkhouse" on lots 9 and 8. Because of the structure's classification as a "bunkhouse," and not as an additional cottage, it is not unreasonable to conclude that the structure was intended to be used in conjunction with the seasonal cottage as part of a "waterfront estate," thereby evincing an intent to use the lots as one. See Webster's Third New International Dictionary 297 (unabridged ed. 2002) (defining "bunkhouse" as "a rough[,] simple building providing sleeping quarters," as used to house persons such as "ranch hands"). Finally, although a shared driveway alone may not be indicative of an intent to merge lots, when viewed in conjunction with evidence of the placement of the garage and bunkhouse, the use of a single driveway to serve multiple lots supports the conclusion that the prior owners intended to merge the lots.

In his brief, the petitioner parses each of these uses and offers explanations for why each individual use does not constitute "voluntary merger." However, the superior court did not analyze each use in isolation, nor was it required to under RSA 674:39-aa. Instead, in affirming the ZBA's decision, the court considered "the use of the property in its entirety." The totality of the evidence reasonably supports a finding that the petitioner's predecessors voluntarily merged the lots under RSA 674:39-aa. Accordingly, we hold that the superior court's decision affirming the ZBA's decision is not unlawful or unreasonable.

As a final matter, the petitioner raises an issue in his notice of appeal that he does not brief. Thus, it is deemed waived. See In re Estate of King, 149 N.H. 226, 230 (2003).

Affirmed.

DALIANIS, C.J., and HICKS, LYNN and BASSETT, JJ., concurred.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KOONTZ *v.* ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 11–1447. Argued January 15, 2013—Decided June 25, 2013

Coy Koontz, Sr., whose estate is represented here by petitioner, sought permits to develop a section of his property from respondent St. Johns River Water Management District (District), which, consistent with Florida law, requires permit applicants wishing to build on wetlands to offset the resulting environmental damage. Koontz offered to mitigate the environmental effects of his development proposal by deeding to the District a conservation easement on nearly three-quarters of his property. The District rejected Koontz's proposal and informed him that it would approve construction only if he (1) reduced the size of his development and, *inter alia*, deeded to the District a conservation easement on the resulting larger remainder of his property or (2) hired contractors to make improvements to District-owned wetlands several miles away. Believing the District's demands to be excessive in light of the environmental effects his proposal would have caused, Koontz filed suit under a state law that provides money damages for agency action that is an "unreasonable exercise of the state's police power constituting a taking without just compensation."

The trial court found the District's actions unlawful because they failed the requirements of *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, and *Dolan* v. *City of Tigard*, 512 U. S. 374. Those cases held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. The District Court of Appeal affirmed, but the State Supreme Court reversed on two grounds. First, it held that petitioner's claim failed because, unlike in *Nollan* or *Dolan*, the District *denied* the application. Se-

cond, the State Supreme Court held that a demand for money cannot give rise to a claim under *Nollan* and *Dolan*.

Held:

1. The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when it denies the permit. Pp. 6–14.

(a) The unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up, and *Nollan* and *Dolan* represent a special application of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. The standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land use exactions. *Dolan, supra,* at 391; *Nollan, supra,* at 837. Pp. 6–8.

(b) The principles that undergird *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. Recognizing such a distinction would enable the government to evade the *Nollan/Dolan* limitations simply by phrasing its demands for property as conditions precedent to permit approval. This Court's unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See, *e.g., Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 592–593. It makes no difference that no property was actually taken in this case. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. Nor does it matter that the District might have been able to deny Koontz's application outright without giving him the option of securing a permit by agreeing to spend money improving public lands. It is settled that the unconstitutional conditions doctrine applies even when the government threatens to withhold a gratuitous benefit. See *e.g., United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210. Pp. 8–11.

