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October 23, 2018

Tracy Uhrin, Clerk
Merrimack Superior Court
163 N. Main Street
PO Box 2880
Concord, NH 03301

Re: Spec Bowers v. Town of New London Zoning Board of Adjustment;
Case No.: 217-2018-CV-00469

Dear Clerk Uhrin:

Enclosed for proper filing with this Court is the Town of New London Zoning Board of Adjustment's Answer, Certified Record, and Motion to Dismiss relative to the above-captioned matter.

I hereby certify that a copy of this letter and the enclosures was mailed to Spec Bowers at 1373 Rt 11, Box 323, Georges Mills, N.H. 03751.

Sincerely,

Barton L. Mayer
bmayer@uptonhatfield.com

BLM/cab
Enclosure(s)
cc: Spec Bowers
Zoning Board of Adjustment
Kimberly Hallquist, Esq., Town Administrator

TOWN OF NEW LONDON
SELECTMEN'S OFFICE
OCT 25 2018
RECEIVED

10 Centre Street, PO Box 1090, Concord, NH 03302-1090
Concord – Hillsborough – Jaffrey – Peterborough – Portsmouth

STATE OF NEW HAMPSHIRE

MERRIMACK, ss

SUPERIOR COURT

Case No. 217-2018-CV-00469

Spec Bowers

v.

Town of New London Zoning Board of Adjustment

ANSWER

NOW COMES, the Town of New London Zoning Board of Adjustment, by and through its attorneys, Upton & Hatfield, LLP, and in Answer to the Complaint filed by Spec Bowers, states as follows:

INTRODUCTION

Accompanying this Answer is the Town of New London Zoning Board of Adjustment's Motion to Dismiss. Plaintiff failed to raise in his Motion for Rehearing filed with the Zoning Board of Adjustment any of the grounds now raised in his Complaint, thereby violating the provision of RSA 677:3, I. See, Certified Record (hereinafter "CR"), pp. 22-23. At paragraph 5 of his Complaint, plaintiff expressly relies on this Motion for Rehearing. Therefore, his Complaint must be dismissed.

Plaintiff's structure was destroyed by fire. Under the terms of the Zoning Ordinance, he was entitled to rebuild the structure as it then existed. Instead of doing so, he sought several variances to permit him to expand the structure on his non-confirming, 0.25 acre lot.

The Zoning Board of Adjustment (hereinafter "ZBA") denied the requested variances.

ANSWER

1. Defendant admits the allegations contained in paragraph 1.



2. Defendant admits the allegations contained in paragraph 2.

3. Defendant denies the allegations contained in paragraph 3.

4. Defendant admits the allegations contained in paragraph 4.

5. Defendant admits the allegations contained in paragraph 5 and further affirmatively states that the plaintiff relies on his Motion for Rehearing filed on July 6, 2018, and denied on July 18, 2018, in support of his Complaint filed with this Court.

6. Defendant admits the allegations contained in paragraph 6.

7. Defendant admits plaintiff quotes a portion of the ZBA decision, and further affirmatively states the entire decision speaks for itself.

8. Defendant denies the allegations contained in paragraph 8 and further affirmatively states that plaintiff did not state these grounds as the basis for his Motion for Rehearing filed with the ZBA, and denied on July 18, 2018, thereby violating RSA 677:3, I, and this claim must be dismissed.

9. Defendant denies the allegations contained in paragraph 9 and further affirmatively states that plaintiff did not state these grounds as the basis for his Motion for Rehearing filed with the ZBA, and denied on July 18, 2018, thereby violating RSA 677:3, I, and this claim must be dismissed.

10. Defendant denies the allegations contained in paragraph 10 and further affirmatively states that plaintiff did not state these grounds as the basis for his Motion for Rehearing filed with the ZBA, and denied on July 18, 2018, thereby violating RSA 677:3, I, and this claim must be dismissed.

11. Defendant denies the allegations contained in paragraph 11 and further affirmatively states that plaintiff did not state these grounds as the basis for his Motion for

Rehearing filed with the ZBA, and denied on July 18, 2018, thereby violating RSA 677:3, I, and this claim must be dismissed.

12. The narrative contained in paragraph 12 constitutes conclusions of law as to which no response is required, but if a response is required, defendant affirmatively states that it applied the correct standards when it reviewed and denied plaintiff's variance requests and plaintiff did not state these grounds as the basis for his Motion for Rehearing filed with the ZBA, denied on July 18, 2018, thereby violating RSA 677:3, I, and these claims must be dismissed. Defendant admits that plaintiff owns a complex of buildings, including a two-story and a three-story building, and the driveway to the properties is located in the Town of Sunapee. Defendant denies the balance of the allegations contained in paragraph 12.

