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**ROBERT L. STAHLMAN'S MOTION FOR REHEARING AND RECONSIDERATION**

**TO:** New London Zoning Board of Adjustment  
**FROM:** Robert L. Stahlman, by his attorneys, Sheehan Phinney Bass + Green, by Bradford E. Cook and Anna Barbara Hantz  
**DATE:** December 9, 2015  
**RE:** **Motion for Rehearing and Reconsideration of the New London Zoning Board of Adjustment's November 10, 2015 Decision Denying Robert Stahlman's Application for a Variance**

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Dear New London Zoning Board of Adjustment ("Board"),

**I. INTRODUCTION**

This Motion for Rehearing and Reconsideration is submitted on the behalf Robert L. Stahlman by his attorneys, Sheehan Phinney Bass + Green, by Bradford E. Cook and Anna Barbara Hantz in response to this Board's decision rendered on November 10, 2015 denying his application for a variance from Article V Section A of the Town of New London Zoning Ordinance ("Ordinance") to allow for a parking use on a parcel of land he owns in the residential zone which is annexed to land he owns in the adjacent commercial zone. After a hearing, the Board denied Mr. Stahlman's application. We believe the Board misunderstood the relief requested and erred in its analysis of the zoning restriction on the subject property. We hope to clarify the intent of the application, and pursuant to New Hampshire Revised Statutes §677:2, we request a rehearing based on the grounds that the Board's decision was unlawful and unreasonable, as outlined below.

**II. POINTS OF ERROR**

**A. The Board Misunderstood the Relief Requested, Particularly the Nature of a Variance.**

"A variance is a waiver or relaxation of particular requirements of an ordinance when" the statutory requirements are satisfied. NH OFFICE OF ENERGY AND PLANNING, THE

BOARD OF ADJUSTMENT IN NEW HAMPSHIRE: A HANDBOOK FOR LOCAL OFFICIALS II-5 (2014); see NEW LONDON, N.H., ZONING ORDINANCE art. III § 161. Thus, “[a] variance seeks permission to do something that the ordinance does not permit.” NH OFFICE OF ENERGY AND PLANNING, supra, at II-5. Variances serve an important role in land use law because this relaxation serves as the flexibility needed to relieve tension “between zoning ordinances and property rights,” which requires a “balance [between] the right of citizens to” enjoy “private property...[and] the right of municipalities to restrict property use.” Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 731 (2001).

“In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions” because “[t]he New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property,” “limit[ing] all grants of power to the State that deprive individuals of the reasonable use of their land.” Id. at 731. Further, municipalities’ ordinances should “reflect the current character of [its] neighborhoods.” Belanger v. City of Nashua, 121 N.H. 389, 392-93 (1981). Thus, variances, which create zoning relief on an individual basis, allow a municipality to serve both these objectives without legislative action. See Simplex Technologies, Inc., 145 N.H. at 731; id.

Here, the Board misunderstood the nature of a variance as outlined above. See Draft Meeting Minutes, New London Zoning Board of Adjustment, 4-5 (Nov. 10, 2015). Several Board members expressed that Mr. Stahlman’s request for a variance should not be granted because a parking lot is not a permitted use in a residential area, misunderstanding that that is exactly why Mr. Stahlman had to submit his application. See id. at 4. This appeared to be the

bases for at least two, possibly three, Board member's vote that the spirit of the ordinance was not observed. See id. at 4-5. This reasoning was contrary to the purpose of a variance, and thus, it was an unreasonable and unlawful basis for the board members' decision. Further, this line of reasoning led these members to question whether this fact alone suggests that the character of the neighborhood would be impermissibly changed. See id. at 4-5. The board members' rationale defeated the whole purpose of variance relief and denied Mr. Stahlman a reasonable and unbiased hearing on his request.

