THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0225

Brian M. Perreault, et al.

v.

Town of New Hampton

BRIEF OF THE APPELLEE/RESPONDENT, TOWN OF NEW HAMPTON

Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Belknap County in
Docket No. 211-2016-CV-00272

Laura Spector-Morgan, Esquire
Bar No. 13790
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246

To Be Argued By:
Laura Spector-Morgan, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

STATEMENT OF THE CASE AND FACTS

Plaintiffs seek to construct a 16' x 10' shed on their property within one foot of the property line, where the required side setback is 20 feet. See Certified Record of Proceedings Before the Town of New Hampton Zoning Board of Adjustment ("CR") at 4, Appendix ("App.") at 1. Plaintiffs currently have on their property three plastic storage containers in which are located the materials they wish to store in the proposed shed. See CR at 24, App. at 3. Plaintiffs acknowledge that there is at least one reasonable location on their property where they can construct the shed in conformance with the setback requirements, specifically in the 30 x 50 level area between the existing house and the shorefront, but state that they do not wish to construct the shed in that location. See CR at 25, 156, App. at 4, 24. This desire, however, is not sufficient to satisfy the criteria for the grant of a variance.

After two public hearings and site walk, the New Hampton Zoning Board of Adjustment initially denied the requested variance, see CR at 39, App. at 5; but later granted a requested rehearing. Upon rehearing, the board again held two public hearings and a site walk. It also reviewed the materials provided by plaintiff regarding other structures for which setback variances were granted or which have apparently been constructed in violation of the zoning ordinance, see CR at 52 and 54, App. at 7 and 9; and conducted its own research into these structures. See CR at 109 and 122, App. at 10 and 16. The board's research revealed that many of these other identified structures were constructed without a building permit or zoning board approval, and the remainder were constructed under different circumstances than those presented here. They were therefore irrelevant to the issues before the board.

After nearly seven months of review, and largely in light of the fact that the shed can be constructed in conformance with the zoning ordinance, the zoning board denied the requested variance holding:

> Granting the variance would be contrary to the public interest because the essential character of the neighborhood and the cumulative impact of granting this and similar variances to others in the neighborhood jeopardizes the goals of the setback requirements in the Zoning Ordinance, to prevent safety issues and in this case, overbuilding on lots. Previous variances that were granted, as pointed out by the applicant, were based on very different facts and were unique to those properties, and therefore cannot be compared to this application.
>
> The loss to the individual does not outweigh the gain to the public interest as substantial justice is done in that setbacks would be preserved. The applicant is not being denied use of his property, he is not being allowed to create storage where he desires to place it.
>
> The board felt that there was not an unnecessary hardship owing to special conditions of the property that distinguish it from other properties in the area as other lots in the neighborhood are small and non-conforming in size, and have similar slopes. The board determined that a fair and substantial relationship between the setback requirement and the spirit of the ordinance exists and that by denying the variance the integrity of the area would be preserved and overbuilding on small lots would be prevented. The board determined there was no unique hardship as the applicant is not being denied storage, but storage is being denied where he desires it.

CR at 166, App. at 30.

Plaintiffs appealed to the superior court which affirmed the zoning board's decision. The superior court began by reviewing whether granting the variance would be contrary to the public interest or the spirit of the ordinance. It reviewed the standard as set forth in RSA 674:33 and as clarified by this Court in Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011), and concluded "that the zoning board reasonably and lawfully determined that granting the requested variance would be contrary to the public interest." See March 28, 2017 Order (O'Neill, J.) at 7,

Plaintiff's Appendix ("P.App.") at A8. The trial court noted that the zoning board specifically found that allowing the requested variance would jeopardize the goal of the setback requirement," id., and that the zoning board"reasonably considered the cumulative effect that such variances may have on the area." Order at 8, P.App. at A9. The trial court was also "unpersuaded that the evidence of previously granted variances . . . required the ZBA to grant the petitioners' request for a variance." Id.

The trial court next addressed the substantial justice criterium, finding that "petitioners failed to establish that the ZBA unreasonably or unlawfully determined that denying the variance would result in substantial justice." Order at 10, P.App. at A11. In so finding, the court noted:

> The ZBA specifically found that the public would benefit from the denial of the variance because the setback requirements were being preserved, which would promote public safety and limit overcrowding. With respect to petitioners' loss resulting from the denial, the ZBA noted that the petitioners were not being denied use of the Property, but instead were only being limited in where they could construct the proposed shed. The ZBA repeatedly discussed the fact that the shed could be built in a location on the Property that complied with the Town's setback requirements. The Court also finds it important to note that the petitioners acknowledged the existence of these potential alternative locations. While the petitioners may feel that these alternatives location are less desirable than the proposed location, the fact remains that the petitioners could build the shed without jeopardizing the purposes of the Town's setback requirements.

Order at 10, P.App. at A11.

The trial court did not address the unnecessary hardship or diminution of value criteria. This appeal followed.

SUMMARY OF ARGUMENT

This Court will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. See, e.g., Harrington v. Town of Warner, 152 N.H. 74, 77 (2005). The inquiry is not whether this Court would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. See, e.g., Bacon v. Town of Enfield, 150 N.H. 468, 471 (2004). The superior court's decision affirming the zoning board of adjustment's denial of the requested variance was legal and reasonable and should be affirmed by this Court.

Granting the variance would be contrary to the public interest and would violate the spirit of the ordinance. This Court has held that these two variance criteria are "related." Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580 (2005), and has further opined that a variance is contrary to the public interest if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives." Id. at 581.

Here the both the zoning board and the trial court properly found that the grant of the variance would be contrary to the public interest and would violate the spirit of the ordinance. The goals of setback requirements are to not only protect the public safety, but to prevent overbuilding on lots, and that the cumulative effect of constantly granting variances would alter the essential character of the neighborhood. See CR at 158-59, App. at 26-27. This, of course, was a proper consideration, given this Court's decision in Bacon v. Town of Enfield, 150 N.H. 468, 472 (2004)(citing Saturley v. Town of Hollis, 129 N.H. 757, 762 (1987)).