WHEREFORE, the Town of New London Zoning Board of Adjustment respectfully prays that this Honorable Court:

- A. Dismiss this appeal in its entirety; and
- B. Grant such other and further relief as may be just and equitable.

Dated: October 23, 2018

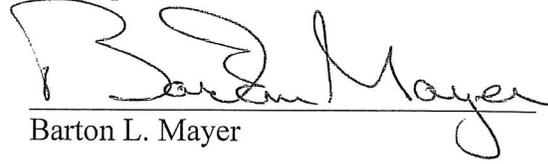
By:

Respectfully submitted,
TOWN OF NEW LONDON
By its attorneys,
UPTON & HATFIELD, LLP


Barton L. Mayer #1644
10 Centre Street, PO Box 1090
Concord, NH 03302-1090
(603) 224-7791
bmayer@uptonhatfield.com

CERTIFICATE OF SERVICE

I certify that a copy of this Answer was mailed to Spec Bowers, *Pro se*.


Barton L. Mayer

STATE OF NEW HAMPSHIRE

MERRIMACK, ss

SUPERIOR COURT

Case No. 217-2018-CV-00469

Spec Bowers

v.

Town of New London Zoning Board of Adjustment

MOTION TO DISMISS

NOW COMES, the Town of New London Zoning Board of Adjustment, by and through its attorneys, Upton & Hatfield, LLP, and submits this Motion to Dismiss and in support thereof states as follows:

1. The basis for this Motion to Dismiss is the plaintiff's failure to set forth fully in his Motion for Rehearing all of the grounds now stated in his Complaint, thereby violating RSA 677:3, which provides, in pertinent part, as follows:

- I. A motion for rehearing made under RSA 677:2 **shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.** No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, **no ground not set forth in the application shall be urged, relied on, or giving any consideration by a court** unless the court for good cause shown shall allow the appellant to specify additional grounds.

(emphasis added).



PROCEDURAL HISTORY

2. On April 17, 2018 the Zoning Board of Adjustment (hereinafter “ZBA”) voted to deny the plaintiff’s application for variance. Certified Record (hereinafter “CR”) p. 14.

3. On May 14, 2018, the ZBA received a Motion for Rehearing, which was granted; a new hearing was held on June 11, 2018; and the variance was again denied. CR pp. 15-16.

4. On June 26, 2018 the ZBA modified its decision so as to more closely conform to the Motion to Deny the Variance, as reflected in the minutes. CR pp. 44-45.

5. On June 27, 2018, the Notice of the June 26, 2018 Decision was made available, said date being **within** 5 business days of the ZBA decision. See RSA 677:2 (“that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed.”); CR p. 117.

6. On July 2, 2018, the minutes of the June 26, 2018 meeting at which the ZBA made its decision were made available, said date being **within** 5 business days of the meeting. Id; CR p. 117.

7. On July 6, 2018, plaintiff, acting through his attorney, filed the Motion for Rehearing, CR pp. 22-23 and Exhibit A, which he expressly relies upon in support of his Complaint. Complaint, ¶5 (“On July 18, the ZBA denied the request for rehearing.”).

8. On July 18, 2018, the ZBA denied plaintiff’s Motion for Rehearing, thereby closing the proceeding. CR p. 17; Exhibit B; Id.

9. Nevertheless, and despite the ZBA decision of July 18, 2018, denying his Motion for Rehearing, plaintiff filed yet another Motion for Rehearing, on July 24, 2018, entitled “Amended Motion for Rehearing.” Exhibit C; CR pp. 24-27.

10. On August 7, 2018, the ZBA rejected plaintiff’s July 24 Motion, observing:

Counsel has no right to amend the motion and the motion for rehearing is not timely.

Exhibit C (p.5); CR p. 57. The Notice of Decision stated:

The ZBA heard the applicant’s July 6 motion for rehearing on July 18. The Board voted to deny the rehearing and that concludes this case.

Exhibit E, CR p. 18.

Legal Analysis

Plaintiff’s “Amended Motion for Rehearing” is invalid as a ZBA applicant may not file serial motions for rehearing.

11. The ZBA denied plaintiff’s Motion for Rehearing on July 18, 2018.

12. As the ZBA observed, “that concludes the case.” Exhibit E.

13. There is no law, and the attorney for plaintiff cited no law, that permits a ZBA applicant to file serial motions for rehearing. Nor does plaintiff cite any rule of the New London ZBA in support of such a proposition.

