
MEMORANDUM IN SUPPORT OF ROBERT L. STAHLMAN'S APPLICATION FOR A VARIANCE

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: November 3, 2015
RE: **Robert L. Stahlman's Application for a Variance**

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

I. INTRODUCTION

This Memorandum is submitted in support of Robert L. Stahlman's Application for a Variance dated September 1, 2015. On September 29, 2015, the Planning Board approved Mr. Stahlman's Subdivision and Annexation Plan to annex his property at 74 Pleasant Street, zoned commercial, and the property located at 21 Gould Road zoned Urban Residential ("R-1"). See Notice of Decision, New London Planning Board (Oct. 6, 2015). One condition of approval was that any use of the residential portion for commercial purposes requires a variance from the ZBA. See id. At its initial hearing on the variance request, this board continued the hearing as to Mr. Stahlman's application for a variance to November 10, 2015. The Planning Board approval creates a split-zoned lot, meaning that Mr. Stahlman's combined property—although now to be one lot—is segmented by the zoning boundary of the R-1 and commercial districts. Mr. Stahlman requests a variance from Article V Section A of the Town of New London Zoning Ordinance ("Ordinance") as to the portion of the property formerly located at 21 Gould Road located in the R-1 district to allow him to build a parking lot behind his existing office building. Alternatively, Mr. Stahlman requests such relief as an accessory use to his commercial use.

II. FACTS

Since 1987, the Stahlman Office Building has been located at 74 Pleasant Street, Tax Map 084-079. See Application for a Variance from Robert L. Stahlman to Zoning Board of Adjustment, Town of New London (Sept. 1, 2015). It is only one of two professional office building complexes in New London. See Draft Meeting Minutes, New London Zoning Board of Adjustment (Sept. 29, 2015). For almost thirty years, the building has housed many businesses, including service providers, the New London Hospital, and Mr. Stahlman's own engineering firm, which was the fourth largest employer in New London in the 1990s. See id.

The property currently has space for twenty-three cars to be parked. See Application for a Variance, supra. These spaces have been insufficient to meet the needs of the building's tenants, and up to fifty employees of tenants have needed to use rented parking next to the building or across Pleasant Street. As the area continues to expand commercially, however, rental spots are no longer available nearby, and Mr. Stahlman has been unable to take on additional tenants as a result. See Draft Meeting Minutes, supra. Mr. Stahlman, therefore, wishes to build a parking lot to accommodate his tenants' needs. The commercial zone along this side of Pleasant Street is only one property deep.

The purchase of .26 acres of back land from Donald and Eleane Greaney, located at 21 Gould Road, will allow for a new lot directly adjacent to the back of the building, increasing the total number of spots from 23 to 41. See Application for a Variance, supra. The property at 21 Gould Road is directly behind the Stahlman Office Building and is bounded by commercial zone boundary lines on two sides, with one of these sides being the Stahlman Office Building and the other the New Hampshire Housing Authority, including some wetlands. See Application for a Variance, supra; Stahlman Office Building 74 Pleasant

Street Plan of Annexation and Existing Conditions, Pennyroyal Hill Land Surveying & Forestry LLC (Sept. 1, 2015). Two sides abut the Greaney property, and the back side is directly abutted by wetlands and beyond those, a sloped incline. See Application for a Variance, supra; Stahlman Office Building 74 Pleasant Street Plan of Annexation and Existing Conditions, supra. Further, as annexed, the lot's residential portion's sole way of access is through the commercial property located at 74 Pleasant Street. See Stahlman Office Building 74 Pleasant Street Plan of Annexation and Existing Conditions, supra.

The neighborhood in question includes Canary Systems, Bittersweet Housing Complex, the Greaneys' single-family home, the condominium, a Bank, and a Church. See Draft Meeting Minutes, supra. Three of the four condominium unit owners—Deborah Lambert, Margaret McPadden, and E.L. Stone—oppose construction of the parking lot. See Letter from Deborah Lambert to the New London Zoning Board of Adjustment (Sept. 29, 2015); Letter from Margaret McPadden to the New London Zoning Board of Adjustment (undated); Letter from E.L. Stone to the New London Zoning Board of Adjustment (undated) [hereinafter *Letters*]. All three share the same concerns. See *Letters*, supra. They are worried that the removal of trees will erode the view between the condominium and the commercial zones, which they believe provides for privacy and blocks noise generated from Pleasant Street. See Draft Meeting Minutes, supra. They are also concerned that runoff from the parking lot into the nearby wetlands may occur. See id. Several other abutters favor the project. Mr. Greaney favors the grant of a variance because he recognizes the parking issue in the area and believes the ability to lease more space in the Stahlman Office Building will help residents find and keep jobs. See id. Bill and Janene Berger, abutting business owners also favor granting a variance to foster a strong commercial presence in New London, noting

the need to provide jobs to young people so they will find housing and spend money locally. See id. They also noted that the town has grown residentially, and now, it must do so commercially to support its residents. See id.