The zoning board also discussed plaintiffs' allegations regarding other variances and sheds in town. The board found that there were substantial differences between this application and the other variances noted by plaintiffs, that each case was unique, and that the ZBA bases its decisions on the evidence presented. Other decisions are not therefore precedential. See CR at 158-159, App. at 26-27. The superior court agreed with these conclusions.

Granting the variance would not do substantial justice. The two critical inquiries in determining whether a variance would do substantial justice are: "(1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use." Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553, 557 (2011)(citing Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007)). Again looking at the cumulative impact of granting many such variances, the board determined that the gain to the public by denying the variance is to preserve the character of the area.

Moreover, both the zoning board and the trial court properly found that the loss to the plaintiffs by the denial of the variance is negligible, as there is a conforming location on the property where they can construct the desired shed; or, they can continue to store equipment on the property as they currently do in plastic totes and under the deck. Although plaintiffs do not wish to construct the shed in conformance with the zoning ordinance, that personal preferences is simply not a sufficient basis on which to grant a variance.

Astoundingly, although the superior court did not address the unnecessary hardship criterium in its decision, plaintiffs allege that "[t]he crux of this case rests in whether this Court agrees the Superior incorrectly applied the old standard of unnecessary hardship to the Perreaults request for a variance from the 20' side setback on their property."[sic] *Brief for Petitioner/Appellant, Brian M. and Margaret A. Perreault*, at 15. Therefore the town also discusses that criterium, although it urges this Court not to review it in the first instance. Plaintiffs chose to address the unnecessary hardship criterium as it was set forth in Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001), ignoring the 2009 legislative amendment to RSA 674:33 which altered this standard. The town's brief utilizes the current standard, as did the zoning board of adjustment.

The starting point of an unnecessary hardship analysis is whether there is anything unique about the property which distinguishes it from other properties in the area. Plaintiffs here alleged that their lot is "small", CR at 25, App. at 4, and that because it is a lakeside lot, it "requires" storage for lake equipment and boats. See CR at 53, App. at 8. While plaintiffs' attorney asked the board to "look at the personal aspect of the variance request," CR at 132, App. at 21; the law is clear that hardship must arise from the conditions of the property, not the circumstances of the owners. See, e.g., Husnander v. Town of Barnstead, 139 N.H. 476, 478 (1995)(quoting Carbonneau v. Town of Exeter, 119 N.H. 259, 263 (1979)). As the board properly found, all of the properties in the neighborhood are small and non-conforming. While the applicants also pointed out the slight slope of the property, the board found that that too was unremarkable compared to other properties in the area. See CR at 160, App.

at 28. The board therefore properly found that there were no special conditions of the property which distinguished it from other properties in the area.

While the unnecessary hardship analysis can and should end upon a finding that the property is not unique, the board continued and next discussed the relationship between the purposes of the ordinance and its specific application to this property, finding that the purposes to be both public safety and preserving the integrity of the area by preventing overbuilding. Most importantly in this case, however, is the fact that there is at least one conforming, and by plaintiffs' attorney's own admission, reasonable, location on which plaintiffs' can construct their requested shed. See CR at 156, App. at 24. While plaintiffs clearly do not desire to construct the shed in this conforming location, that personal desire does not create a basis for a variance, nor does it negate the fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to this property.

Finally, because the shed can be constructed in a conforming location, the proposed use is simply not reasonable. Plaintiffs allege that they should be permitted to use their property as all of his neighbors do by constructing a shed; but the denial of the variance does not deprive them of that opportunity. It merely requires them to construct the shed in an unquestionably existing conforming location.

The trial court therefore properly affirmed the zoning board's denial of the requested variance, and this Court should do the same.

ARGUMENT

I. STANDARD OF REVIEW

The superior court's review in zoning cases is limited. See, e.g., Garrison v. Town of Henniker, 154 N.H. 26, 29 (2006). Factual findings of the zoning board are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the zoning board's decision is unreasonable. Id. The party seeking to overturn a decision of a zoning board bears the burden of establishing that the board's decision was unlawful or unreasonable, and the findings of fact made by a zoning board are deemed prima facie lawful and reasonable. See, e.g., Kelsey v. Town of Hanover, 157 N.H. 632, 634 (2008)(citing Greene v. Town of Deering, 151 N.H. 795, 797, 868 A.2d 986 (2005), and Harrington v. Town of Warner, 152 N.H. 74, 77, 872 A.2d 990 (2005)). See also RSA 677:6.

This Court will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. See, e.g., Harrington v. Town of Warner, 152 N.H. 74, 77 (2005). The inquiry is not whether this Court would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. See, e.g., Bacon v. Town of Enfield, 150 N.H. 468, 471 (2004).

II. THE SUPERIOR COURT'S DECISION AFFIRMING THE ZONING BOARD OF ADJUSTMENT'S DENIAL OF THE REQUESTED VARIANCE WAS LEGAL AND REASONABLE AND SHOULD BE AFFIRMED BY THIS COURT

A. *Granting the Variance Would Be Contrary to the Public Interest and Would Violate the Spirit of the Ordinance*

This Court has opined that the first and third variance criteria under RSA 674:33 are "related." Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580 (2005).

In that case, this Court established that a variance is contrary to the public interest if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives." Id. at 581; see also Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011).

Here both the zoning board and the trial court properly found that despite plaintiffs' assertions that the proposed variance would result in the removal of plastic storage bins from their property and that the shed would be hidden from view, see CR at 23-24, App. at 2-3, the grant of the variance would both be contrary to the public interest and would violate the spirit of the ordinance. As expressed by the board members, the goals of the setback requirements are to not only protect the public safety but to prevent overbuilding on lots. Thus, despite the fact that the fire chief had no concern with the shed being constructed so close to another structure, the cumulative effect of constantly granting variances would alter the essential character of the neighborhood. See CR at 158-59, App. at 26-27. This, of course, was a proper consideration, given that the 20 foot

> setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single [shed] might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contributed to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance.

Bacon v. Town of Enfield, 150 N.H. 468, 472 (2004)(citing Saturley v. Town of Hollis, 129 N.H. 757, 762 (1987)). Plaintiffs do not address this issue of cumulative impact in their brief.

The board also discussed plaintiffs' allegations regarding other variances and sheds in town. The board found that there were substantial differences between this

application and the other variances noted by plaintiffs, that each case was unique, and that the ZBA bases its decisions on the evidence presented. Other decisions are not therefore precedential. See CR at 158-159, App. at 26-27.

