

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."

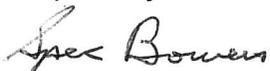
"Under Simplex, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment." *BONNITA RANCOURT & a. v. CITY OF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