14. In fact, the law is serial motions may not be filed. DiPietro v. Nashua, 109 NH 174 (1968).

15. The decision denying the Motion for Rehearing on July 18, 2018 closed the case, and that is why plaintiff filed this appeal on August 10, 2018, within 30 days after the ZBA’s July 18, 2018 decision, rather than waiting until September 7, 2018, 30 days after the ZBA rejected his second motion.

The Complaint must be dismissed as plaintiff did not set forth fully in his motion for rehearing these grounds as bases for his appeal, thereby violating the requirements of RSA 677:3.

16. In his July 6, Motion for Rehearing, plaintiff complained that the Board's procedures were defective and the ZBA used incorrect legal standards. Plaintiff's entire motion focused on the alleged procedural deficiency. See Exhibit A, ¶¶1-9.

17. Plaintiff's procedural complaint focused on the fact that following the ZBA's June 11 decision denying the variance, the ZBA met again on June 26 to clarify its decision.

18. The ZBA understood the motion to be with respect to this procedural issue, stating in its decision denying the motion:

[T]he Board has a perfect right to clarify our record during the appeal....

Exhibit B; See Cox St., LLC v. City of Nashua, 156 N.H. 228 (2007) ("We have no difficulty concluding that when the legislature authorized ZBAs to grant or deny requests for rehearing, see RSA 677:3, II (1996), that statutory grant included the authority to reconsider decisions to deny rehearing within the thirty-day limit recognized by the trial court.")

19. Plaintiff's Complaint is a word-for-word copy of his untimely "Amended Motion for Rehearing." Compare, Exhibit C and Complaint.

20. The conclusion that plaintiff did not preserve these issues in the Motion for Rehearing considered by the ZBA is inescapable based on plaintiff's attorney's obvious conclusion that a second motion for rehearing was necessary. "It would have been simple for the petitioner to clearly articulate [his] position" in his first motion for rehearing, "yet [he] did not do so." Robinson v. Town of Hudson, 154 N.H. 563, 657 (2006) (Trial court ruling refused to consider claim because not raised in motion for rehearing, affirmed.)

21. Rather than submitting to the Court the identical questions that were raised in his Motion for Rehearing and considered by the ZBA, as in the case of Colla v. Town of Hanover, 153 NH 206 (2006), plaintiff's complaint is a verbatim copy of his untimely amended motion which was rejected by the ZBA. Robinson, supra at 567.

22. In fact, this case is similar to DiPietro v. Nashua, supra, where the plaintiff filed no grounds for the motion for rehearing, although the filing certainly placed the board on notice that the plaintiff thought the board's decision was "illegal or unreasonable."

23. Here, plaintiff merely stated in a conclusory fashion, and without any citation to facts or law, "[t]he board's decision was unlawful and unreasonable in that it used incorrect legal standards and put additional burdens of proof on the applicant by law and statute." Exhibit A. What law or statute? What standard? What burden? The ZBA is left to guess. Certainly, plaintiff's attorney could have presented in the first motion the grounds stated in his second motion, and apparently believed that was necessary. The balance of the motion does not address this in anyway. Indeed, plaintiff abandoned the only argument he spelled out in his original motion.

24. "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. Thus, a motion for rehearing must put the zoning board on notice of an alleged error in order to satisfy the requirements of RSA 677:3. If a timely motion for rehearing fails to set forth all alleged errors with respect to the ZBA's decision on the merits, the party may not raise those grounds in a later appeal unless the court for good cause shown orders otherwise." Id. (quotations and citations omitted)

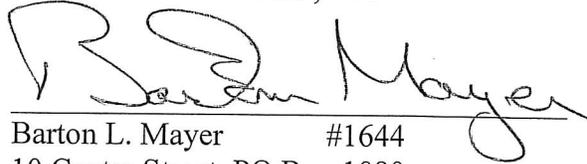
WHEREFORE, the Town of New London ZBA respectfully prays that this Honorable Court:

- A. Find and rule that plaintiff cannot file a second motion for rehearing after the ZBA denied his first motion, DiPietro v. Nashua, *supra*; and
- B. Find and rule that plaintiff failed to set forth in his motion for rehearing the grounds he now relies upon in his complaint, RSA 677:3; Robinson v. Town of Hudson, *supra*;
- C. Dismiss this appeal in its entirety; and
- D. Grant such other and further relief as may be just and equitable.