The proposed project would include removing some trees from the property, not in the wetlands, as well as constructing a fence to screen the neighboring residential areas from the parking lot. See id. Further, the parking lot would only be utilized during the workweek and only during workday hours. See id. Thus, the lot would be vacant during the night, weekends, and holidays.

III. DISCUSSION

A. **Mr. Stahlman's Application for a Variance Should Be Granted because it is Not Contrary to the Public Interest, Observes the Spirit of the Ordinance, Substantial Justice Will Be Done, the Values of Surrounding Properties Will Not Be Diminished, and Literal Enforcement of the Ordinance Would Result in an Unnecessary Hardship.**

A tension exists “between zoning ordinances and property rights,” requiring 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). Variances allow for this flexibility. Under New Hampshire law, grant of a variance is appropriate when “[t]he variance will not be contrary to the public interest; [t]he

spirit of the ordinance is observed; [s]ubstantial justice is done; [t]he values of surrounding properties are not diminished; and [l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship.” N.H. Rev. Stat. § 674:33-I(b)(1)-(5).

1. The Variance Will Not Be Contrary to the Public Interest and the Spirit of the Ordinance is Observed Because It Will Not Harm Landowners in the Area and Will Encourage, Not Prevent, the Accomplishment of the Purposes of the Zoning Scheme.

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). In so doing, “an applicant for a variance must prove...that the variance he seeks will not harm landowners in the vicinity of his proposed site, or prevent the accomplishment of the purposes of the zoning scheme.” Id. at 581. In so doing, the first step is to analyze “the applicable zoning ordinance.” Id. In New Hampshire, zoning ordinances are crafted to, among other things, “lessen congestion in the streets;...secure safety from fires, panic and other dangers;...promote health and the general welfare; [and]...facilitate the adequate provision of transportation....” N.H. Rev. Stat. Ann. § 674:17-I. Further, “[e]very zoning ordinance shall be made with reasonable consideration to...the character of the area involved and its peculiar suitability for particular uses, as well as with a view to...encouraging the most appropriate use of land throughout the municipality.” Id. at II.

To be contrary to the public interest, this analysis must show that the variance “‘unduly, and in a marked degree’ conflict[s] with the ordinance such that it violates the ordinance’s ‘basic zoning objectives.’” Chester Rod & Gun Club, Inc., 152 N.H. at 580. “Mere conflict with the terms of the ordinance is insufficient.” Harborside Associates, L.P. v.

Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011). Two tests are utilized in determining whether a variance would violate basic zoning objectives. See Chester Rod & Gun Club, Inc., 152 N.H. at 581. One test asks whether the variance “would ‘alter the essential character of the locality.’” Id. The other asks “whether granting the variance would threaten the public health, safety or welfare.” Id.

For example, the Malachy Glen Associates, Inc. v. Town of Chichester court held that the ZBA unreasonably found that a grant of a variance to allow the building of storage units to encroach on a wetlands buffer would be contrary to the public interest and the spirit of the ordinance. See 155 N.H. 102, 106 (2007). That court reasoned that at issue was a commercial project in a commercial area, in which already consisted of a fire station, telephone company, and gas station, so the addition of storage units would be in harmony with, not alter, the essential character of the neighborhood. See id. That court further reasoned that the project would not injure the health, safety, or welfare of the public because the ZBA had already granted the landowner a variance for a driveway that encroached closer to the wetlands than the proposed storage units, the landowner had presented credible evidence through an expert that the project would not harm the wetlands, and the project itself provided safeguards to protect the wetlands through “a closed drainage system, a detention pond, and an open drainage system.” See id. Similarly, the Harrington v. Town of Warner court upheld a ZBA’s grant of a variance allowing a mobile home park’s expansion, reasoning it was not contrary to the public interest, the spirit of the ordinance was observed, and substantial justice done because mobile home parks were a permitted use under the ordinance, it already existed in the area, a tree buffer would be planted, the use of the area would not change, affordable

housing would be provided, and a dilapidated area of town would be improved. See 152 N.H. 74, 84-85 (2005).

a. Analysis of the Ordinance Demonstrates that the Variance Will Not Harm Landowners in the Vicinity and Encourages the Accomplishment of the Purposes of the Zoning Scheme.

