

8-27-2018

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Merrimack Superior Court  
163 North Main St./PO Box 2880  
Concord NH 03302-2880

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**SUMMONS  
ZONING BOARD APPEAL  
RSA 677:4**

Case Name: **Spec Bowers v Town of New London ZBA**

Case Numbers: **217-2018-CV-00469**

Date Complaint Filed: August 10, 2018

A Complaint has been filed in this Court. A copy of the Complaint is attached.

**The Court ORDERS that ON OR BEFORE:**

October 11, 2018 Spec Bowers shall have this Summons and the attached Complaint served upon Town of New London ZBA.

November 01, 2018 Spec Bowers shall file the returns of service with this Court. Failure to do so may result in this action being dismissed without further notice.

30 days after service Town of New London ZBA must file an Appearance and Answer or other responsive pleading and certified record of all previous proceedings with this Court. A copy of the Appearance and Answer or other responsive pleading must be sent to the party listed below and any other party who has filed an Appearance in this matter.

**See attached Notice of Hearing for December 19, 2018 at 10:00 AM.**

**Notice to Town of New London ZBA:** If you do not comply with these requirements, you will be considered in default and the Court may issue orders that affect you without your input.

Send copies to:  
Spec Bowers

1373 RT 11 Box 323  
Georges Mills NH 03751

BY ORDER OF THE COURT

  
Tracy A. Uhrin  
Clerk of Court

August 27, 2018

(485)

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NOTICE OF HEARING

FILE COPY

Case Name: **Spec Bowers v Town of New London ZBA**  
Case Number: **217-2018-CV-00469**

The above referenced case(s) has/have been scheduled for: **Hearing on the Merits**

Date: December 19, 2018      163 North Main St./PO Box 2880  
Time: 10:00 AM                      Concord NH 03302-2880  
Time Allotted: 30 Minutes      Location:

**Zoning Board Appeal. Hearing on the Merits is limited to oral argument based upon the Certified Record absent an order to expand the record pursuant to RSA 677:13. Parties shall file trial memorandums by December 05, 2018.**

If you do not appear at this hearing, the Court may consider you to be in default and may make orders against you without your input. If you are the defendant and do not appear, the Court may find for the plaintiff(s) and proceed immediately to the assessment of damages or a hearing on the relief sought. If you are the plaintiff and do not appear, the Court may dismiss the case.

Multiple cases are scheduled during this session. Please notify the court immediately if your hearing is expected to last longer than the allotted time, as the Court cannot guarantee that additional time will be available.

If you will need an interpreter or other accommodations for this hearing, please contact the Court immediately.

Please be advised (and/or advise clients, witnesses, and others) that it is a Class B felony to carry a firearm or other deadly weapon as defined in RSA 625.11, V in a courtroom or area used by a court.

August 27, 2018

Tracy A. Uhrin  
Clerk of Court

(485)

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
<http://www.courts.state.nh.us>

Court Name: Merrimack Superior Court  
Case Name: Bowers v. New London ZBA  
Case Number: \_\_\_\_\_  
(if known)

COMPLAINT

Requested:  Jury Trial (as allowed by law)  Bench Trial

1. Plaintiff's Name Spec Bowers E-mail Address GMCottages77@gmail.com  
Residence Address 1373 Rt. 11, Sunapee, NH  
Mailing Address (if different) PO Box 323, Georges Mills, NH 03751  
Telephone Number (Home) \_\_\_\_\_ (Work) 603-763-2369 (Mobile) 603-454-4233

2. Defendant's Name Town of New London ZBA  
Residence Address 375 Main St., New London, NH 03257  
Mailing Address (if different) \_\_\_\_\_

3. First thing that happened (in one sentence):  
The ZBA, making multiple errors of law, denied Plaintiff's application for a Variance

4. Second thing that happened (in one sentence):  
Plaintiff timely filed a request for rehearing

5. Third thing that happened (in one sentence):  
On July 18, the ZBA denied the request for rehearing

Continue on using separately numbered paragraphs (attach additional sheets if necessary).  
See attached pages 3 thru 8

6. The variance requested was from two sections of the New London Zoning Ordinance:
- XX.B.1.a - "No ... vertical expansion of the existing structure shall be allowed."
  - XX.B.5.a - "... so long as the new Structure is a functionally equivalent use (with regard to number of Bedrooms)"

Plaintiff wants to add a second story and one additional bedroom.

7. The ZBA's [amended] notice of denial stated:

- The variance requested is not in the public interest because it conflicts with the basic zoning objective of preventing building expansion in the waterfront buffer.
- The variance requested also violates the spirit of the ordinance by allowing building expansion in the waterfront buffer.
- Substantial justice is not an issue because the applicant has the right to rebuild the destroyed cottage as it was, so there is no loss to the Applicant.
- There is no hardship because all waterfront properties in New London are burdened with the same waterfront buffer requirements.
- On the issue of diminution of property values, no evidence was submitted to suggest diminution of property values.