Respectfully submitted,
TOWN OF NEW LONDON
By its attorneys,
UPTON & HATFIELD, LLP

Dated: October 23, 2018

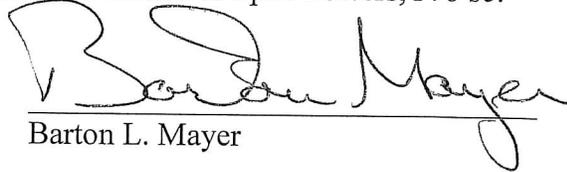
By:



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CERTIFICATE OF SERVICE

I certify that a copy of this Motion to Dismiss was mailed to Spec Bowers, *Pro se*.



Barton L. Mayer

STATE OF NEW HAMPSHIRE

Merrimack County
ZBA #18-02

New London
Zoning Board of Adjustment

MOTION FOR REHEARING PURSUANT TO RSA 677:2

NOW COMES Spec Bowers, of PO Box 323, Georges Mills, New Hampshire 03751, by and through counsel, John P. Rab, Esq., and says as follows:

1. This Motion is related to property located at 1876 Newport Road, New London, New Hampshire.
2. On June 11, 2018, the Board of Adjustment considered an application for a variance from Article xx, Sections B.1.a and B.5.a of the New London Zoning Ordinance to permit a vertical expansion of a structure damaged by fire and an increase in the number of bedrooms.
3. The June 11th hearing was a result of a previously filed Motion For Rehearing which was related to a denial of a variance by the board solely on the grounds that it failed "to satisfy the requirements of the unnecessary hardship provision." (April 17, 2018 hearing)
4. At the June 11th hearing the board denied the variance solely on the grounds that it violated the spirit of the ordinance.
5. The draft minutes of the meeting stated:

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to deny the variance request for the reasons discussed, that primarily, the consensus is that the spirit of the ordinance was violated that that related to three criteria, Public Interest, Spirit of the Ordinance and Substantial Justice. Also some members felt the hardship criteria has been met. THE MOTION WAS APPROVED UNANIMOUSLY 5-0.

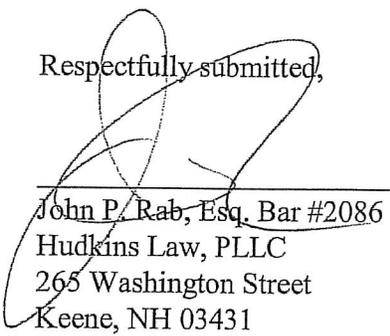
6. The vote to deny the variance solely on the basis of violation of the spirit of the ordinance comports with the recollection of the applicant and his counsel.
7. For reasons presently unknown to the applicant and counsel, the board subsequently met on June 26, 2018 for "Clarification of Motion/Decision from June 11th rehearing."
8. The board then made material changes to the original motion that was approved by the board on June 11, 2018.
9. The board issued a Notice of Decision on the matter on June 27, 2018 which expanded the

stated grounds for denial over and above the basis for denial at the April 17, 2018 hearing and what was voted at the June 11, 2018 hearing. Therefore, the filing of this Motion for Rehearing is required. See, Dziama v. City of Portsmouth, 140 N.H. 542 (1995).

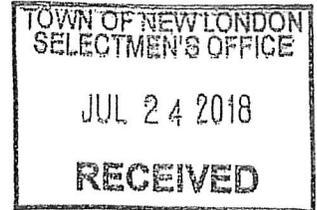
10. The action of the Board of Adjustment was unlawful and unreasonable and it is respectfully requested that the board grant a rehearing for the following reasons:
 - a. The second meeting was unlawfully held and resulted in an improper and unlawful revision of the record and of the original vote of the board.
 - b. The board's decision was unlawful and unreasonable in that it used incorrect legal standards and put additional burdens of proof on the applicant over what is required by law and statute.
 - c. The board's decision dated June 27, 2018 was inconsistent with its deliberations and vote of June 11, 2018.
11. The applicant reserves the right under RSA 677:2 to amend this Motion For Rehearing, including the grounds therefor, within 30 days after the date the decision was actually filed which was June 27, 2018.