(c) The District concedes that the denial of a permit could give rise to a valid *Nollan/Dolan* claim, but urges that this Court should not review this particular denial because Koontz sued in the wrong court, for the wrong remedy, and at the wrong time. Most of its arguments raise questions of state law. But to the extent that respondent alleges a federal obstacle to adjudication of petitioner's claim, the Florida courts can consider respondent's arguments in the first in-

stance on remand. Finally, the District errs in arguing that because it gave Koontz another avenue to obtain permit approval, this Court need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan*. Had Koontz been offered at least one alternative that satisfied *Nollan* and *Dolan*, he would not have been subjected to an unconstitutional condition. But the District's offer to approve a less ambitious project does not obviate the need to apply *Nollan* and *Dolan* to the conditions it imposed on its approval of the project Koontz actually proposed. Pp. 12–14.

2. The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when its demand is for money. Pp. 14–22.

(a) Contrary to respondent's argument, *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, where five Justices concluded that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest," *id.*, at 540 (KENNEDY, J., concurring in judgment and dissenting in part), does not control here, where the demand for money did burden the ownership of a specific parcel of land. Because of the direct link between the government's demand and a specific parcel of real property, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue. Pp. 15–18.

(b) The District argues that if monetary exactions are subject to *Nollan/Dolan* scrutiny, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. But the District exaggerates both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain. It is beyond dispute that "[t]axes and user fees . . . are not 'takings,'" *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 243, n. 2, yet this Court has repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained through taxation, *e.g.*, *id.*, at 232. Pp. 18–21.

(c) The Court's holding that monetary exactions are subject to scrutiny under *Nollan* and *Dolan* will not work a revolution in land use law or unduly limit the discretion of local authorities to implement sensible land use regulations. The rule that *Nollan* and *Dolan* apply to monetary exactions has been the settled law in some of our Nation's most populous States for many years, and the protections of those cases are often redundant with the requirements of state law.

Syllabus

Pp. 21–22.

77 So. 3d 1220, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 11–1447

COY A. KOONTZ, JR., PETITIONER *v.* ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 25, 2013]

JUSTICE ALITO delivered the opinion of the Court.

Our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr.[1] The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court

[1] For ease of reference, this opinion refers to both men as "petitioner."

blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." 1972 Fla. Laws ch.

72–299, pt. IV, §1(5), pp. 1115, 1116 (codified as amended at Fla. Stat. §373.403(5) (2010)). Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." 1972 Fla. Laws §4(1), at 1118 (codified as amended at Fla. Stat. §373.413(1)).

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. 1984 Fla. Laws ch. 84–79, pt. VIII, §403.905(1), pp. 204–205. Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. See Fla. Stat. §373.414(1). Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental

effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent." App. 75.

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his

building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. §373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

B

The Florida Circuit Court granted the District's motion to dismiss on the ground that petitioner had not adequately exhausted his state-administrative remedies, but the Florida District Court of Appeal for the Fifth Circuit reversed. On remand, the State Circuit Court held a 2-day bench trial. After considering testimony from several experts who examined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. App. to Pet. for Cert. D–3. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. *Id.*, at D–11. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, 5 So. 3d 8 (2009), but the State Supreme Court reversed, 77 So. 3d 1220 (2011). A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan*, the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. 77 So. 3d, at 1230. Second, the majority drew a distinction between a demand for an

interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. 77 So. 3d, at 1229–1230. The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot. 77 So. 3d, at 1229–1230. Compare, *e.g.*, *McClung* v. *Sumner*, 548 F. 3d 1219, 1228 (CA9 2008), with *Ehrlich* v. *Culver City*, 12 Cal. 4th 854, 876, 911 P. 2d 429, 444 (1996); *Flower Mound* v. *Stafford Estates Ltd. Partnership*, 135 S. W. 3d 620, 640–641 (Tex. 2004). Two justices concurred in the result, arguing that petitioner had failed to exhaust his administrative remedies as required by state law before bringing an inverse condemnation suit that challenges the propriety of an agency action. 77 So. 3d, at 1231–1232; see *Key Haven Associated Enterprises, Inc.* v. *Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982).

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari, 568 U. S. ___ (2012), and now reverse.