As noted above, as the property is now, there is not adequate off-street parking for vehicles attracted by the Stahlman Office building. Thus, granting the variance to allow the proposed parking lot would be in accord with the spirit of the ordinance because it provides: "...In all districts, if any proposed business and Use of property is such as to attract vehicles, adequate off-street space shall be provided to accommodate such vehicles." NEW LONDON, N.H., ZONING ORDINANCE art. II § 6 (2015) (referring reader to requirements in Site Plan Review Regulations). The Site Plan Review Regulations of New London further elaborate on requirements for adequate off-street parking, including that "[t]hrough traffic on fronting Streets shall not be significantly impeded or endangered by vehicles entering or leaving the site" and that "[p]rovision shall be made for the safe accommodation of pedestrian traffic within and through the site and along fronting Streets in the vicinity of the Development..." See NEW LONDON, N.H., SITE PLAN REVIEW REGULATIONS art. VI § F.8.

Here, the Stahlman Office Building "attracts vehicles" of its tenants' employees and customers, but due to the expansion of its tenants and other commercial space in the area, there is not adequate parking to support these vehicles. This congestion that could "significantly imped[] or endanger[]" traffic on Pleasant Street and that could affect "the safe accommodation of pedestrian traffic" on the property and Pleasant Street would be remedied by a grant of the requested variance. See id. Thus, grant of the requested variance would observe the spirit of the Ordinance as it would provide for the adequate off-street parking

necessary for proper traffic flow and pedestrian accommodations on the property and Pleasant Street.

The lot is even further aligned with the spirit of the ordinance because off-site parking is not favored by the Site Plan Review Regulations relied upon in the Ordinance, which provides that “Off-site parking may be permitted by the Planning Board under extenuating circumstances” and lists various restrictions on the off-site parking, including that it “...shall be located within a reasonable distance to the site in question,” generally “no more than 500 feet...” Id. at Appendix A. Finally, the lot would be in the back of the Stahlman Office Building as favored by the Ordinance, which provides that “on-site parking shall be provided at the rear of commercial buildings.” NEW LONDON, N.H., ZONING ORDINANCE art. II § C.2 (2015). Thus, a grant of the variance requested will be in observance of the spirit of the ordinance.

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. In the R-1 district, the Ordinance here allows as of right two-family housing, municipal buildings, and public schools; multi-family housing by conditional use permit under the Workforce Housing Overlay project; and private recreational facilities, such as swimming pools and tennis courts, by special exception and as accessory uses. See NEW LONDON, N.H., ZONING ORDINANCE art. III § 4, V § 1-2, XXI § 4, XXVI (2015). Two-family, and surely multi-family, use—where the uses are utilized twenty-four hours a day seven days a week, including multiple people parking multiple cars—is more intense than a parking lot that will be utilized roughly twice a day Monday-Friday as employees arrive and leave work. Also, the parking lot here would likely generate less constant traffic than a municipal building because the parking lot will be

used primarily by employees who will enter in the morning and leave at the end of the day rather than coming and going as those frequenting a municipal building.

As well, the parking lot will likely generate less noise than public schools where children will be playing outside and gathering outdoors after school hours for various extracurricular activities and socializing. Further, private recreational facilities would likely prove more intense uses than the proposed parking lot here because a pool or a tennis court, although used by less people, could be used at any time and for a longer period of time, generating more noise than the parking lot here. Notably, the aesthetics of a tennis court is very similar if not equal to those of a parking lot. Lastly, the condition of the lot as a split-zoned lot is acknowledged by the Ordinance which addresses split-zoned lots as to area and dimensional regulations suggesting there should be similar accommodation for these lots in regards to use. See NEW LONDON, N.H., ZONING ORDINANCE art. IV § D, XXVI. Thus, grant of the variance is clearly in observance of the spirit of the Ordinance and, as a result, would not violate the public interest.

b. The Proposed Parking Lot Conforms With the Essential Character of the Neighborhood, which is Largely and Increasingly Becoming More Commercial.