Dated: July 6, 2018

Respectfully submitted,



John P. Rab, Esq. Bar #2086
Hudkins Law, PLLC
265 Washington Street
Keene, NH 03431
#603-357-1007



STATE OF NEW HAMPSHIRE

Merrimack County
ZBA #18-02

New London
Zoning Board of Adjustment

AMENDED MOTION FOR REHEARING

NOW COMES Spec Bowers, of PO Box 323, Georges Mills, New Hampshire, and says as follows:

1. This Motion is related to property located at 1876 Newport Rd., New London, NH.
2. In our Motion for Rehearing dated July 6, 2018, we reserved the right under RSA 677:2 to amend that motion within 30 days of the decision filed on June 27, 2018.
3. Without waiting for the end of 30 days, the board denied our request for hearing. We respectfully request the board to reconsider that denial with the information in this amendment.
4. In its decision from the June 11 hearing, as later modified by its meeting of June 26, the board made multiple errors of law:
 - a. The ZBA erred as a matter of law regarding the public interest and the spirit of the ordinance.

The Zoning Board Handbook (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. II-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 at least two 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.

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

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

b. The ZBA erred by using the wrong standard to determine 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:

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

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.

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

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."

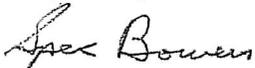
"Under Simplex, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment." BONNITA RANCOURT & a. v. CITY OF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

Respectfully submitted,


Spec Bowers

dated: July 24, 2018



TOWN OF
NEW LONDON, NEW HAMPSHIRE

375 MAIN STREET • NEW LONDON, NH 03257 • WWW.NL-NH.COM

ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES
Tuesday August 7, 2018 at 6:30 PM

MEMBERS PRESENT: Douglas W. Lyon (Chair), W. Michael Todd, Katharine Fischer, Ann Bedard, Heidi Lauridsen, Stan Bright

MEMBERS EXCUSED: Frank Anzalone, Bruce Hudson

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT:

Mike Black, Continuum

Wayne Morrill, Jones & Beach Engineering

Attorney James Callahan

Luke Hurley, GES Inc.

Pat Deragon, Ray Deragon, Alison Trow

1. Call to Order – Chair Lyon called the meeting to order at 6:30PM.
2. Roll Call – Chair Lyon called the roll. Chair Lyon will recuse himself for the public hearing as he is the Chairman of the Board for the New London Hospital. Vice Chair Michael Todd will lead that part of the meeting.
3. Review Minutes from July 18, 2018

IT WAS MOVED (Michael Todd) AND SECONDED (Ann Bedard) to approve the minutes from the July 18, 2018 meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

4. PUBLIC HEARING for Case #ZBA18-05. Applicants Mike Black of Continuum Development & Attorney James Callahan and Owners New London Hospital Association request a Special Exception for Wetlands Crossing, per XIII, E.1 to allow wetlands impact and crossing in connection with a proposed development for a senior living community (planned unit development). The lot is located on County Road in the R-1 (Residential) zone and is identified as Parcel ID 072-017-000.

Chair Lyon stated that a spreadsheet was previously distributed. Michael Todd prepared a summary of various cases on special exceptions. He did a similar one for variances. This is public information so if anyone wants a copy, please see Nicole Gage, Zoning Administrator.

Vice Chair Todd stated exceptions are not the same as variances. Exceptions provide relief from the operation of the ordinance. In this instance, the ordinance prohibits the crossing of wetlands. The conditions that are imposed in the ordinance for crossing wetlands by special exception must be met or the special exception can't be granted. The conditions cannot be waived.

Attorney Jim Callahan stated there are special criteria in section 21 and asked if they could dispense with it. Chair Todd stated he wouldn't dispense with them as some may apply peripherally to the effect of the crossing of the wetlands. He is primarily interested in the provisions in XIII, E.1.

Mr. Callahan stated a wetland scientist and an engineer are here to discuss the wetlands in detail.

Section XIII E of the ordinance states the applicant must demonstrate to the Zoning Board of Adjustment that there is not a layout of the access way, driveway, street or utility line which

conforms to your zoning regulations and does not cross the wetlands and proposed crossing will create the least impact on the wetlands compared with other crossing locations. This will be the standard to focus on. There is a precondition in our ordinance that the applicant must first have gone to the Conservation Commission. This happened on January 17, 2018. No response was received back from the Conservation Commission. The New Hampshire Wetlands board and the Soils Conservation Service also did not reply. They did receive notice so that requirement has been met.

Based on feedback that Jones and Beach Engineering received at the January 17, 2018 Conservation Commission meeting, they did more design work and reduced the impact. Originally, the affected square footage was 7,500 of impact. This has been reduced by 20-25%. This has been a heavily engineered site and there have been approximately 30 redesigns of the project.

Ian McKinnon of Jones and Beach Engineering attended to address the four wetland crossings that have been identified. There were many alternative layouts but this layout resulted in the best locations for flow through the site, for connecting the site and with regards to elevation and width of wetland areas, provided the smallest possible impact.