8. The ZBA erred as a matter of law regarding the public interest and the spirit of the ordinance.

9. The ZBA erred by using the wrong standard to determine substantial justice.

10. The ZBA erred by ignoring the definition of hardship provided in statute and in case law.

11. The ZBA erred in not respecting constitutional property rights as required by Simplex.

12. Statement of Law

The public interest and the spirit of the ordinance

The Zoning Board Handbook (The Board of Adjustment In New Hampshire - A Handbook for Local Officials, December 2017) (henceforth "Handbook") provides this guidance to Boards:

"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. There are two methods to answer this question:

1. Examine whether granting the variance would alter the essential character of the neighborhood; or
  2. Examine whether granting the variance would threaten the public health, safety or welfare."
- Handbook p. 11-12

This reading is affirmed in multiple court decisions.

"[T]o be contrary to the public interest . . . the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.

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. . . .

Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare." MALACHY GLEN ASSOCIATES, INC. v. TOWN OF CHICHESTER (2007)

"A variance is contrary to the public interest or injurious to the public rights of others if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives."

"[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." Id. (quotation and citation omitted). "Another approach . . . is to examine whether granting the variance would threaten the public health, safety or welfare." Id." ROBERT FARRAR & a. v. CITY OF KEENE (2009)

"Thus, to be contrary to the public interest or injurious to the public rights of others, the variance must "unduly, and in a marked degree" conflict with the ordinance such that it violates the ordinance's "basic zoning objectives." Coderre, 251 A.2d at 401.

"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." ...

"Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare." CHESTER ROD AND GUN CLUB, INC. v. TOWN OF CHESTER (2005)

The ZBA failed this standard in several respects:

1) it did not examine whether granting the variance would "alter the essential character of the locality." There is ample evidence that adding a second story would not alter the character of the neighborhood in the slightest.

2) it did not examine whether it "would threaten the public health, safety or welfare." There is no rational basis for the Board to think that adding a second story (while remaining in the same footprint and staying under the height restriction) would be any threat at all.

Additionally, the Board did not provide any facts to support its assertion that the variance would violate the ordinance's basic objective.

"Mere conflict with the terms of the ordinance is insufficient." HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC (2011)

"the law demands that findings be more specific than a mere recitation of conclusions." EUGENE A. CORMIER v. TOWN OF DANVILLE (1998)

Substantial justice

The Board claims that "Substantial justice is not an issue because the applicant has the right to rebuild the destroyed cottage as it was so there is no loss to the applicant." But that is not the standard for deciding Substantial Justice.

The Board compares the Status Quo Ante with the status after the Board denies a variance, claims they are the same, hence there is no loss. If that were the proper comparison, then every single application would fail Substantial Justice because the Board could claim there was no loss, hence no injustice. A Board could tell the applicant, "Keep your property the same as it is now. There is no loss because your property is unchanged. Any loss by the general public outweighs your zero loss, therefore your application fails Substantial Justice."

The proper comparison is to compare the status if the application is approved vs. the status if the application is denied. Clearly, the applicant will benefit from approval of the variance. So the question for the Board is to determine whether any loss to the general public outweighs the benefit to the applicant.

In Malachy (<https://www.courts.state.nh.us/supreme/opinions/2007/malac31.pdf>), for instance, the trial court found and the supreme court agreed that

"Since the project is appropriate for the area and does not harm its abutters, or the nearby wetlands, the general public will realize no appreciable gain from denying this variance." Both courts found that the applicant had established Substantial Justice. MALACHY GLEN ASSOCIATES, INC. v. TOWN OF CHICHESTER (2007)

In Farrar (<https://www.courts.state.nh.us/supreme/opinions/2009/farra062.pdf>), the courts found that

"the proposed use would not alter the character of the area, injure the rights of others, or otherwise undermine the public interest" and thus "granting the variance would work substantial justice". ROBERT FARRAR & a. v. CITY OF KEENE (2009)

In both cases, the courts decided that Substantial Justice was served because if the variance were approved there was no appreciable loss to the general public that could outweigh the benefit to the applicant.

In Harborside (<https://www.courts.state.nh.us/supreme/opinions/2011/2011103harborside.pdf>), the ZBA found that

"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."

The court noted with approval that "the ZBA correctly focused upon whether the general public stood to gain from a denial of the variance." HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC (2011)

Perhaps the simplest way to determine Substantial Justice is to use the formulation in the Handbook, p. B-2:

## Bowers v. New London ZBA

"Substantial justice is done. [Explanation:] The benefit to the applicant should not be outweighed by harm to the general public."

In this case, a variance is requested to add a second story while staying in the current footprint and staying under the height limit for the zone.