**B. The Board Misunderstood Its Role in Granting Variances and the Standard of Review Required Under New Hampshire Revised Statutes §674:33 As Applied to the Variance Request.**

The Board was concerned that by granting Mr. Stahlman's requested variance application it would be rezoning a portion of the community, and thus, taking on the role of a Planning Board and exercising legislative authority. See Draft Meeting Minutes, supra, at 5. The Board, therefore, misunderstood its role in granting variances. A Zoning Board of Adjustment ("ZBA") can make these variations and waivers of the ordinance because the New Hampshire legislature specifically authorizes ZBAs the power to grant variances within specific bounds under New Hampshire Revised Statutes §674:33-I. See N.H. Rev. Stat. Ann. §674:33-I. Thus, ZBAs do not have the ability to rezone but to change the ordinance only as to specific properties that meet the specific five-part test. See id.

The Board here did not do that. See Draft Meeting Minutes, supra, at 3-5. The Board expanded the scope of what the statutory authority permits, unlawfully and unreasonably taking into consideration numerous irrelevant circumstances and hypothetical situations. See id. One board member incorrectly stated that Mr. Stahlman was required to go to the ZBA

before the Planning Board for his subdivision plan. See id. at 4. Another improperly referred to spot zoning cases as controlling to Mr. Stahlman's variance application. See id. One nonvoting Board member improperly influenced the voting members to consider that the protesting abutters may appeal and cost the town money in the form of legal fees if the variance was granted. See id. Further, the majority of the Board took into consideration other properties in the community and those properties' past applications for relief from the Ordinance, leading to lengthy discussions implying that grant of this variance would lead to all properties that abut a commercial property with frontage to request variances to expand into other zones. See id. at 3, 5. These were unlawful considerations given that ZBAs are not authorized to deal with general line drawing but rather to judge specific impacts on specific properties. See N.H. Rev. Stat. Ann. §674:33.

In expanding its focus, the Board lost track of the specific modest request before the Board – to use vacant residential land as a parking lot for the office building next door. The residential property owner sought a variance to allow parking on his property, the analysis would have been limited to weighing the appropriateness of the relief sought to allow cars to park on the property during business hours. The purchase of the property by Mr. Stahlman should not have changed the focus of the Board's attention from this simple request to irrelevant considerations of spot zoning and expansion of other zoning districts.

**C. The Board Misunderstood the Relationship that Exists Between the Five Variance Requirements Outlined in New Hampshire Revised Statutes §674:33.**

Four voting members of the Board voted that Mr. Stahlman had proven that granting the variance would not result in a diminution in value of the surrounding property, substantial

justice would be done, and it would not be contrary to the public interest. See Draft Meeting Minutes, supra, at 5.<sup>1</sup> Four voting members voted, however, that Mr. Stahlman has not provided sufficient evidence to show that an unnecessary hardship existed and that granting the variance was in observance of the spirit of the ordinance. See id. As such, the vote is fatally flawed and inconsistent.

First, the requirements that the variance will not be contrary to the public interest and will observe the spirit of the ordinance are to be considered together as they are coextensive. See Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 580 (2005). Thus, the votes of the board should have been consistent on these two points. Cf. id. Where these votes are conflicting, it constitutes error. Second, a hardship will be unnecessary when a zoning ordinance's "interference with [his] right to use [his] property as it sees fit" is not outweighed by injury to the public or diminution in property values. Cf. Fortuna v. Zoning Bd. Of Adjustment of City of Manchester, 95 N.H. 211, 213-14 (1948). Where the majority of the board determined that granting the variance would not result in diminution in the surrounding property values and would not be contrary to the public interest, see Draft Meeting Minutes, supra, at 5, they tacitly acknowledged that the hardship imposed by the zoning restriction was unnecessary. Cf. Fortuna, 95 N.H. at 213-14. Thus, the inconsistent votes of the majority of the voting board members renders the denial of Mr. Stahlman's variance application unlawful and unreasonable.

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<sup>1</sup> The Draft Meeting Minutes from the November 10, 2015 meeting incorrectly state that the majority of the voting members of the board voted that granting Mr. Stahlman's variance application would be contrary to public interest. See Draft Meeting Minutes, supra, at 5. This is an error. The applicant's counsel's contemporaneous notes reflect that a majority (4) of the voting members voted that granting Mr. Stahlman's variance application would *not* be contrary to the public interest.