II

A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983). See also, *e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 59–60 (2006); *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 78 (1990). In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. And in *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250

(1974), we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

Nollan and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 547 (2005); *Dolan*, 512 U. S., at 385 (invoking "the well-settled doctrine of 'unconstitutional conditions'"). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. See *id.*, at 384; *Nollan*, 483 U. S., at 831. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building

proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. *Dolan*, *supra*, at 391; *Nollan*, 483 U. S., at 837. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. *Ibid.* (internal quotation marks omitted). Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the ap-

plicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, *e.g.*, *Perry*, 408 U. S., at 597 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital*, 415 U. S. 250 (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See *Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"). See also *Flower Mound*, 135 S. W. 3d, at 639 ("The government

cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless'"). To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though "'no property of any kind was ever taken,'" 77 So. 3d, at 1225 (quoting 5 So. 3d, at 20 (Griffin, J., dissenting)); see also 77 So. 3d, at 1229–1230, but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. See, *e.g.*, *Regan*, 461 U. S. 540 (tax benefits); *Memorial Hospital*, 415 U. S. 250 (healthcare); *Perry*, 408 U. S. 593 (public employment); *United States* v. *Butler*, 297 U. S. 1, 71 (1936) (crop payments); *Frost*, *supra* (business license). Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E.g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210 (2003) ("[T]he government may not deny a

benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech *even if he has no entitlement to that benefit*" (emphasis added and internal quotation marks omitted)); *Wieman* v. *Updegraff*, 344 U. S. 183, 191 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. See *Nollan*, 483 U. S., at 836–837 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition").

That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases.

C

At oral argument, respondent conceded that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan*, Tr. of Oral Arg. 33–34, but it urged that we should not review the particular denial at issue here because petitioner sued in the wrong court, for the wrong remedy, and at the wrong time. Most of respondent's objections to the posture of this case raise questions of Florida procedure that are not ours to decide. See *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975); *Murdock* v. *Memphis*, 20 Wall. 590, 626 (1875). But to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner's unconstitutional conditions claim, we remand for the Florida courts to consider that argument in the first instance.

Respondent argues that we should affirm because, rather than suing for damages in the Florida trial court as authorized by Fla. Stat. §373.617, petitioner should have first sought judicial review of the denial of his permit in the Florida appellate court under the State's Administrative Procedure Act, see §§120.68(1), (2) (2010). The Florida Supreme Court has said that the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a . . . statute or rule in such a way that the aggrieved party's constitutional rights have been violated," *Key Haven Associated Enterprises*, 427 So. 2d, at 158, and respondent has argued throughout this litigation that petitioner brought his unconstitutional conditions claim in the wrong forum. Two members of the Florida Supreme Court credited respondent's argument, 77 So. 3d, at 1231–1232, but four others refused to address it. We decline respondent's invitation to second-guess a State Supreme Court's treatment of its own procedural law.

Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without any

conditions. But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law. Florida law allows property owners to sue for "damages" whenever a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. Ann. §373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law that the Florida Supreme Court did not address and on which we will not opine.

For similar reasons, we decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*. The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeals' characterization of respondent's behavior as a demand for *Nollan/Dolan* purposes. See 77 So. 3d, at 1224 (quoting 5 So. 3d, at 10). Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.

Finally, respondent argues that we need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan* because it gave petitioner another avenue for obtaining permit approval. Specifically, respondent said that it would have approved a revised permit application that reduced the footprint of petitioner's proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9

acres of petitioner's land. Respondent argues that regardless of whether its demands for offsite mitigation satisfied *Nollan* and *Dolan*, we must separately consider each of petitioner's options, one of which did not require any of the offsite work the trial court found objectionable.

Respondent's argument is flawed because the option to which it points—developing only 1 acre of the site and granting a conservation easement on the rest—involves the same issue as the option to build on 3.7 acres and perform offsite mitigation. We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition. But respondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent's offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*.

III

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. See *Rumsfeld*, 547 U. S., at 59–60. For that reason, we

began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. See *Dolan*, 512 U. S., at 384; *Nollan*, 483 U. S., at 831. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. 77 So. 3d, at 1230. Respondent and the dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises* v. *Apfel*, 524 U. S. 498 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim. See *post*, at 5–8 (opinion of KAGAN, J.).