Specifically, the board reviewed two tables presented by plaintiffs: Table 1, CR at 52, App. at 7; and Table 2, CR at 54, App. at 9. Table 1 lists 7 variances that the ZBA granted between 2005-2013 to allow sheds, a deck and a garage within the property setbacks. Those variances, however, are substantively different from plaintiffs' requested variance.

As an initial matter, from 2004-2009, the standard for granting dimensional variances, such as those reflected in Table 1, was set forth in the case of Boccia v. City of Portsmouth, 151 N.H. 85 (2004). As this Court will recall, that case altered the unnecessary hardship criteria for the grant of a dimensional variance to render it much easier to meet,[1] by requiring only that the applicant demonstrate "whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance." Id. at 92 (internal citations omitted). Boccia was overruled by the legislature via an amendment to RSA 674:33 in 2009, which removed

[1]While plaintiffs state, for the first time on appeal with without any argument to support the bald allegation, that this standard was more stringent that the standard enunciated in Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001), Harborside, supra, or the current version of RSA 674:33, that is simply not the case. See, e.g., legislative history of 2010 HB 446 (attached to 2009 SB 147 and passed), App. at 32-54. In fact, the Boccia standard was so easy to meet that it was "almost impossible *not* to satisfy," App. at 50; and "seem[ed] to render dimensional standards almost meaningless in some circumstances." App. at 52.

the distinction between area and use variances and established the definition of unnecessary hardship utilized today.

Four of the variances identified in plaintiffs' Table 1 were granted between 2005 and 2009, under the less stringent Boccia standard. They are therefore not comparable to plaintiffs' requested variance. The three variances granted after 2009 are likewise distinguishable. The first identified variance was for 42 West Shore Road, granted on September 12, 2012. That variance, which was requested for a long, narrow lot, allowed a shed one foot from the property line. That variance is distinguishable from plaintiffs' requested variance because in that case, unlike the situation on plaintiffs' lot, without the variance there was no other location on the property to construct the shed, given the locations of the propane tank and the septic area. Moreover, the structures on the abutting property were quite a distance from the applicant's structure, with much vegetation separating the two, whereas plaintiffs' abutters' structures are very close to the property line. See CR at 109, 118-120, App. at 13-15.

The second variance identified by plaintiffs as similar to their requested variance was for 84 Seminole Avenue, granted on February 13, 2013 to allow a garage to be 25 feet from the road right of way, where 35 feet was required. A variance for the location of a new septic system was also sought and granted at that time. See CR at 109, App. at 10. The variance for the garage was necessary because the new septic system was to be located in the middle of the old driveway, and without the variance for the garage, the septic system could not be replaced. CR at 116, App. at 12. Importantly, while a variance from the road right of way setback was requested, the garage was designed to meet the side setbacks, thus not posing the overcrowding concerns raised by plaintiffs' requested variance. CR at 115, App. at 11-a.

The final variance plaintiffs argued justified the grant of their variance was for 11 Pemi Point Road, granted on October 3, 2013, which allowed a preexisting nonconforming shed to be reconstructed 5 feet from the property line, in conjunction with the installation of a new septic system. See CR at 109, App. at 10. The variance brought the existing shed no closer to the property line than it had always been. CR at 112, App. at 11. The difference between this variance and plaintiffs' requested variance is obvious in that this property was already developed with a non-conforming shed.

Plaintiffs next presented Table 2, which identified 16 properties on which there were allegedly located garages and/or sheds within the required setbacks. The town reviewed these properties, and determined that of the 32 outbuildings on these properties, 7 of them did, in fact, comply with the required setbacks, and 10 were legal preexisting nonconforming uses. The town had no knowledge of the 15 other identified structures, as 12 had not required building permits because they were less than 120 square feet or valued at less than $5,000, and two had never been noted on the town's tax cards. The town is now in the process of determining the legality of these sheds; however, the fact remains that the town had not knowingly allowed them to be constructed in violation of the zoning ordinance. See CR at 122, App. at 6. They are therefore distinguishable from plaintiffs' requested shed.

The zoning board therefore property considered the evidence before it regarding whether the proposed variance to allow a shed within one foot of the side setback would be contrary to the public interest and/or the spirit of the ordinance and concluded that it would. This finding was legal and reasonable and was properly affirmed by the trial court. It should likewise be affirmed by this Court.

B. *Granting the Variance Would Not Do Substantial Justice*

The two critical inquiries in determining whether a variance would do substantial justice are: "(1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use." Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553, 557 (2011)(citing Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007)). Again looking at the cumulative impact of granting many such variances, the board determined that the gain to the public by denying the variance is to preserve the character of the area. Specifically, the board noted the town could have created smaller setbacks for smaller lots, but had not done so for this neighborhood, as it had for properties along the Pemigewasset River. See CR at 160, App. at 28.

Moreover, both the zoning board and the trial court properly found that the loss to the plaintiffs by the denial of the variance is negligible, as there is a conforming location on the property where they can construct the desired shed; or, they can continue to store equipment on the property as they currently do in plastic totes and under the deck. See CR at 158-160, App. at 26-28. While plaintiffs initially alleged that there was no where else on the property where they could construct their shed, because other places were either too steep, or blocked the basement windows, see, e.g., CR at 53, App. at 8; plaintiffs later acknowledged that there is a 50 foot x 30 foot relatively flat area between the house and the lake where the shed can be legally constructed. See CR at 4, App. at 1. While plaintiffs eventually came around to acknowledging that this area "is a reasonable location" for the shed, CR at 156, App. at

24, they nonetheless continue to argue before this Court that they should not have to construct the shed in this reasonable, conforming location because doing so would require them to build "in the only area the family can use for reasonable recreation save the lake." *Brief for Petitioner/Appellant, Brian M. and Margaret A. Perreault*, at 22. However, it is only plaintiffs' personal preferences that prevent them from constructing their shed in conformance with the zoning ordinance; and personal preferences are simply not a sufficient basis on which to grant a variance.