Here, the proposed parking lot is compatible with the essential character of the neighborhood because the neighborhood is largely commercial. As in Malachy Glen Associates, the parking lot would conform to, not alter, the essential character of the neighborhood because the property is bordered by commercial uses on two sides, near a busy street, half of its neighbors are commercial uses, and the neighborhood's commercial character is expanding as businesses desire to rent office space in the area. See 155 N.H. at 106. Similarly, like in Harrington, the proposed use—a parking lot—already exists in the

area; there are multiple. See 152 N.H. at 84-85. Further, the expansion and continued viability of this commercial use is not feasible with the current residential zoning of the portion of Mr. Stahlman's lot in question. Thus, New London is required to grant this variance in order to abide by its obligation to ensure its zoning is compatible with the surrounding area and reflective of changes in the neighborhood. See N.H. Rev. Stat. Ann. § 674:17-I; II.

c. The Proposed Parking Lot is in Furtherance of the Health, Safety, and General Welfare of the Community.

The proposed parking should further be granted because it would not pose a threat to the health, safety, or general welfare of the community. See Malachy Glen Associates, 155 N.H. at 106; Harrington, 152 N.H. at 84-85. Like in Malachy Glen Associates, Mr. Stahlman has provided for protection of the wetlands in his site plan by the existing ditch that drains out to Pleasant Street and the construction of an engineered detention pond. See 155 N.H. at 106. Thus, the abutters' concern that the proposed parking lot will cause harmful runoff to the wetlands is not realistic because the wetlands will be protected. The abutters' concern that they will lose privacy and be subjected to noise from Pleasant Street is likewise misguided. Similar to the planted buffer in Harrington, Mr. Stahlman is constructing a vinyl fence that will create a barrier between the parking lot and the condominium. See 152 N.H. at 84-85. This barrier will further provide the abutters will privacy and abate any noise from Pleasant Street in addition to the existing open space which will continue to separate the two lots. Between the proposed parking lot with fence and the abutters' property is a wetland, an incline, trees which will remain undisturbed. Accordingly, the views of the proposed parking lot from the abutters' property is minimal due to these above mentioned features, the

condominium's garage, and the positioning of each unit. See Memorandum from Robert Stahlman to Town of New London, Zoning Board & Planning Board (Oct. 6, 2015). Also of note, there has never been a noise problem from the Stahlman Office Building. The abutters' concerns, therefore, of loss of privacy, noise, and any loss of aesthetic value are unrealistic, given Mr. Stahlman's improvements to the property, the property's existing features, and the location of the condominium units and garage. Finally, the abutters concern over Mr. Stahlman cutting down trees on the annexed property is irrelevant to this application because, as the property owner, Mr. Stahlman has the right to cut down trees on his property, as did the Greaneys before him. Thus, there exists no added harm to the abutters.

Further, the parking lot would cut down on traffic and congestion, which currently poses a safety risk to the public as there is inadequate off-street parking, "facilitate[ing] the adequate provision of transportation" in observance of the spirit of the ordinance. See N.H. Rev. Stat. Ann. § 674:17-I. The parking lot would also increase the value of the land, which is currently vacant and useless, generating more tax revenue for New London; bring in new business to the Stahlman Office Building because the property will be able to accommodate more tenants, providing even more tax revenue; and generate more jobs for the community in furtherance of New London's policy to generate opportunities for residents to work and live in New London. Thus, the proposed parking lot, as the mobile home expansion in Harrington, will improve the safety and general welfare of New London, and thus, should be allowed. See 152 N.H. at 84-85. Overall, the variance observes the spirit of the Ordinance and benefits, not harms, the public, proving the conflict here is not "unduly...such that it violates the ordinance's 'basic zoning objectives'" but is a "[m]ere conflict with the terms of the ordinance," imposing a residential zone on this orphaned property and thus, meets these

requirements of the variance test. See Harborside Associates, L.P., 162 N.H. at 514; Chester Rod & Gun Club, Inc., 152 N.H. at 580.

2. Substantial Justice Will Be Done By Granting the Requested Variance Because the Proposed Parking Lot is Consistent with the Area's Present Use, and It Would Be Unjust to Deny the Variance When No Injury to the Public Will Occur.