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, 59 S. M. U. L. Rev. 177, 202–203 (2006), and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

A

In *Eastern Enterprises*, *supra*, the United States retroactively imposed on a former mining company an obliga-

tion to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. *Id.*, at 529–537. Although JUSTICE KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.*, at 540 (opinion concurring in judgment and dissenting in part); see *id.*, at 554–556 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did "operate upon . . . an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. *Id.*, at 540 (opinion of KENNEDY, J.). In this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. See *Armstrong* v. *United States*, 364 U. S. 40, 44–49 (1960); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 601–602 (1935); *United States* v. *Security Industrial Bank*, 459 U. S. 70, 77–78 (1982); see also *Palm Beach Cty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379, 383–384 (1999) (the right to receive income from land is an interest in real property under Florida law). The fulcrum this case turns on is the

direct link between the government's demand and a specific parcel of real property.[2] Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*'s "essentially ad hoc, factual inquir[y]," 438 U. S., at 124, at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. *Eastern Enterprises*, 524 U. S., at 542 (opinion of KENNEDY, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent. *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 235 (2003).

Finally, it bears emphasis that petitioner's claim does not implicate "normative considerations about the wisdom of government decisions." *Eastern Enterprises*, 524 U. S.,

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[2]Thus, because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking. That is so even when the demand is considered "*outside* the permitting process." *Post*, at 8 (KAGAN, J., dissenting). The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property.

at 545 (opinion of KENNEDY, J.). We are not here concerned with whether it would be "arbitrary or unfair" for respondent to order a landowner to make improvements to public lands that are nearby. *Id.*, at 554 (BREYER, J., dissenting). Whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien. Cf. *Dolan*, 512 U. S., at 384; *Nollan*, 483 U. S., at 831.

B

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. See *post*, at 9–10. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" *Brown*, *supra*, at 243, n. 2 (SCALIA, J., dissenting). We said as much in *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1881), and our cases have been clear on that point ever since. *United States* v. *Sperry Corp.*, 493 U. S. 52, 62, n. 9 (1989); see *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44 (1934); *Dane* v. *Jackson*, 256 U. S. 589, 599 (1921); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614–615 (1899). This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by

imposing a tax. Most recently, in *Brown*, *supra,* at 232, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation. *Armstrong*, 364 U. S. 40; *Louisville Joint Stock Land Bank*, 295 U. S. 555.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes. Brief for Respondents Washington Legal Foundation et al. 32 and Brief for Respondent Justices of the Washington Supreme Court 22, in *Brown* v. *Legal Foundation of Wash.*, O. T. 2002, No. 01–1325. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy

taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by the legislature, not the courts. See 538 U. S., at 242, n. 2 (SCALIA, J., dissenting).

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. See Fla. Stat. Ann. §373.503 (authorizing respondent to impose ad valorem tax on properties within its jurisdiction); §373.109 (authorizing respondent to charge permit application fees but providing that such fees "shall not exceed the cost . . . for processing, monitoring, and inspecting for compliance with the permit"). If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.[3]

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary . . . that it was not the exertion of taxation but a confiscation of property." *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24–25 (1916). For present purposes, it suffices to say that despite having long recognized that "the power of taxation should not be confused with the

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[3] Citing cases in which state courts have treated similar governmental demands for money differently, the dissent predicts that courts will "struggle to draw a coherent boundary" between taxes and excessive demands for money that violate *Nollan* and *Dolan*. *Post*, at 9–10. But the cases the dissent cites illustrate how the frequent need to decide whether a particular demand for money qualifies as a tax under state law, and the resulting state statutes and judicial precedents on point, greatly reduce the practical difficulty of resolving the same issue in federal constitutional cases like this one.

power of eminent domain," *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 264 (1915), we have had little trouble distinguishing between the two.

C

Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. *Post,* at 8. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. See, *e.g.*, *Northern Ill. Home Builders Assn.* v. *County of Du Page*, 165 Ill. 2d. 25, 31–32, 649 N. E. 2d 384, 388–389 (1995); *Home Builders Assn.* v. *Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000); *Flower Mound*, 135 S. W. 3d, at 640–641. Yet the "significant practical harm" the dissent predicts has not come to pass. *Post,* at 8. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees. *Post,* at 11.