The board properly weighed the competing interests in this case and found that substantial justice would not be done by the grant of the variance. This was a legal and reasonable finding, which was properly affirmed by the trial court, and which should be affirmed by this Court.

C. *No Unnecessary Hardship Will Result from the Denial of the Variance*

Interestingly, although the superior court did not address the unnecessary hardship criteria in its decision, plaintiffs allege that "[t]he crux of this case rests in whether this Court agrees the Superior incorrectly applied the old standard of unnecessary hardship to the Perreaults request for a variance from the 20' side setback on their property."[sic] *Brief for Petitioner/Appellant, Brian M. and Margaret A. Perreault*, at 15. Therefore the town also discusses that criterium, although it urges this Court not to review it in the first instance. Plaintiffs chose to address the unnecessary hardship criterium as it was set forth in Simplex, supra, ignoring the 2009 legislative amendment to RSA 674:33 which altered this standard. The town's brief utilizes the current standard, as did the zoning board of adjustment.

1. There Are No Special Conditions of the Property That Distinguish it from Other Properties in the Area

The starting point of an unnecessary hardship analysis is whether there is anything unique about the property which distinguishes it from other properties in the area. Plaintiffs here alleged that their lot is "small", CR at 25, App. at 4, and that because it is a lakeside lot, it "requires" storage for lake equipment and boats. See CR at 53, App. at 8. While plaintiffs' attorney asked the board to "look at the personal aspect of the variance request," CR at 132, App. at 21; the law is clear that hardship must arise from the conditions of the property, not the circumstances of the owners. See, e.g., Husnander v. Town of Barnstead, 139 N.H. 476, 478 (1995)(quoting Carbonneau v. Town of Exeter, 119 N.H. 259, 263 (1979)). As the board properly found, all of the properties in the neighborhood are small and non-conforming. While the applicants also pointed out the slight slope of the property, the board found that that too was unremarkable compared to other properties in the area. See CR at 160, App. at 28. The board therefore properly found that there were no special conditions of the property which distinguished it from other properties in the area.

2. A Fair and Substantial Relationship Exists Between the General Public Purposes of the Ordinance Provision and the Specific Application of That Provision to the Property

While the unnecessary hardship analysis can and should end upon a finding that the property is not unique, the board continued and next discussed the relationship between the purposes of the ordinance and its specific application to this property, finding that the purposes to be both public safety and preserving the integrity of the area by preventing overbuilding. Most importantly in this case, however, is the fact that there is at least one conforming, and by plaintiffs' attorney's own admission,

reasonable, location on which plaintiffs' can construct their requested shed. See CR at 156, App. at 24. While plaintiffs clearly do not desire to construct the shed in this conforming location, that personal desire does not create a basis for a variance, nor does it negate the fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to this property.

3. The Proposed Use Is Not a Reasonable One.

Finally, because the shed can be constructed in a conforming location, the proposed use is simply not reasonable. Plaintiffs allege that they should be permitted to use their property as all of his neighbors do by constructing a shed; but the denial of the variance does not deprive them of that opportunity. It merely requires them to construct the shed in an unquestionably existing conforming location.[2]

CONCLUSION

Variances are the constitutional safety valve to ensure that a zoning ordinance does not effect a taking. See, e.g., Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 246 (1992). Plaintiffs suffer no taking of their property by denial of their requested variance, because they can construct the shed they desire in conformance with the ordinance and without a variance. Though they prefer not to build the shed in this conforming location, that personal preference is not sufficient to meet their burden of demonstrating that the variance criteria are satisfied. The zoning board properly so found and denied the variance. The trial court properly affirmed that denial, and this Court should likewise affirm that decision.

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[2]Because it was not entirely clear under which unnecessary hardship test plaintiffs sought their variance, the zoning board also considered the criteria established by RSA 674:33, I(b)(5)(B) and found that it was not met. See CR at 161, App. at 29.

REQUEST FOR ORAL ARGUMENT

The Town of New Hampton does not believe oral argument is necessary to resolve the issues before the Court; however, should the Court determine that such argument would be helpful, the Town of New Hampton requests oral argument not to exceed 15 minutes, to be presented by Laura Spector-Morgan, Esquire.

CERTIFICATION

I have forwarded, by first class mail, two copies of the foregoing brief to Alvin E. Nix, Jr., Esquire.

Respectfully submitted,

TOWN OF NEW HAMPTON

By Its Attorneys
MITCHELL MUNICIPAL GROUP P.A.