In determining whether substantial justice will be done by granting a variance, New Hampshire ZBAs consider “whether the proposed development was consistent with the area’s present use,” recognizing that “any loss to the individual that is not outweighed by a gain to the general public is an injustice.” Malachy Glen Associates, Inc., 155 N.H. at 109. For example, the Malachy Glen Associates court held that no reasonable fact finder could have found that substantial justice would not be done because “the project [wa]s appropriate for the area[,]...d[id] not harm its abutters [] or the nearby wetlands, [and] the general public [would] realize no appreciable gain from denying th[e] variance.” See id.

Here, like in Malachy Glen Associates, the proposed parking lot is “appropriate for the area” for the same reasons it is not injurious to the public—it will “not harm its abutters [] or the nearby wetlands.” See id. Further, not only will “the general public...realize no appreciable gain from denying th[e] variance,” but a grant of the variance will benefit the public through commercial expansion, decreased traffic and congestion, increased tax revenue, and more jobs to the community. See id. Thus, a denial of the proposed parking lot, and thus a loss of Mr. Stahlman’s ability to reasonably use his land as he sees fit, would be an injustice, given it “is not outweighed by a gain to the general public.” Id. It must be noted, that the limitation of the one lot deep commercial zoning on the south side of Pleasant Street itself constitutes a hardship to an owner seeking to use the property properly and safely

when the number of legal occupants expands, and it should be noted further, that had the lot been of the present size when the zoning ordinance was passed, the entire lot undoubtedly would have been zoned commercial and, with the lot's annexation, the one-lot deep zone is preserved.

3. The Surrounding Property Values Will Not Be Diminished Because the Proposed Parking Lot Will Not Increase Noise in the Area, Will Decrease Traffic and Congestion in the Area, Will Not Negatively Impact the Aesthetics of the Area, and a Parking Lot in General is Not an Intense Use Given Other Uses Allowed in the R-1 District.

In assessing a proposed use's ability to diminish surrounding property values, "noise, traffic, aesthetics and intensity of use" may all be considered. See Farrar v. City of Keene, 158 N.H. 684, 692 (2009). For example, in upholding the ZBA's grant of the variance sought in Farrar, the court held that the ZBA acted reasonably "in 'deciding that the proposed use would not negatively impact the value of the surrounding properties,'" in part, because "office usages [existed] on either side of the property" and "if the property was used entirely as an office building—as permitted by the zoning ordinance—[rather than mix use] there would be greater traffic and intensity." Id. at 692-93.

Here, as noted above, the parking lot will only be utilized Monday through Friday during work hours and not on holidays. Thus, any activity generated by the parking lot will be minimal, only in the mornings and evenings as employees are coming and leaving work, and not much different from the activity already generated by the commercial uses in the area, such as the multifamily housing building. See id. at 692. As well, with the added parking the congestion and traffic on Pleasant Street will be decreased because cars for the Stahlman Office Building will no longer need to squeeze on lots on opposite sides of the street. See id. Further, although the condominium unit owners may argue the parking lot

negatively impacts the aesthetic view of the now vacant lot, as outlined above, the view of the lot itself from the condominium is minimal, and any unpleasant view is remedied by the fence and the vegetation that remains.. See id.

Finally, as the mixed use in Farrar was deemed less intense than the sole business use in the district, the use here, a parking lot, is less intense as several allowed in the district. See id. at 692-93. As mentioned above, in the R-1 district, the Ordinance here allows as of right two-family housing, municipal buildings, and public schools; multi-family housing by conditional use permit under the Workforce Housing Overlay project; and private recreational facilities, such as swimming pools and tennis courts, by special exception and as accessory uses. See NEW LONDON, N.H., ZONING ORDINANCE art. III § 4, V § 1-2, XXI § 4, XXVI. Most of these uses, as detailed above, are more intense of a use than the proposed parking lot. Thus, the proposed parking lot here would not diminish the surrounding property values because the parking lot will have minimal noise impact, will decrease traffic and congestion in the area, and will maintain an aesthetic value and intensity of use less than or equal to other uses allowed in the district. See Farrar, 158 N.H. at 692.

4. 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.