**D. The Board Unlawfully Failed to Consider the Placement of the Property Itself and Failed to Apply the Reasonableness Standard in Determining Whether an Unnecessary Hardship Existed.**

A “hardship exists when special conditions of the land render the use for which the variance is sought ‘reasonable.’” Rancourt v. City of Manchester, 149 N.H. 51, 54 (2003). For example, the Rancourt court held that sufficient evidence existed for the ZBA to find that a zoning ordinance prohibiting horses in the landowner’s district interfered with the landowner’s reasonable proposed use of stabling horses on their property, given the unique settings of the property. See id. Similarly, here, the configuration of the annexed parcel makes the proposed parking lot reasonable. It is surrounded by uses with similar parking areas, such as the Bittersweet Housing complex, and adjoins wetlands which create limited access. Further there is no direct frontage to this parcel which is located behind Mr. Stahlman’s existing commercial office building. The only access is through the office building’s driveway frontage on Pleasant Street. These “special conditions of the land” create an unnecessary hardship rendering what would otherwise be an unreasonable use reasonable and grant of the variance appropriate. See id.

Further, at least one voting board member relied upon the marginal use of the residential portion of Mr. Stahlman’s lot in question for such uses as a second garage or shed in making a decision as to whether an unnecessary hardship existed. See id. at 2. This was clearly unlawful as the test is whether the proposed use is reasonable, and the potential for the construction of shed or garage has no bearing on that question. See N.H. Rev. Stat. Ann. §677:2; id. Even if a shed or garage could be constructed on the parcel, it is not for the ZBA to dictate uses, rather it is for the ZBA to grant relief when the request is reasonable.

**E. Denial of the Variance Because of Self-Created Hardship Is Error.**

Mr. Stahlman purchased the parcel and necessarily sought permission first from the Planning Board to annex the parcel to his existing commercial lot precisely to solve the parking problem for his tenants consisting of New London based businesses. The Planning Board granted the annexation but conditioned the parking use on the residential portion on receipt of a variance from the ZBA. Objecting to the process used, the Board incorrectly concluded that the hardship was solely self-created. See Draft Meeting Minutes, supra, at 3-5. The Board's reliance on the self-created hardship argument was unlawful as a landowner's purchase of property "with knowledge [of a zoning defect] does not preclude the granting of a variance and, *at most, is considered a nondeterminative factor* in consideration of a variance," Hill v. Town of Chester, 146 N.H. 291, 293 (2001) (emphasis added); see Harrington v. Town of Warner, 152 N.H. 74, 83 (2005), and is grounds for a remand. See Alex Kwader v Town of Chesterfield (No. 2010-0151, March 21, 2011) (self-created hardship not basis for denial).

**F. The Board Misapplied the Language of NEW LONDON, N.H., ZONING ORDINANCE art. IV § D.**

At least one Board member had reasoned that granting Mr. Stahlman's request for a variance would not be in the spirit of the Ordinance because NEW LONDON, N.H., ZONING ORDINANCE art. IV § D states that, "Any new Lot which will encompass more than one Zone District shall conform to the minimum Lot size, density, setback, lake Frontage and any other applicable standard of the more restrictive Zone District." NEW LONDON, N.H., ZONING ORDINANCE art. IV § D; see Draft Meeting Minutes, supra, at 3. The Board members assumed that the more restrictive zone would be the residential zone. See Draft Meeting

Minutes, supra, at 3. This provision of the code, however, only addresses split-zoned lots as to area and dimensional regulations, not use as requested here. See NEW LONDON, N.H., ZONING ORDINANCE art. IV § D. Further, even if use was intended to be covered in this provision, a parking use is more restrictive than many uses permitted in the R-1 district which are more intense uses than the proposed parking lot here, including two-family housing, municipal buildings, public schools, and private recreational facilities, such as swimming pools and tennis courts. See NEW LONDON, N.H., ZONING ORDINANCE art. III § 4, V § 1-2, XXI § 4, XXVI (2015).