Date: September 26, 2017 By: Laura Morgan

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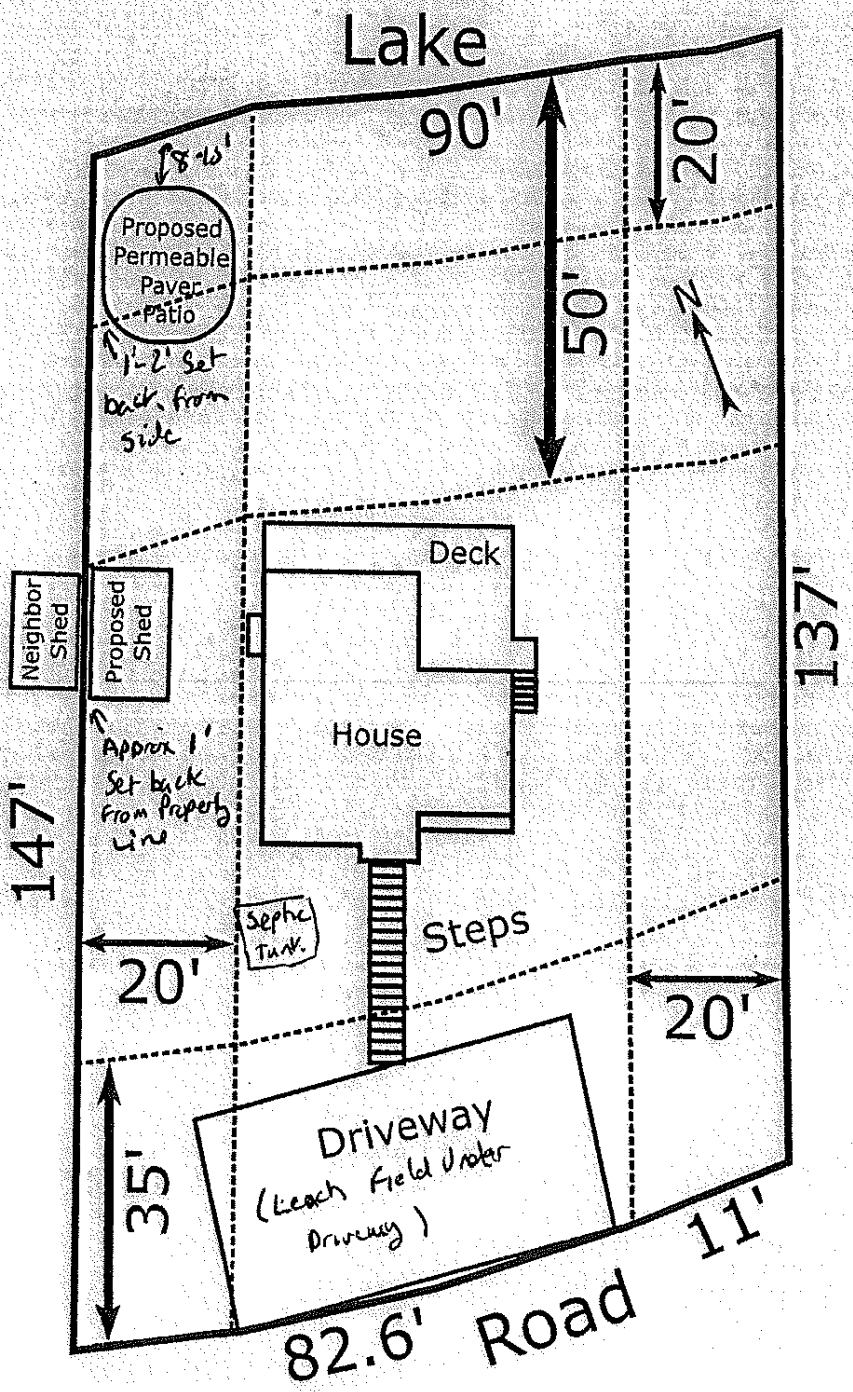
INDEX TO APPENDIX

NEW HAMPTON PLOT PLAN

Location and Detail must be correct, complete and legible.
You **must** show proposed structures and their distance from:

- ♦ front right-of-way and side and rear property lines

You **must** also show the location of the septic system and its distance from property lines.



NOTE: Septic system setback is 20 ft. from ALL property lines

BUILDING SETBACK information obtainable at Selectmen's office.

TAX MAP U10 LOT# 8 OWNER PER 1 AULT, BRIAN M. & MARGARET A
(MAP U10, BLOCK 8, LOT 0 on New Hampton Property List)

TOWN OF NEW HAMPTON
ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
TOWN OFFICE Upstairs Meeting Room
NEW HAMPTON, NH 03256

April 6, 2016

MEMBERS PRESENT Regular members: Mr. Tierney, Ms. Karnis, Mrs. Erler, Mr. Frazier, and Mr. Orvis, and alternate member Mr. Hofling and Mr. Smith.

OTHERS PRESENT Administrative Assistant Mrs. Vose and Brian Perreault

CALL TO ORDER Acting Chair Mr. Tierney called the meeting to order at 7:00 PM.

Mr. Tierney advised that Mr. Hofling is now an alternate member, with Ms. Karnis becoming a regular board member.

MINUTES There were none.

PUBLIC HEARING
Brian Perreault, 94 Seminole Avenue, Tax Map R-10, Lot 8, for a Variance, Article IV, Section A.4.iii, of the New Hampton Zoning Ordinance

Mr. Perreault was present.

Mrs. Vose advised that the applicant, Brian Perreault, has requested a Public Hearing in accordance with RSA 676:7, for a Variance under Article IV, Section A.4.iii of the New Hampton Zoning Ordinance. The applicant's proposal is to construct a 10'x16' shed within the 20 foot setback from the side property line, being one foot from the property line. The property belonging to Brian & Margaret Perreault is located at 94 Seminole Avenue, Tax Map U-10, Lot #8, in the General Residential, Agricultural and Rural District and the Waukewan Watershed Overlay District.

Mrs. Vose advised that all abutters were notified. She advised she received an email from Barbara and Thomas Ruescher stating their support and Mr. Reuter called the office and learning it was not proposed on his side of the property advised he had no issue with it.

Mr. Tierney asked Mr. Perreault if he drew the plot map and he said he did.

The variance will not be contrary to the public interest; the applicant states *"it allows the removal of plastic sheds replacing them with a structure that fits better with the character of the area. It will be mostly hidden from the view of the closest neighbor by the neighbor's own shed which sits right on the property line. The*

location, about 50' from the lake behind existing trees improves the view from the lake as compared with the existing sheds. The affect abutter approved of the shed".

Mr. Perreault explained there are currently 3 Rubbermaid sheds (roughly 5x8, 2x4, & 2x3) on the property but needs a larger space for items such as kayaks. He said it is a .3 acre lot. Mr. Orvis asked if there a restriction on how far a structure needed to be from another for access by the fire department and Mr. Tierney advised there was no specific restriction but the ZBA could impose conditions such as review by the Fire Department. Mr. Perreault said he was proposing 1 foot between the proposed shed and the abutter's existing shed though would increase it to what was practical. Asked what the distance would be between the proposed shed Mr. Perreault said about 10 feet. Mrs. Erler advised that relative to the viewscape for the applicant and neighbor, this proposed location appears to be good.

The spirit of the ordinance is observed; the applicant wrote *"The 3/10's acre, non-conforming, sloping lot significantly limits the location of the shed. The addition of the new shed also allows for the removal of existing sheds, one of which already violates the same setback requirement".* It was pointed out that the abutter's shed was constructed prior to zoning restrictions. Mr. Orvis said it appears to be a good location but is concerned with its distance from the abutter's shed.

Substantial justice is done; the applicant wrote: *"Without the Variance he would not be able to reasonably build a new shed which is needed for storage, and would have to retain the out-of-character plastic sheds for that purpose, which are not as aesthetically pleasing as the new shed. No other practical location exists more than 50' from the shoreline, due to the slope of the lot".* Ms. Karnis asked if there are any permanent sheds currently existing on the property and if so, are they within the setback area. Mr. Perreault said one of the plastic sheds is likely within the setback but confirmed it was short, small, and movable.