Grass stabilized slopes and retaining walls reduced the size of the crossings. They are currently designed with HDPD pipe and are designed with the 50 year storm event. The standard is generally 25 year storm for road crossing culverts but they felt a 50 year storm was a proper sizing.

Wetland impact 1 is in a high point in the wetland. This pipe is designed solely as an equalizer pipe between the road way. There isn't consistent flow through this area.

Wetland impact 2 is near the corner of the building and under the main access way. This is the tallest elevation wise from wetland to finish surface. To reduce slopes on the high side of the crossing they will put in a retaining wall so there isn't impact to the wetland further down. This was realigned to reduce the impact size.

Wetland impact 3 is behind the building and the access behind this building is restricted for life safety. The fire and police departments will have access but it will not be a regularly traveled roadway. Pedestrians can also use this access way.

Wetland impact 4 is the largest crossest in terms of what is sees for flow. That watershed extends up towards the hospital and some storm water runoff comes off Newport Road. The hospital has a porous employee parking lot and some existing storm water infrastructure but the water ultimately comes through this site. The pavement that will be used for all roads will be standard asphalt. This wetland is closest to Parkside Drive. This was designed with four, smaller 12 inch pipes because it is a wider crossing and they wanted to keep the impact down as this allowed for a lower road elevation. The pipes have open ends on both sides so as long as water is moving it shouldn't freeze.

Luke Hurley of Gove Environmental explained that crossings 1, 2 and 3 aren't flowing wetlands. Where they get narrow, it concentrates and then drains downhill. They pick the narrowest points to go through for lesser impact. It's important to maintain the functions and values of the wetlands. The goal is to maintain the natural flowing system that goes from the top to the bottom of the site. The large wetlands are all staying intact.

There won't be any direct runoff from the roads and parking areas into the wetlands. There are ponds located on the property to slow water down.

All the roof runoff will be detained and infiltrated.

Mr. McKinnon identified where all the ponds will be located. The roof water is controlled in standard chambers underground. There is a system under the parking lot as well. There is a larger pond that pretreats the water and detains the water before entering the wetland. The water is being slowed down by going through multiple systems. The water flow is controlled.

There are concerns about the culvert on Parkside. Some preliminary work has been done for recommendations to the Department of Public Works. Mike Black stated they are discussing this with the review peer engineers to come up with an improvement for flow across Parkside Road.

On this entire site there is no sheet flow as all of the roads are curbed or pitched inward. There is no direct runoff so no sediment or salt running directly into the wetlands. It will go through the storm water features scattered among the site. They are required to meet the predevelopment conditions and are not adding any additional flow to the pipes.

The hospital property contributes to the wetland and then this development will. It will continue to handle the hospital runoff and they have worked to slow the runoff within their disturbance. With all of this development, this area can still sustain the runoff.

The post run off cannot be more than the pre run off and in some cases it is actually less.

Vice Chair Todd asked if there was any other layout that would have less impact, cross them fewer times and affect fewer square feet. Mr. McKinnon stated this is the best option and have chosen all the narrowest locations to cross and have crossed them only once.

The units that will have a basement will have a standard foundation drain. The foundation drains are obtaining water that is already in the ground and they don't collect flow. There isn't a need to slow water down and the ground water level isn't at the footing. It is there as for emergencies if there are heavy rain events.

Alison Trow discussed her concerns about heavy water flow. She feels the culvert needs to be replaced on Parkside as it is not adequate. Her concern is that she already has water issues and this will add to it. Will there be more water coming down. Mr. McKinnon stated there are two requirements they have to meet for the site design. One is the peak flow for the site which determines how much water and volume comes off the site. They have to meet or reduce the precondition on both of these. They cannot increase the volume coming off the site.

IT WAS MOVED (Katharine Fischer) AND SECONDED (Anne Bedard) to close the public hearing. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Heidi Lauridsen) AND SECONDED (Stan Bright) to discuss. THE MOTION WAS APPROVED UNANIMOUSLY.

Vice Chair Todd noted that the applicant must demonstrate to the board that there is no other layout with less impact. Ann Bedard stated they have met this and the evidence is sufficient.

They also have to ascertain that where these wetland crossings have been identified, that evidence has been presented to sustain a finding that they are done with the minimum impact possible. Ms. Fischer stated they have been convincing that they have spent the time and done the work to lead to that conclusion.