**G. The Two Criteria On Which the Board Denied Mr. Stahlman's Application Were Misapplied, the Decision Was Against the Weight of the Substantial Evidence in the Record Presented by Mr. Stahlman, and No Contrary Evidence Was Introduced to Rebut Any of the Mr. Stahlman's Evidence With Respect to Any of These Factors.**

**1. Granting the Variance Observes the Spirit of the Ordinance Because It Will Encourage, Not Prevent, the Accomplishment of the Purposes of the Zoning Scheme.**

The majority of voting Board members voted that Mr. Stahlman did not meet this requirement, largely in part to several Board members' misunderstanding of the nature of a variance discussed above. Undisputed evidence, however, was presented that granting the requested variance is in observance of the spirit of the ordinance because the variance encourages the accomplishment of the purposes of the New London Zoning Scheme by alleviating current congestion and traffic in the area due to the lack of parking. Providing adequate off-street parking on-site and behind the building is the ideal parking configuration the Ordinance recommends to ensure safe accommodation of pedestrian and vehicle traffic. See NEW LONDON, N.H., ZONING ORDINANCE art. II § 6, § C.2 (2015) (referring reader to

requirements in Site Plan Review Regulations); see also NEW LONDON, N.H., SITE PLAN REVIEW REGULATIONS art. VI § F.8, Appendix A. The only way this can be accomplished is by the acquisition of property to allow for expansion of the onsite parking. Further, the proposed parking lot is further in observance of the Ordinance because the proposed use is less than or as intense as the uses permitted in R-1, including two-family housing, municipal buildings, public schools, and private recreational facilities, such as swimming pools and tennis courts. See NEW LONDON, N.H., ZONING ORDINANCE art. III § 4, V § 1-2, XXI § 4, XXVI (2015).

**2. Literal Enforcement of the Provisions of the Ordinance Would Result in an Unnecessary Hardship Because the Split-Zoned Lot, Wetlands, and Lack of Access to the Main Road Provide for Special Conditions, No Fair and Substantial Relationship Exists between the Ordinance and Its Application Here, and the Use as a Parking Lot is Reasonable.**

The majority of voting Board members found that Mr. Stahlman did not show that literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. Mr. Stahlman, however, presented uncontroverted evidence that such a hardship would result. Here, by nature of the Planning Board approval that created a split-zoned lot, which is not present in any surrounding lot, a unique unnecessary hardship exists. See Duffy v. City of Dover, 149 N.H. 178, 179 (2003); Nelson v. Zoning Bd. Of Appeals of Town of Ridgefield, No. 31 09 62, 1993 WL 256515, at \*4 (Conn. Super. Ct. June 30, 1993). This unfavorable zoning characteristic should not continue because it “create[s] a practical difficulty preventing a reasonable utilization of the land involved.” Christian v. Laufer, 262 N.Y.S.2d 359, 360 (N.Y. App. Div. 1965). The residential portion of the annexed lot is useless without a variance because no reasonable residential use exists, and it abuts a

multifamily use, a commercial office building, wetlands, and the back of another residential property with no way of access. The split-zoned nature of the property, therefore, is more than “a ‘mere inconvenience.’” Also, Mr. Stahlman has proven that he “has been deprived of all beneficial use of the land” without variance relief. Harrington, 152 N.H. at 80-81, 83. These characteristics are unique to the residential portion of Mr. Stahlman’s property, regardless of the split-lot nature of the whole lot. Thus, the only reasonable use is to allow Mr. Stahlman to construct his proposed parking lot so the land can be used to benefit the community because “special conditions of the land render” the proposed parking lot a reasonable use. See Rancourt, 149 N.H. at 54. A variance to allow Mr. Stahlman to construct his proposed parking lot is proper due to the property’s unique setting—its small size, the bordering wetlands, adjacent commercial uses, the buffer that exists and will be enforced between the proposed parking lot and the condominium, and the lot’s inaccessibility. See id. “[T]hese special conditions of the property ma[k]e the proposed” parking lot to service the Stahlman Office Building reasonable. See id.