The dissent criticizes the notion that the Federal Constitution places any meaningful limits on "whether one town is overcharging for sewage, or another is setting the price to sell liquor too high." *Post,* at 9. But only two pages later, it identifies three constraints on land use permitting fees that it says the Federal Constitution imposes and suggests that the additional protections of *Nollan* and *Dolan* are not needed. *Post,* at 11. In any event, the dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all, the Due Process Clause protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the govern-

ment's demand for property amounted to a taking under the *Penn Central* framework. See *Nollan*, 483 U. S., at 838. We have repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

* * *

We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 11–1447

COY A. KOONTZ, JR., PETITIONER *v.* ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 25, 2013]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

In the paradigmatic case triggering review under *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money? This case also raises other, more fact-specific issues I will address: whether the government here imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent). That

means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan*, then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over *Eastern Enterprises* v. *Apfel*, 524 U. S. 498 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision.

I also would affirm for two independent reasons establishing that Koontz cannot get the money damages he seeks. First, respondent St. Johns River Water Management District (District) never demanded *anything* (including money) in exchange for a permit; the *Nollan-Dolan*

standard therefore does not come into play (even assuming that test applies to demands for money). Second, no taking occurred in this case because Koontz never acceded to a demand (even had there been one), and so no property changed hands; as just noted, Koontz therefore cannot claim just compensation under the Fifth Amendment. The majority does not take issue with my first conclusion, and affirmatively agrees with my second. But the majority thinks Koontz might still be entitled to money damages, and remands to the Florida Supreme Court on that question. I do not see how, and expect that court will so rule.

I

Claims that government regulations violate the Takings Clause by unduly restricting the use of property are generally "governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978)." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538 (2005). Under *Penn Central*, courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." *Penn Central*, 438 U. S., at 124. That multi-factor test balances the government's manifest need to pass laws and regulations "adversely affect[ing]. . . economic values," *ibid.*, with our longstanding recognition that some regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

Our decisions in *Nollan* and *Dolan* are different: They provide an independent layer of protection in "the special context of land-use exactions." *Lingle*, 544 U. S., at 538. In that situation, the "government demands that a landowner dedicate an easement" or surrender a piece of real property "as a condition of obtaining a development permit." *Id.*, at 546. If the government appropriated such a

property interest outside the permitting process, its action would constitute a taking, necessitating just compensation. *Id.*, at 547. *Nollan* and *Dolan* prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government's demand to heightened scrutiny: The government may condition a land-use permit on the relinquishment of real property only if it shows a "nexus" and "rough proportionality" between the demand made and "the impact of the proposed development." *Dolan*, 512 U. S., at 386, 391; see *ante*, at 8. *Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on land use (the function of *Penn Central*), but instead to stop the government from imposing an "unconstitutional condition"—a requirement that a person give up his constitutional right to receive just compensation "in exchange for a discretionary benefit" having "little or no relationship" to the property taken. *Lingle*, 544 U. S., at 547.

Accordingly, the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. That is why *Nollan* began by stating that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public . . . , rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking" requiring just compensation. 483 U. S., at 831. And it is why *Dolan* started by maintaining that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to [d]evelop her property on such a dedication, a taking would have occurred." 512 U. S., at 384. Even the majority acknowledges this

basic point about *Nollan* and *Dolan*: It too notes that those cases rest on the premise that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Ante*, at 14–15. Only if that is true could the government's demand for the property force a landowner to relinquish his constitutional right to just compensation.

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. I assume for now that the District made that demand (although I think it did not, see *infra*, at 12–16). The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan-Dolan* test apply.