In addition to those specific conditions, there are others that need to be met. Item 21G on page 81 was identified and Ann Bedard stated she is concerned that there isn't more information from the Department of Public Works regarding this. We have the applicants' word that they are working with them and she hopes that happens. Vice Chair Todd stated if there isn't sufficient evidence to sustain a finding, we can give them an opportunity to produce further answers and the hearing could be continued.

Attorney Callahan suggested that they consider that at the Planning Board level, making an approval conditioned upon the Planning Board working in conjunction with peer review engineering on these concerns. The plan will be more heavily scrutinized. Vice Chair Todd is concerned that if they grant a special exception and the plan changes they have to come back to the Zoning Board anyway. They

will have forgone the right to impose conditions that they may see fit in granting the special exception. They need all the information they can get now.

Mike Black commented that the culvert issue on Parkside is an existing condition and Continuum brought it to the town's attention. The special exception relates to wetlands crossings and doesn't relate to these culverts. Ms. Bedard appreciates this however, she objects to not hearing from our Department of Public Works. These other things need to be looked at as well.

IT WAS MOVED (Michael Todd) AND SECONDED (Stan Bright) to suspend the discussion pending a presentation on 21 G. THE MOTION WAS APPROVED UNANIMOUSLY.

The public hearing has been reopened to for the purposes of discussing 21 G and related points on these four wetland crossings.

This use is permitted by special exception and it has been heavily engineered. The issue that has arisen is the impact of the water flow based on the inadequacy of the town culvert on Parkside. Two licensed professionals testified today that there will not be an impact on the property. The runoff and the drainage on the site will be improved as a result of the systems put in place. Condition A- this involves the use and they will be in harmony with surrounding area because they won't be adding more water to it.

Condition B – the impact on wetlands on these crossings is minimal and is improved.

Condition C – the use is specifically allowed and it is.

Condition D – Adequate and lawful facilities for sewage disposal, water supply, drainage. This has been addressed.

Condition E – The use will not be detrimental to vehicular or pedestrian traffic. This has been met.

Condition F – The proposed special exception conforms to all other requirements of the ordinance.

Condition G – the use will not be detrimental to the character of the neighborhood. Internally the effects of this project will be an improvement. A concern was flagged by the applicant by being proactive and being a good neighbor. This is a complicated project on many levels. It's unclear who would pay for the upgrades but that will be discussed. An agreement could be put together between the town and the applicant to identify a process to move this forward on an efficient basis.

Condition H – use is compatible with the spirit and intent of the ordinance. The purpose of this overlay district is to protect wetlands and they have mitigated the impact.

Doug Lyon stated that the request is for a special exception for wetland crossings. The issue that is stalling this discussion is a preexisting condition in the town that is of concern. We've heard testimony that nothing that will happen on this site will increase the flow of water across Parkside. That means that this site is not going to contribute to the problem that already exists. Penalizing this project for a preexisting problem is not fair. Continuum has gone to exceptional lengths to say they will work with the town to try to alleviate that problem which is more than reasonable. He suggests that the special exception be approved with the understanding that Continuum, in good faith, will work with the DPW to try to alleviate what they can. He doesn't agree with putting a condition on this that adds to the burden of the project by requiring the project to address conditions that existed in the town prior to this, especially when the project is adding nothing to that problem.

Vice Chair Todd doesn't think its right to deny the Board advice of their own expert before making their decision. Mr. Lyon is suggesting that there will be peer review as part of the Planning Board.

Ann Bedard stated that since it has now been brought to our attention that we don't have crossings that can accommodate any increase in flow. She is suggesting that they have some way of knowing it will be addressed as now we know the culverts are undersized to accommodate the flow. She

would like to impose a condition. Attorney Callahan stated they are open to an agreement to address these offsite issues.

Chris Cundy, New London Hospital Trustee commented that he understands the concerns of the Zoning Board but he thinks this presentation has complied with all the requirements of approving the case. If the approval is delayed, things can develop that are out of anyone's control including changes in the marketplace, financing and availability. This can potentially destroy the project. If they have complied with the requirements, he would hope that they would not put conditions on it that will significantly time delay it. Vice Chair Todd responded that they have 30 days to make this decision if they need to, and will not make a decision until they have all the information they need.

IT WAS MOVED (Katharine Fischer) AND SECONDED (Ann Bedard) to close the public hearing. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Heidi Lauridsen) AND SECONDED (Ann Bedard) to resume the discussion. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Michael Todd) AND SECONDED (Stan Bright) to approve the Special Exception with the following Conditions:

- 1) Satisfactory peer review by outside engineers;
- 2) No change in the number or location of wetland crossings;
- 3) No more than 20% change in the wetland impact area;
- 4) Further assurance that plans do not result in additional downstream flow; and that the Special Exception is based on the plans presented.