**H. The Board Misunderstood the Nature of an Accessory Use.**

As an alternative to the variance required by the Planning Board, Mr. Stahlman pointed out to the Board members, that the proposed parking use would actually qualify as an accessory use to the office building now existing on the combined property notwithstanding the residential zone governing the annexed parcel. The Zoning Board retains jurisdiction, as does the court, to make a threshold determination whether a variance is needed at all, whether or not the decision is separately challenged. See Bartlett v. City of Manchester, 164 NH 634, 640-43 (2013). Rather than exercise this authority to review the request as an

accessory use, the Board rejected the concept, improperly concluding that accessory uses must be specifically listed in the code. Cf. Draft Meeting Minutes, supra, at 4. Accessory uses, however, are not limited to those which may be identified by ordinance. Rather, whether a use is an accessory use is a question of law and fact. See KSC Realty Trust v. Town of Freedom, 146 NH 271 (2001). It is determined by reference to the customary association of the principal and subordinate uses. Here, where parking is customary to a commercial use and the residential parcel is now made part of the commercial property by annexation, allowing parking on the newly annexed parcel as an accessory use to the primary commercial use is warranted. Showing further confusion about the nature of accessory uses, some Board members, contrary to fact and law, disagreed that a commercial use requires a certain amount of incidental parking. Cf. Draft Meeting Minutes, supra, at 4. Such a disagreement is unreasonable given that commonsense and the ordinance support the notion that commercial properties require some sort of incidental parking to its business for customers, employees, vendors, and other business visitors. Cf. NEW LONDON, N.H., ZONING ORDINANCE art. III § 4. Even though the application came to this Board as a variance application, the Board should have exercised its jurisdiction to administratively determine that the proposed use an accessory use is not requiring a variance at all. Bartlett, 164 NH at 640-43.

**I. The Board Exhibited Hostility, Bias, Prejudgment and Bad Faith In Its Scrutiny of Mr. Stahlman's Application Which Denied Mr. Stahlman Due Process and Equal Protection of the Laws.**

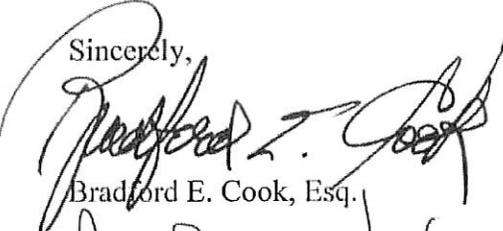
The Board abdicated its quasi-judicial role and its obligation to review Mr. Stahlman's application dispassionately. This was evidenced by the positions taken by

various board members. See Draft Meeting Minutes, supra, at 2-5. One member was overly concerned with the potential for a lawsuit by neighbors. See id. at 4. Another member improperly demanded expert opinion on property values to rebut alleged claims of abutters which were never made. See id. at 4-5. Another member questioned whether the parcel was unusable when it could be returned to the parent parcel. See id. at 2. Still another was angry that Mr. Stahlman had followed proper procedure in obtaining the subdivision prior to seeking variance relief and felt “jammed up” by Mr. Stahlman’s request. See id. at 4. In light of these expressions of annoyance and hostility, there was no way Mr. Stahlman was given a fair hearing or treated fairly as others under the law.

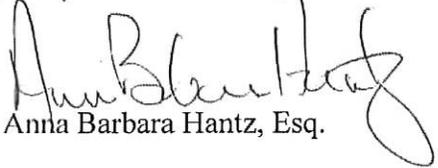
**III. CONCLUSION**

For all of the foregoing reasons, we respectfully request that a rehearing be granted on this variance application.

Sincerely,



Bradford E. Cook, Esq.



Anna Barbara Hantz, Esq.