But we have already answered that question no. *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, as the Court describes, involved a federal statute requiring a former mining company to pay a large sum of money for the health benefits of retired employees. Five Members of the Court determined that the law did not effect a taking, distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money. JUSTICE KENNEDY acknowledged in his controlling opinion that the statute "impose[d] a staggering financial burden" (which influenced his conclusion that it violated due process). *Id.*, at 540 (opinion concurring in judgment and dissenting in part). Still, JUSTICE KENNEDY explained, the law did not effect a taking because it did not "operate upon or alter" a "specific and identified propert[y] or property right[]." *Id.*, at 540–541. Instead, "[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.*, at 540. JUSTICE BREYER, writing for

four more Justices, agreed. He stated that the Takings Clause applies only when the government appropriates a "specific interest in physical or intellectual property" or "a specific, separately identifiable fund of money"; by contrast, the Clause has no bearing when the government imposes "an ordinary liability to pay money." *Id.*, at 554–555 (dissenting opinion).

Thus, a requirement that a person pay money to repair public wetlands is not a taking. Such an order does not affect a "specific and identified propert[y] or property right[]"; it simply "imposes an obligation to perform an act" (the improvement of wetlands) that costs money. *Id.*, at 540–541 (opinion of KENNEDY, J.). To be sure, when a person spends money on the government's behalf, or pays money directly to the government, it "will reduce [his] net worth"—but that "can be said of any law which has an adverse economic effect" on someone. *Id.*, at 543. Because the government is merely imposing a "general liability" to pay money, *id.*, at 555 (BREYER, J., dissenting)—and therefore is "indifferent as to how the regulated entity elects to comply or the property it uses to do so," *id.*, at 540 (opinion of KENNEDY, J.)—the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan-Dolan* test, because it does not force Koontz to relinquish a constitutional right.

The majority tries to distinguish *Apfel* by asserting that the District's demand here was "closely analogous" (and "bears resemblance") to the seizure of a lien on property or an income stream from a parcel of land. *Ante*, at 16, 19. The majority thus seeks support from decisions like *Armstrong* v. *United States*, 364 U. S. 40 (1960), where this Court held that the government effected a taking when it extinguished a lien on several ships, and *Palm Beach Cty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379 (1999), where the Florida Supreme Court held that the government

committed a taking when it terminated a covenant entitling the beneficiary to an income stream from a piece of land.

But the majority's citations succeed only in showing what this case is *not*. When the government dissolves a lien, or appropriates a determinate income stream from a piece of property—or, for that matter, seizes a particular "bank account or [the] accrued interest" on it—the government indeed takes a "specific" and "identified property interest." *Apfel*, 524 U. S., at 540–541 (opinion of KENNEDY, J.). But nothing like that occurred here. The District did not demand any particular lien, or bank account, or income stream from property. It just ordered Koontz to spend or pay money (again, assuming it ordered anything at all). Koontz's liability would have been the same whether his property produced income or not—*e.g.*, even if all he wanted to build was a family home. And similarly, Koontz could meet that obligation from whatever source he chose—a checking account, shares of stock, a wealthy uncle; the District was "indifferent as to how [he] elect[ed] to [pay] or the property [he] use[d] to do so." *Id.*, at 540. No more than in *Apfel*, then, was the (supposed) demand here for a "specific and identified" piece of property, which the government could not take without paying for it. *Id.*, at 541.

The majority thus falls back on the sole way the District's alleged demand related to a property interest: The demand arose out of the permitting process for Koontz's land. See *ante*, at 16–17. But under the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny. As I have described, the heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants; rather, it is "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a

constitutional right—here the right to receive just compensation when property is taken"—in exchange for a land-use permit. *Lingle*, 544 U. S., at 547 (internal quotation marks omitted); see *supra*, at 3–5. As such, *Nollan* and *Dolan* apply only if the demand at issue would have violated the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *outside* the permitting process. And here, under *Apfel*, it would not.[1]

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. 524 U. S., at 541. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. See, *e.g.*, *Olympia* v. *Drebick*, 156 Wash. 2d 289, 305, 126 P. 3d 802, 809 (2006). Others cover the direct costs of providing services like sewage or