THE MOTION WAS APPROVED UNANIMOUSLY 5-0.

5. Amended Motion for Rehearing, Case #ZBA18-02, 1876 Newport Rd., Parcel ID 041- 001-000, SDB Investments, Inc.

Chair Lyon stated that he sent out research information to Board member as this is public information.

There was an amended motion for rehearing by counsel for Spec Bowers. Counsel states that "In our motion for rehearing dated July 6, 2018 we reserve the right under RSA 677:2 to amend our motion within 30 days of the decision filed on June 27, 2018.

Nicole Gage and Chair Lyon reviewed RSA 677:2 and sought advice from town counsel. Under RSA 677:2 there are two conditions that must be met in order to file an amended motion. Those conditions are that both the minutes of the meeting and the decision of the meeting must not have been filed within five business days of the date when the decision was made. Ms. Gage has produced a chronology which was distributed that demonstrates both the decision and the minutes were in fact filed in a timely fashion. Counsel has no right to amend the motion and the motion for rehearing is not timely. An untimely appeal can't be considered by the Zoning Board of Adjustment.

The ZBA heard the applicants July 6th motion for rehearing on July 18th and voted to deny the rehearing. That concludes this case.

IT WAS MOVED (Chair Lyon) AND SECONDED (Katharine Fischer) to deny the amended motion for rehearing.

Applicant Spec Bowers has filed an amended appeal based on RSA 677:2. However, RSA 677:2 requires that two conditions be met: Those conditions are that both the minutes of the meeting and the decision must not have been filed within 5 business days of the date when the decision was made.

However, both the decision and the minutes were filed in a timely fashion. Therefore, the application is not timely and cannot be heard. The ZBA heard the applicant's July 6 motion for rehearing on July 18. The Board voted to deny the rehearing and that concludes this case. The Amended Motion for Rehearing is denied. **MOTION PASSED 5-0**

Spec Bowers stated that when the ZBA met on June 26, 2018 you thereafter amended the minutes to incorporate the substitute motion that you made on June 26. The minutes were modified long after the June 11, 2018 meeting so that gives me 30 days to amend the motion.

Chair Lyon stated that on the advice of counsel, the ZBA is rejecting that argument. Mr. Bowers asked if counsel was aware that the minutes were modified after. Chair Lyon stated yes.

Nicole Gage and Chair Lyon discussed the distribution of information between meetings. In many cases it is appropriate but sometimes it is not. As a result, any information to be distributed between meetings will go through Ms. Gage directly.

6. New ZBA meeting schedule

The new schedule has been distributed. The August 21, 2018 meeting has been cancelled.

7. Other Business - None

8. Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:34 pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT
(ZBA)
NOTICE OF DECISION
Meeting Held Tuesday, August 7, 2018

You are hereby notified that on August 7, 2018 the New London Zoning Board of Adjustment (ZBA) held a public meeting to consider an Amended Motion for Rehearing for the following:

1. Case #ZBA18-02 - 1876 Newport Rd., Parcel ID 041-001-000, SDB Investments, Inc.

MOTION was made and duly seconded: Applicant Spec Bowers has filed an amended appeal based on RSA 677:2. However, RSA 677:2 requires that two conditions be met: Those conditions are that both the minutes of the meeting and the decision must not have been filed within 5 business days of the date when the decision was made. However, both the decision and the minutes were filed in a timely fashion. Therefore, the application is not timely and cannot be heard. The ZBA heard the applicant's July 6 motion for rehearing on July 18. The Board voted to deny the rehearing and that concludes this case. The Amended Motion for Rehearing is denied. **MOTION PASSED 5-0**

Nicole Gage, Zoning Administrator
Town of New London
August 8, 2018

Variances and Special Exceptions shall be valid if exercised within two (2) years. Refer to RSA 674:33, Powers of the Zoning Board of Adjustment, for the specific language. Persons who are aggrieved by the decision of the ZBA are advised to seek legal counsel as they deem appropriate and to review applicable laws including but not limited to RSA 677 Rehearing and Appeal Procedures; RSA 674:33 Powers of the Zoning Board of Adjustment; RSA 676:5 Appeals to Board of Adjustment; RSA 676:3 Issuance of Decision and other NH State Statutes and Laws which may apply. This notice is for general informational purposes and in no way shall convey any legal advice.