The values of surrounding properties are not diminished; the applicant wrote *"View of the shed by the closest abutter is blocked by the abutter's own shed, which is on the property line. The new shed will better fit the character of the surroundings and neighborhood with muted colors. It will allow for removal of the plastic sheds currently in place, and be partly hidden from the lake by trees."*

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Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because special conditions of the property distinguish it from other properties in the area; no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because: The applicant wrote *"the lot is an existing small, con-conforming one, and has very limited space inside the setback lines. The proposed location is the only relatively level location on the lot more than 50' from the lake (other than the driveway, which is less than the 35' setback away from the road)"*. Mr. Tierney asked if it was possible to excavate some of the slope to locate the shed and stay out of the setback. Mr. Perreault advised it would be difficult and the other side of the property has a steeper slope. Ms. Karnis asked if there was an area between the driveway and the house to construct a platform to place the shed, keeping it out of the setback. Mr. Perreault said it was possible but is quite a distance from the lake, and is also the steepest slope on the lot. Mr. Tierney asked if a survey had been done when he purchased the lot 2 years ago and Mr. Perreault said it had not been done and did not know exactly where the property lines were. Mr. Perreault said he used the town map to draw his diagram and determine setbacks. Mr. Hofling pointed out that is it easier to allow for a septic system to be placed within a setback when it means moving the system further from the lake, to maintain its quality, but the large shed is different. Mr. Hofling suggested a site visit and it was the consensus of the board to perform one.

The proposed use is a reasonable one because; the applicant wrote *"it fits the neighboring properties (which both have sheds which violate the setback limits to my property). It helps preserve the character of the area by allowing removal of less aesthetic plastic sheds. It preserves the lake quality by being setback about 50' from the lake"*. There was discussion on whether the 50' setback from the lake is a state requirement and Mr. Perreault said a shed does not need to meet the 50' setback – it is preferred.

Mr. Tierney closed the hearing to go into deliberations. It was the consensus of the board to perform a site visit after a survey is done of the property. The board suggested Mr. Perreault determine if there were pins available to locate the lines, prior to obtaining a survey. Mr. Tierney opened the hearing to ask Mr. Perreault if he could locate property lines. Mr. Perreault said he would research further but would obtain a survey if needed. Mr. Tierney asked Mr. Perreault to show the 50' distance from lake, when the site visit takes place.

Town of New Hampton

Zoning Board of Adjustment

6 Pinnacle Hill Road, New Hampton, New Hampshire 03256 • 744-3559

NOTICE OF DECISION

Case No: **06132016 - PERREAULT**

DENIED

June 14, 2016

Brian Perreault
28 Deer Field Lane
Stow, MA 01775

Re: Variance Request
Article IV, Section A(4)iii

Dear Mr. Perreault:

The Zoning Board of Adjustment at its meeting on April 6, 2016, site visit and meeting on June 13, 2016, and after due Public Hearing, completed its consideration of your request for a Variance under the New Hampton Zoning Ordinance Article IV, Section A(4)iii, regarding your request to construct a 10' by 16' shed within the 20-foot setback of a side property, the shed being one foot from the property line.

The property is shown on Tax Map U-10 as Lot 8 in the General Residential, Agricultural and Rural District, and Waukewan Watershed Overlay District, located at 94 Seminole Avenue.

The request for a variance was denied based on the following:

Though the property slopes it is not an egregious slope compared to other lots in that same area, there are places within the permitted area where a shed could be constructed.
As this is a shed the denial would not limit the property owners in the use of their property.
The spirit of the ordinance, in terms of wanting to control overbuilding, is important because allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.

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Please be advised that you have the right to file a Motion for Rehearing with the Zoning Board of Adjustment as provided under RSA 677:2. Said motion for rehearing must set forth in detail all grounds on which you base your appeal.

Paul J. Tierney, Chair
Zoning Board of Adjustment

Cc: Board of Selectmen
Town Clerk
Planning Board

The ruling of [2] clarifies that "*Thus, 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.'*" It clearly recognizes "*two methods for ascertaining whether granting a variance would violate an ordinance's 'basic zoning objectives.'*" More importantly, "*Mere conflict with the terms of the ordinance is insufficient.*" The two methods are:

1) "*One way is to examine whether granting the variance would "alter the essential character of the neighborhood.*"
2) "*Another approach 'is to examine whether granting the variance would threaten the public health, safety, or welfare'*"

I will show below that the location of the shed within the setback is 'within the character of the neighborhood', by showing that nearly all properties on Seminole Avenue (with the notable exception of my own) have a walk-in storage structure that lies within the setback distance (even the larger properties). A list of the lots, their structures, and their setback violations is shown in Table 2 below. Thus, the proposed location of the shed fits within the character of the neighborhood. Furthermore, similar variance requests have been approved by the town, and a list of some of the very similar cases is shown below, showing precedent. It is unreasonable, unfair, and discriminatory to grant the other similar variances, and not my own. The placement of the shed does not threaten the public health, safety or welfare in any significant way. Shoreland regulations and permitting protect the lake, and the shed itself is no direct danger to people, showing that no such threat described by 2) above exists.