“[I]n seeking a variance, the hardship requirement is the most difficult to meet.” Simplex Technologies, Inc., 145 N.H. at 730. “[U]nnecessary hardship’ means that, owing to special conditions of the property that distinguish it from other properties in the area[,]...[n]o fair and substantial relationship exists between the general public purposes of the ordinance provision and [its] specific application...to the property; and [t]he proposed

use is...reasonable....” N.H. Rev. Stat. § 674:33-I(b)(5)(A). If this standard is not satisfied, “an unnecessary hardship will be deemed to exist...only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is...necessary to enable a reasonable use of it.” *Id.* at I(b)(5)(B). The focus of evaluating hardship is on “[t]he uniqueness of the land, not the plight of the owner.” Simplex Technologies, Inc., 145 N.H. at 730. Thus, in granting a variance, a ZBA must find that, “considering the unique setting of the property in its environment,” “a zoning restriction as applied to the[] property interferes with the[] reasonable use of the property,” “no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property,” and “the variance would not injure the public or private rights of others.” *Id.* at 731-32.

a. The Ordinance as Applied to this Property Interferes with the Reasonable Use of the Property, Considering the Unique Setting of the Property and its Environment.

In determining whether a landowner is allowed reasonable use of his or her property under a zoning ordinance, the landowner must show more than “a ‘mere inconvenience’” and “the landowner’s ability to receive a reasonable [, but not maximum,] return on his or her investment” is relevant. See Harrington, 152 N.H. at 80. The landowner need not show, however, “that he or she has been deprived of all beneficial use of the land,” and reasonable use should be determined consistently with the constitutional right for individuals to enjoy private property. See id. at 80-81. Further, for an unnecessary hardship to exist, the property must be burdened as “a result of specific conditions of the property and not the area in general,” meaning that it is “burdened by the zoning restriction in a manner that is distinct

from other similarly situated property.” See id. at 81, 83 (holding ZBA consideration of inability to subdivide and presence of swamp land appropriate). The property, however, need not “be the only such burdened property.” See id. at 81. Thus, “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. That court reasoned that the hardship arose from a unique setting of the property because the lot was in a country setting; a “thick wooded buffer” existed around the proposed stable area; the lot was larger than those in the surrounding area; the stables were to be located on the rear portion of the lot, which “was considerably larger than the front;” and that the proposed area was an acre and a half, larger than required by the ordinance to keep livestock. See id. That court concluded that it was appropriate for the ZBA to find that “these special conditions of the property made the proposed stabling of two horses on the property ‘reasonable.’” Id. Similarly here, the configuration of the annexed parcel makes the proposed parking lot reasonable.

- i. The Split-Zoned Character of the Lot Unique to This Property Creates an Unnecessary Hardship Because It Presents a Practical Difficulty in Preventing Reasonable Use of the Property.*

A split-zoned lot can be considered an unnecessary hardship necessitating a variance because “[i]t is contrary to good planning to have the zone line running through private property” and “[a] flawed zone line should not be maintained at the expense of the safety of the neighborhood.” 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); see Duffy v. City of Dover, 149 N.H. 178, 179 (2003). “Many municipalities are sufficiently aware of the hazards of split lot zoning to avoid it where possible and to make special provisions for relief of hardship in cases where lots are split....” Nelson, 1993 WL 256515, at *4. When a landowner must seek a variance for such relief, it will be granted if the landowner can show that the split causes unnecessary hardship and “the variant use” would be “harmless to the neighborhood.” Id. Overall, a split zone “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).

For example, the Nelson Court agreed with the reasoning of the ZBA that a split-zoned lot provided for an unusual hardship, especially because the proposed use was consistent with the surrounding area and the inability to use the land for the purpose a variance was sought for created safety hazards. See 1993 WL 256515, at *2-*3. There, the zone boundary did not run through other lots in the area, and “[t]hus, the literal enforcement of the zoning ordinance...inflict[ed] an unusual hardship unique to th[e]...property and not generally affecting the district in which it [wa]s situated.” Id. at *2. Similarly, as discussed in Duffy, the Town of Dover specifically provides for relief in its ordinance for landowners with split-zoned lots, allowing the less restricted zone’s regulations to extend between certain distances into the more restrictive zone as of right. See 149 N.H. at 179.

Thus, here, by nature of the Planning Board approval that created a split-zoned lot, which is not present in any surrounding lot, as in Nelson and recognized in Duffy, a unique unnecessary hardship exists. See Nelson, 1993 WL 256515, at *4; Duffy, 149 N.H. at 179. This unfavorable zoning characteristic should not continue because it “create[s] a practical difficulty preventing a reasonable utilization of the land involved.” Christian, 262 N.Y.S.2d

at 360. Also, granting the variance, as discussed above, will benefit, not harm, by alleviating the public safety hazards as a result of the inadequate off-street parking. See Nelson, 1993 WL 256515, at *4.