This application fits the fact patterns of all three cases above. The addition of a second story would not alter the character of the area, would not harm its abutters, or in any way cause harm to the general public that could outweigh the benefit to the applicant.

### Hardship

The ZBA invented its own definition of hardship - "there is no hardship because all waterfront properties in New London are burdened with the same waterfront buffer requirements" - rather than use the statutory definition of hardship.

RSA 674:33 I.b.5.A defines "hardship" in terms of whether the proposed use of property is reasonable given the special conditions. The statute defines "necessary" as "[Does a] fair and substantial relationship exist between the general public purposes of the ordinance provision and the specific application of that provision to the property"?

The Simplex decision (<https://www.courts.state.nh.us/supreme/opinions/2001/simpl013.htm>) set the standard for determining whether there is hardship:

"We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property. Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others." *SIMPLEX TECHNOLOGIES, INC. v. TOWN OF NEWINGTON & a.* (January 29, 2001)

Rancourt (<https://www.courts.state.nh.us/supreme/opinions/2003/ranco002.htm>) affirmed this standard:

"We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property."

"Under Simplex, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment." *BONNITA RANCOURT & a. v. CITY OF MANCHESTER*

Likewise, Harborside (<https://www.courts.state.nh.us/supreme/opinions/2011/2011103harborside.pdf>):

"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. HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC (2011)

In these three court cases - indeed, in every zoning case since Simplex - the test for hardship is whether the proposed use is "reasonable". If an ordinance interferes with a property owner's constitutional right to reasonable use of his property, that is a hardship.

The subject property in this case is unique in that it is a small part of a larger complex that already has a 2-story building and a large 3-story building. The driveway and sewer are in Sunapee, not New London. Other properties in the neighborhood are mostly 2- and 3-story buildings.

It is certainly reasonable for this building to be expanded vertically to two stories with no change of footprint. It would not change the character of the neighborhood, nor would it threaten public health, safety or welfare.

The Handbook (p. E-2) states that a "hardship may be considered "necessary" if it affords commensurate public advantage and is required in order to give full effect to the purposes of the ordinance. (Grey Rocks - Dissent - page 247.)"

In this variance application, the ordinance provisions in question have to do with the waterfront buffer. "The purpose of this buffer shall be to protect the quality of public waters" (New London Zoning Ordinance XVI. F.)

There is no fair and substantial relationship between the goal of protecting water quality and the zoning restrictions in question. Whether the building is one story or two stories, whether it has two bedrooms or three bedrooms, will make no difference in water quality.

The New Hampshire Department of Environmental Services is charged with protecting the water quality of the state's public water bodies. DES allows vertical expansion without a permit. "Maintenance, repair and modifications including vertical expansion of existing, legal, nonconforming primary structures does not require a shoreland permit if the existing impervious area footprint is not modified ..." (<https://www.des.nh.gov/organization/divisions/water/wetlands/cspa/categories/faq.htm#faq6>)

Clearly, the DES thinks that it is not necessary to prohibit vertical expansion in order to achieve the public purpose of protecting the public water.

The zoning restrictions in question, prohibiting any vertical expansion and prohibiting any increase in number of bedrooms, impose a hardship that is unnecessary. The proposed use is

very reasonable considering its unique environment. The restrictions provide no advantage to the general public; they are not necessary to protect water quality.

### Constitutional property rights

Simplex and all zoning cases since have recognized constitutional property rights and the need to balance citizens' rights with municipalities' rights:

"Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, **constitutional property rights must be respected** [emphasis added] and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property. See N.H. CONST. pt. I, arts. 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land." SIMPLEX TECHNOLOGIES, INC. v. TOWN OF NEWINGTON & a. (January 29, 2001)

Even without giving proper deference to applicant's constitutional rights - which the ZBA did not even attempt - this application easily meets all criteria for a variance, according to the standards set in case law.

### 13. Statement of facts

Any reasonable fact finder would find these facts:

- a. the NH DES finds that adding a second story is no threat to public water quality.
- b. adding a second story would not alter the character of the neighborhood in the slightest.
- c. adding a second story (while remaining in the same footprint and staying under the height restriction) would not in the least threaten the public health, safety or welfare.
- d. there is no benefit to the public that would outweigh the hardship on the applicant if the variance[s] were denied.
- e. there are "special conditions of the property that distinguish it from other properties in the area."
- f. it is reasonable to add a second story and a third bedroom.

### 14. Relief requested

There is no need nor benefit in remanding this case to the ZBA:

"remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion." Simpson v. Young, 153 N.H. 471, 474 (2006).

Plaintiff requests that the Court order the ZBA to issue a variance from sections XX.B.1.a and XX.B.5.a of the New London zoning ordinance to allow rebuilding of the cottage with a second story and a third bedroom.