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[1]The majority's sole response is that "the unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property." *Ante*, at 17, n. 1. That mysterious sentence fails to make the majority's opinion cohere with the unconstitutional conditions doctrine, as anyone has ever known it. That doctrine applies only if imposing a condition directly—*i.e.*, independent of an exchange for a government benefit—would violate the Constitution. Here, *Apfel* makes clear that the District's condition would not do so: The government may (separate and apart from permitting) require a person—whether Koontz or anyone else—to pay or spend money without effecting a taking. The majority offers no theory to the contrary: It does not explain, as it must, why the District's condition was "unconstitutional."

water to the development. See, *e.g.*, *Krupp* v. *Breckenridge Sanitation Dist.*, 19 P. 3d 687, 691 (Colo. 2001). Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. See, *e.g.*, *Phillips* v. *Mobile*, 208 U. S. 472, 479 (1908); *BHA Investments, Inc.* v. *Idaho*, 138 Idaho 348, 63 P. 3d 474 (2003). All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse because the majority's distinction between monetary "exactions" and taxes is so hard to apply. *Ante*, at 18. The majority acknowledges, as it must, that taxes are not takings. See *ibid.* (This case "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners"). But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible "exaction," how is anyone to tell the two apart? The question, as JUSTICE BREYER's opinion in *Apfel* noted, "bristles with conceptual difficulties." 524 U. S., at 556. And practical ones, too: How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must confront the same question, as they enforce restrictions on localities' taxing power. And their decisions—contrary to the majority's blithe assertion, see *ante*, at 20–21—struggle to draw a coherent boundary. Because "[t]here is no set rule" by which to determine "in which category a particular" action belongs, *Eastern Diversified Properties, Inc.* v. *Montgomery Cty.*, 319 Md. 45, 53, 570 A. 2d 850, 854 (1990), courts often reach opposite

conclusions about classifying nearly identical fees. Compare, *e.g.*, *Coulter* v. *Rawlins*, 662 P. 2d 888, 901–904 (Wyo. 1983) (holding that a fee to enhance parks, imposed as a permit condition, was a regulatory exaction), with *Home Builders Assn.* v. *West Des Moines*, 644 N. W. 2d 339, 350 (Iowa 2002) (rejecting *Coulter* and holding that a nearly identical fee was a tax).[2] Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. See *ante*, at 8, 21. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. See, *e.g.*, *Ehrlich* v. *Culver City*, 12 Cal. 4th 854, 911 P. 2d 429 (1996). *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[] classifying entire areas of the city." 512 U. S., at 385. Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money. *Ante*, at 20.

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[2] The majority argues that existing state-court precedent will "greatly reduce the practical difficulty" of developing a uniform standard for distinguishing taxes from monetary exactions in federal constitutional cases. *Ante*, at 20, n.2. But how are those decisions to perform that feat if they themselves are all over the map?

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evade the limitations" on exaction of real property interests that those decisions impose. *Ante*, at 15. But that is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. See, *e.g.*, *Krupp* v. *Breckenridge Sanitation Dist.*, 19 P. 3d, at 697; *Home Builders Assn. of Central Arizona* v. *Scottsdale*, 187 Ariz. 479, 486, 930 P. 2d 993, 1000 (1997); *McCarthy* v. *Leawood*, 257 Kan. 566, 579, 894 P. 2d 836, 845 (1995). And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. See, *e.g.*, *Norwood* v. *Baker*, 172 U. S. 269 (1898) (preventing circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in advance of condemning it). That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[] too far." *Mahon*, 260 U. S., at 415; see *supra*, at 3.[3]

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[3]Our *Penn Central* test protects against regulations that unduly burden an owner's use of his property: Unlike the *Nollan-Dolan* standard, that framework fits to a T a complaint (like Koontz's) that a permitting condition makes it inordinately expensive to develop land. And the Due Process Clause provides an additional backstop against excessive permitting fees by preventing a government from conditioning a land-use permit on a monetary requirement that is "basically

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the Takings Clause would otherwise prevent—*i.e.*, take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process, because under *Apfel* such an action does not otherwise trigger the Takings Clause's protections. By extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of "necessary predictability." *Apfel*, 524 U. S., at 542 (opinion of KENNEDY, J.). That decision is unwarranted—and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit.[4] And second,