Table 1 List of some of the approved variances for setbacks for very similar lakeside lots

Tax map	Address	Lot size (acres)	Approval Date	Description	Water Body
U09-13	11 Pemi point road	0.28	October 3, 2013	144 ft² shed on waterfront lot, 5' from property line	Pemigewasset Lake
U10-6	84 Seminole Avenue	0.28	February 13, 2013	24'x24', 2-level garage 10' into setback	Lake Waukewan
U15-6	42 West Shore Road	0.27	September 12, 2012	8'x14' shed on waterfront lot, 1' from property line	Lake Winona
U15-6	42 West Shore Road	0.27	August 5, 2009	Deck, 7' from property line	Lake Winona
U10-2	70 Seminole Ave	0.35	September 8, 2007	Shed within setback (<10' from property line) House construction on a lot below minimum size, with less than minimum frontage on lake and road	Lake Waukewan
U14-9	104 West Shore Road	0.37	March 5, 2006	14'x10' shed, <5' from property line	Lake Winona
U13-21	Anchorage Road	0.24	August 3, 2005	10'x12' shed, 5' from property line	Lake Winona

The first reason for denial was as follows

"*Though the property slopes it is not an egregious slope compared to other lots in that same area, there are places within the permitted area where a shed could be constructed.*"

This denial does not properly follow the guidance set forth in [1] for unnecessary hardship. There are not other reasonable places within the setback to place the shed, and the possible alternate location suggested by a zoning board member is unreasonable for reasons listed below, and such location creates unnecessary hardship. The variance ordinance calls out special conditions (not special conditions 'in the area') as a reason to grant a variance, and I believe this property merits such conditions. The building ordinances were designed for a much larger 1 acre lot, and this small, nonconforming lot is only 0.3 acres (3.3 times smaller), so has much less available area for a shed. While the denial specifies that the slope is not 'egregious' compared to other lots "in the area", it is a steeper slope than most lots in town, and steeper than is practical for the installation of a shed (the shed company will not install on a slope that steep[3]). The slope in the area a board member suggested, as a

possible location without needing the variance, slopes about 6 feet over the length of the shed, which is impractical for building a shed. While one board member suggested that the lot does not merit special consideration because the neighboring lots are also small and sloped, this is a misinterpretation of the variance ordinance and the law. Either of the lot size or slope conditions alone should qualify the property for variance consideration. All small, non-conforming, sloping lots like this one deserve special consideration (rather than none of them, as was professed by the board). After performing some research, I found that less that 2% of all lots in town have buildings (other than garages or other small structures) and are smaller than 0.3 acres. Fewer still have the steep slope. Thus this lot clearly, for multiple reasons, meets the special conditions requirement of the variance requirements. Furthermore, my lot, unlike the neighboring ones, does not have a walk in shed or garage with sufficient storage for the property. Finally, as another special condition, the lot is a lakeside lot, which requires storage for lake equipment and boats. Also, locations on the lot within 50' of the water subject the project to Shoreland regulations and permitting, and so it is desireable to minimize non-permeable roof area within this distance.

As for other locations on the lot that the shed could be constructed, a board member suggested construction underneath the porch. This location is not possible for several reasons, listed below, and creates unnecessary hardship:

1) It is on a steep slope, and the shed company will not install a shed there.
2) A shed in this location would block the window of the lower level room, and thus would be a safety violation (the only room window of sufficient size for egress). A picture is attached.
3) The well supply line comes out in the area, which would have to be dug out to put a shed there.
4) There is insufficient height for walk in storage. Also, having to dig out the area would require the pouring of new concrete walls, and would lead to undesired humidity for storage in the shed, since it would not be above ground.

The only other place, without violating the setback, would place the shed immediately beside the east side of the house, with its long side along the side of the house (the other orientation would violate the setback as well), which is undesirable and impractical because

1) It is on a steep slope, where the shed company will not install a shed
2) It would block the large main floor bedroom window (the only bedroom window)
3) It would block a lower level window
4) It would block the steps to the porch

The second reason for denial was as follows, "*As this is a shed the denial would not limit the property owners in the use of their property.*"
I believe that this was meant to address the necessity of the shed, and is incorrect. A shed is necessary on the property for the following reasons:

1) Storage of boats and equipment used on the lake. Storage of these without protection from the elements and weather, and freeze thaw cycles in the presence of water damages these items, and severely reduces their lifetimes. Dry storage is needed for these items. This includes a 16' canoe, three kayaks, a paddleboard, a paddleboat, a tube, life jackets, ropes, etc. (typical items for a lake house, or a house near a lake).
2) Storage of lawn furniture. We have already had lawn chairs that we have had to get dispose of because water got in the legs and froze, bursting their metal legs. All of our lawn furniture is susceptible to this destruction when not stored in a dry location during the winter and cold months of the spring and fall. Lawn and patio furniture is customarily stored in a dry location for the winter. Our lawn furniture currently includes two tables, 10 chairs, 2 lounge chairs, and 2 small end tables.
3) Storage for a lawn mower, spreader, and garden tools. Due to gasoline fumes, storage inside the house is not an option.
4) Storage of this type is customary and typical for lakeside houses. Evidence of this necessity is proven by the existence of dry above ground storage all alor[illegible] Seminole Avenue. If you walk down the street from the start all the way to my house, you will see that every one, except mine, has either a walk-in shed (tall

enough to stand up in) or a garage, or both. Some have basement storage as well, or multiple garages. The neighbor to my left (#90) has two sizeable sheds. The neighbor to my right (#96) has two sizable sheds and a large shed/boat house. A table of the houses, their garages and sheds, and whether or not one of these violates a setback is shown in the table below, and pictures with notations on the back are attached. Note that nearly all houses (and possibly all) have one of these structures that go beyond the setback, so this is typical and within the character of the area. To deny my property the right to place such a structure is unfair and unreasonable, when it is customary and prevalent in the area. The existing sheds on my property are not of sufficient size to store either the lawn furniture or any of the boats. This storage is necessary to the practical use of the property.

Walk in storage for items necessary is clearly customary and necessary for these items, and lack of storage unreasonably limits my use of the property, which is typical for the area.

Table 2 List of all houses from the start of Seminole Avenue to my lot, with list of walk-in storage structures and whether or not such a structure on the property violates the setback distance. Pictures of violations are attached.

House Number	Garages	Walk-in Sheds	Setback violation
6	1		Yes
8	1		Yes
12	2		Yes
14	1	1	Yes
20	3	2	Yes
24	1	1	?
28	2	1+	Yes
46		2+	Yes
64	1		Yes
70		1	Yes
74		1	Yes
76	1	2	Yes
82		3	Yes
84	1		Yes
90		2	Yes
96		3	Yes

The third reason for denial was as follows, "*The spirit of the ordinance, in terms of wanting to control overbuilding, is important because allowing many sheds to be build on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.*"

1) The denial for the "spirit of the ordinance" does not follow the guidance set forth in [2].
2) I did not request a variance for "many sheds", as specified in the denial. I have requested a variance for one shed.
3) The affected area is only 1.2% of the lot area, which does not amount to overbuilding or overcrowding. Furthermore, the effective affected area and crowding is reduced by allowing the consolidation of 3 sheds into 1. Also, one of the sheds is already within the setback area. Thus, the granting of the variance is not contrary to the spirit of the ordinance.
4) The spirit of the ordinance was designed for a 1-acre lot, not a 0.3 acre lot. Thus, the variance is also compatible with the spirit of the ordinance, as the ordinance was designed for larger lots, not small ones.
5) The spirit of the ordinance is not violated because such sheds and garages violating the setbacks are prevalent in the area of my house, as shown in the table above. There will be no more crowding on my property than on others in the area, and such locations beyond the setback line are within the character of the neighborhood.