As a split-zoned lot, the residential portion of the annexed lot is useless without a variance because no reasonable residential use exists. It is only .26 acres, which is impractical to create a separate lot without annexation. Further, 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.’” See Harrington, 152 N.H. at 80. Further, even though Mr. Stahlman is not so required, he has proven that he “has been deprived of all beneficial use of the land” without variance relief. Id. at 80-81, 83 (ZBA consideration of inability to subdivide and presence of swamp land appropriate). Lastly, the split-zoned nature of the property is “a result of specific conditions of the property and not the area in general,” as it is the only property so zoned. See id. at 81. 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.

- ii. *A Self-Created Hardship Does Not Preclude Mr. Stahlman from Seeking a Variance, and If It Does, an Unnecessary Hardship Exists as to the Property Prior to Annexation Due to Its Unique Features, Namely the Lack of Access and Bordering of Wetlands On Two Sides.*

Likely, the abutters will argue that the hardship of a split lot is self-created because Mr. Stahlman knew before purchasing it that annexation will cause a split-zoned lot, and thus, Mr. Stahlman is precluded from seeking a variance. That, however, is not the law in

New Hampshire. A self-created hardship is one that may result from an act of the landowner, such as purchasing a property knowing or constructively knowing it is inadequate to support one's desired use of the property due to the municipality's zoning restrictions. Hill v. Town of Chester, 146 N.H. 291, 294 (2001). "[L]andowners are deemed to have constructive notice of the zoning restrictions applicable to their property." Id. at 294. "A purchase with knowledge[, however,] does not preclude the granting of a variance and, at most, is considered a nondeterminative factor in consideration of a variance." Id. at 293; see Harrington, 152 N.H. at 83. But see Alex Kwader v. Town of Chesterfield (No. 2010-01511 Issued March 21, 2011) (non-binding decision) (making self-created nature of hardship dispositive).

For example, in Hill, the New Hampshire Supreme Court disagreed with the Town of Chester's argument that the landowner was precluded from seeking a variance because the hardship was self-created, even though the landowner had constructive knowledge that the lot was inadequate to build a single family home. See Hill, 146 N.H. at 293-94. The Hill court held that "purchase with knowledge' is a nondispositive factor to be considered" when determining whether an unnecessary hardship is proven." See id. at 293-94 (rejecting argument that lot should have been adjusted before purchase). Thus, that court concluded that although the landowner in part contributed to the hardship alleged, and thus, it was self-created, the landowner was not precluded from seeking a variance. See id. at 293-94. Here, therefore, although the split-zoned lot was created by the purchase with knowledge by Mr. Stahlman that the lot is so zoned and the annexation approved by the Planning Board, as noted in Hill, that is only one not *the* factor to consider in determining whether Mr. Stahlman

has met his burden in proving an unnecessary hardship exists in need of a variance. See id. at 293-94.

Further, even if a self-created hardship was a dispositive factor, an unnecessary hardship exists on this portion of the property even before annexation because it is surrounded by wetlands on two sides and has no way of access except through Mr. Stahlman's commercially zoned lot. These characteristics are "a result of specific conditions of the property and not the area in general," as it is the only such property that is surrounded by wetlands on two sides and is cut off from the main road. See Harrington, 152 N.H. at 81. Thus, prior to acquisition by Mr. Stahlman, it was useless backland because, as noted above, it cannot be reasonably utilized for residential use due to the bordering wetlands, its small size, and inaccessibility to the main road. As a result, even the Greaneys were "deprived of all beneficial use of the land," Harrington, 152 N.H. at 80-81, rendering the annexation the most reasonable use of the property. Hence, a variance to allow Mr. Stahlman to construct his proposed parking lot is proper due to the property's unique setting discussed above—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 Rancourt, 149 N.H. at 54. "[T]hese special conditions of the property ma[k]e the proposed" parking lot to service the Stahlman Office Building reasonable. See id.