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arbitrary." *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 557–558 (1998) (BREYER, J., dissenting). My point is not, as the majority suggests, that these constraints do the same thing as *Nollan* and *Dolan*, and so make those decisions unnecessary. See *ante*, at 21. To the contrary, *Nollan* and *Dolan* provide developers with enhanced protection (and localities with correspondingly reduced flexibility). See *supra*, at 8. The question here has to do not with "overruling" those cases, but with extending them. *Ante*, at 21. My argument is that our prior caselaw struck the right balance: heightened scrutiny when the government uses the permitting process to demand property that the Takings Clause protects, and lesser scrutiny, but a continuing safeguard against abuse, when the government's demand is for something falling outside that Clause's scope.

[4]The Court declines to consider whether the District demanded anything from Koontz because the Florida Supreme Court did not reach the

because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

A

Nollan and *Dolan* apply only when the government makes a "demand[]" that a landowner turn over property in exchange for a permit. *Lingle*, 544 U. S., at 546. I understand the majority to agree with that proposition: After all, the entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the government may use its control over benefits (like permits) to "coerc[e]" a person into giving up a constitutional right. *Ante,* at 7; see *ante,* at 13. A *Nollan-Dolan* claim therefore depends on a showing of government coercion, not relevant in an ordinary challenge to a permit denial. See *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 703 (1999) (*Nollan* and *Dolan* were "not designed to address, and [are] not readily applicable to," a claim based on the mere "denial of [a] development" permit). Before applying *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed.

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about

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issue. See *ante,* at 13. But because the District raised this issue in its brief opposing certiorari, Brief in Opposition 14–18, both parties briefed and argued it on the merits, see Brief for Respondent 37–43; Reply Brief 7–8, Tr. of Oral Arg. 7–12, 27–28, 52–53, and it provides yet another ground to affirm the judgment below, I address the question.

how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. See W. Fischel, Regulatory Takings 346 (1995). But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer. Hence the need to reserve *Nollan* and *Dolan*, as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State's rapidly diminishing wetlands, Florida law prevents landowners from filling or draining any such property without two permits. See *ante,* at 2–3. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. See App. Exh. 19–20, 47. At that point, the District could simply have denied the applications; had it done so, the *Penn Central* test—not *Nollan* and *Dolan*—would have governed any takings claim Koontz might have brought. See *Del Monte Dunes*, 526 U. S., at 702–703.

Rather than reject the applications, however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. See App. Exh. 87–88, 91–92.

Alternatively, the District raised several options for "off-site mitigation" that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. *Id.*, at 90–91. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, "[n]ot in any great detail." App. 103. And the District made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands. See *id.*, at 75. Even at the final hearing on his applications, the District asked Koontz if he would "be willing to go back with the staff over the next month and renegotiate this thing and try to come up with" a solution. *Id.*, at 37. But Koontz refused, saying (through his lawyer) that the proposal he submitted was "as good as it can get." *Id.*, at 41. The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition—not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District's only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria. Koontz's failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means*. *Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those decisions require a condition; and here, there was none.

Indeed, this case well illustrates the danger of extending

Nollan and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance. As the Florida Supreme Court observed of this case: Were *Nollan* and *Dolan* to apply, the District would "opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation"; and property owners like Koontz then would "have no opportunity to amend their applications or discuss mitigation options." 77 So. 3d 1220, 1231 (2011). Nothing in the Takings Clause requires that folly. I would therefore hold that the District did not impose an unconstitutional condition—because it did not impose a condition at all.

B

And finally, a third difficulty: Even if (1) money counted as "specific and identified propert[y]" under *Apfel* (though it doesn't), and (2) the District made a demand for it (though it didn't), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. See *supra*, at 1–2. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the Takings Clause. See *ante*, at 11. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida

Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts.

But as I look to the Florida statute here, I cannot help but see yet another reason why the Florida Supreme Court got this case right. That statute authorizes damages only for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. §373.617 (2010); see *ante*, at 12. In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear). See App. to Pet. for Cert. C–2; 5 So. 3d 8, 8 (2009). So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said—that Koontz is not entitled to money damages.

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend

money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.