- b. No Fair and Substantial Relationship Exists between the General Purposes of the Ordinance and the Specific Restriction on the Property Because No Injury to the Public or Diminution in Surrounding Property Values Exist to Outweigh Mr. Stahlman's Right to Use His Property as He Sees Fit.*

A fair and substantial relationship between the general purposes of the ordinance and the specific restrictions on the property will be evident when the public and surrounding

properties are protected. See Fortuna v. Zoning Bd. of Adjustment of City of Manchester, 95 N.H. 211, 213 (1948). Conversely, no fair and substantial relationship, and thus a hardship, exists where the purposes of the restriction are not achieved. For example, the Fortuna court held that an unnecessary hardship existed when the landowner automobile business sought to expand its garage as a lawful nonconforming use in an apartment house district because the addition would not decrease the property values of the surrounding area and the expansion would benefit the public as it would decrease traffic and congestion in the area. See id. Thus, no fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific restriction on the property because the hardship suffered from the zoning ordinance's "interference with its right to use its property as it sees fit" was not outweighed by injuries to the public or decreases in property values, rendering the restriction unnecessary. Cf. id. at 213-14. Here, like in Fortuna and as discussed above, no diminution in surrounding property values is present and the public will be benefited by the grant of the variance, not injured, because the proposed parking lot will decrease traffic and congestion. See id. at 213. Thus, the Ordinance provision prohibiting parking lots in the R-1 district as applied to the proposed parking lot is unnecessary because Mr. Stahlman's hardship suffered from the 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. id. at 213-14.

For the above reasons, "owing to special conditions of the property that distinguish it from other properties in the area[,]...[n]o fair and substantial relationship exists between the general public purposes of the ordinance provision and [its] specific application...to the property; and [t]he proposed use is...reasonable...." N.H. Rev. Stat. § 674:33-I(b)(5)(A). Further, due to these special conditions, "the property cannot be reasonably used in strict

conformance with the ordinance, and a variance is...necessary to enable a reasonable use of it” through the proposed parking lot. See N.H. Rev. Stat. § 674:33-I(b)(5)(B). Mr. Stahlman, therefore, has satisfied both definitions of unnecessary hardship under the statute, has proven no injury will be done to the public, the spirit of the Ordinance will be overserved, substantial justice will be done, and the surrounding properties will not diminish in value. Accordingly, the ZBA should grant his Application for a Variance.

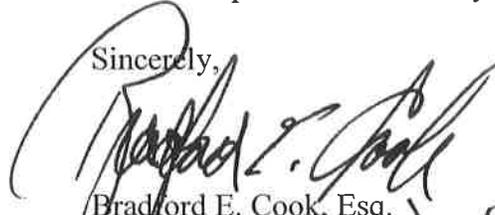
B. The Proposed Parking Lot is a Valid Use of the Property Because It is an Accessory Use to the Stahlman Office Building.

Under the Ordinance, an accessory use is “a Use incidental to, and on the same Lot, as a principal Use.” NEW LONDON, N.H., ZONING ORDINANCE art. III § 4. Here, the lot is now merged, meaning the parking lot will be on the same lot as the Stahlman Office Building, a commercial use. See id. The principal use of the property is commercial as 74% of the lot is zoned commercial and utilized by the Stahlman Office building and existing parking lot, whereas the residential portion is only 26% of the lot, vacant, and not currently in use. See id. Further, a parking lot is clearly incidental to a commercial use, specifically an office building, where numerous employees and customers will need to access the building and thus park their cars nearby. See id. Thus, the proposed parking lot is permitted as an accessory use to the commercial use. See id. Even though the application comes to this Board as a Variance application, the Board retains jurisdiction to administratively determine that the proposed use an accessory use not requiring a variance at all. Bartlett v. City of Manchester, 164 NH 634, 640-43 (2013).

IV. CONCLUSION

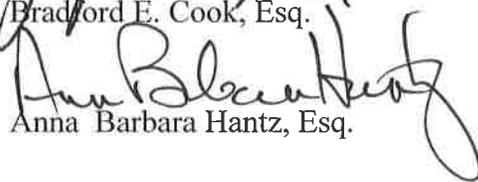
For the above reasons, the ZBA should grant Mr. Stahlman's Application for a Variance. He has established that "[t]he variance will not be contrary to the public interest; [t]he spirit of the ordinance is observed; [s]ubstantial justice is done; [t]he values of surrounding properties are not diminished; and [l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." N.H. Rev. Stat. § 674:33-I(b)(1)-(5). Alternatively, the use as a parking lot should be deemed a permitted accessory use.

Sincerely,



Bradford E. Cook, Esq.

Bradford E. Cook, Esq.



Anna Barbara Hantz, Esq.