PERREAULT Rehearing: TABLE 1
VARIANCES

Map/Lot	Address	Lot size	Approval Date	
U9-13	11 Pemi Point	0.28	10/3/13	Shed 5' from side property line. Shed was previously on site in different location, was within the setback at that time, and was pre-zoning. Owner had to install new septic system which meant the shed had to be moved and the land built up to accommodate the new system. Resulting change to land prevented shed from going back to its original location. This lot is on a point. Abutting properties are a condominium development and on the side where the shed was relocated to - was a 1.1 acre lot.
U10-6	84 Seminole Ave	0.28	2/13/13	Garage 25+ feet from ROW. A variance for a new septic system also granted at this hearing.
U15-6	42 West Shore Rd	0.27	9/12/12	Long, narrow lot. Shed 1' from side property line. Lots on either side or .85 and 1.14 acres
U15-6	42 West Shore Rd	0.27	8/5/09	Deck 7' from side property line. Granted with condition that no stairs/ steps from deck would not go into setback. Site visit reflected fact that neighboring structures were a great distance from this building site. At this time the property had an old delapidated camp which was non-conforming to setbacks and was being demolished with a new home being constructed, that would become more conforming to the side setbacks.
U10-2	70 Seminole Ave	0.35	9/8/07	Shed noted here was not part of the original building permit for the new house, nor was it part of the variance request. Plot plan for new home on previously empty substandard lot showed it met setback requirements. Shed referenced in appeal has no permit. Possible violation of setbacks.
U14-9	104 West Shore Rd	0.37	3/5/06	Shed 5' from side property line; granted with condition that shed be improved and sided, not to be placed on poured foundation, and this be the only outbuilding. Minutes noted that this shed had previously been attached to the house, but when they added onto the home the shed had to be moved.
U13-21	108 Anchorage Rd	0.24	9/3/05	Shed 5' from side property line; granted with condition that there is no permanent foundation. According to minutes it appears considertaion was given to the fa that the shed was to be on the side of the property closest to a clubhouse, not a dwelling.

it in its present location.

The board reviewed the criteria:

The variance will not be contrary to the public interest because: Ms. Smith wrote: *It has always been within the setback. We purchased the property in 2010 and this shed was within the setback.*

The board noted the original location of the shed was on the opposite side of the property.

The spirit of the ordinance is observed because: Ms. Smith wrote: *The shed will not be any closer to a neighboring property.*

Mr. Tierney advised that this shed had previously been within the side setback and was moved to accommodate a new septic system and is the optimum location for it on this non-conforming lot. Mrs. Erler added that it is better hidden on the property as it is screened from the lake and is screened from the abutting property to the west, due to vegetation. The board agreed.

Substantial justice is done because: Ms. Smith wrote: *I would like to keep the shed. There is no way to locate it within the setback lines due to the size of the lot.*

The board agreed with this statement.

The values of surrounding properties are not diminished because: Ms. Smith wrote: *the shed is nicely sided and roof is in good condition.*

Mr. Tierney advised it was naturally shielded from the abutting property through vegetation. The board expressed agreement.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because: Ms. Smith wrote: *the property is too small to keep the shed outside of the 20' setback. The septic system takes up the space the shed was located on.*

The proposed use is a reasonable one because: Ms. Smith wrote: *the shed has always been on the property and it never bothered*

engineer look at the site, who advised that a new septic system would not survive in the area previously designed, due to how wet it was. The most recent designer, who previously worked for DES advised a new system would be best located near Seminole Ave. as it would further away from the lake and higher up on the slope, which is very steep going down to Mr. Sweeney's home.

Relative to request for a variance to construct a garage, Mr. Hays explained that previously Mr. Sweeney's driveway traversed the property 2 times to get down to the house, as it was so steep. The new septic system will now be located the middle of his driveway. The new system is on a high spot that's level with the road. The proposal is for the garage to be situated near the road and a parking area created. This area is very high above the house. They have removed the old septic tank, creating a location for the new tank, which was difficult due to many very large boulders. Mr. Sweeney plans on accessing his house from the garage and parking area, through some type of stairway. Mr. Hays said that the garage should be able to meet the 20 foot setbacks from the side property lines as its being placed in the middle of a 90 foot wide lot.

Mr. Hofling asked if there would be 2 floors to the garage, and Mr. Hays explained that due to the roof line of garage there would be some space for a small of storage. Due to the steepness of the property the foundation for the garage would allow for some storage underneath.

Mrs. Vose pointed out that a variance will be requested from NH DES as the proposed septic design does not meet their 10 setback. Mr. Hays advised that he wanted to obtain this variance prior to submitting the plan to the state. He said the septic designer was confident the state would approve the plan, due to the site's conditions. Mr. Hays advised they will also be amending the wetlands permit.

Mrs. Erler asked if this was a year-round house and Mr. Hays advised that it has been for many years, even prior to Mr. Sweeney purchasing the property, as it has a heating system, it is insulated, and had somewhat of a foundation, as opposed to being constructed on piers.

The Variance will not be contrary to the public interest because:
Mr. Hays wrote: *the structure fits the neighborhood architecture and the septic will benefit the quality of the lake.*

Mr. Tierney advised he has no problems with the proposal as he is familiar with the area. The remainder of the members agreed that all

those lots are small and have limitations, and the new septic system will improve the quality of the lake.

The spirit of the ordinance is observed because: Mr. Hays wrote: *Due to the non-conforming lot.*

The board agreed the lot limits what can be done.

Substantial justice is done because: Mr. Hays wrote: *without the variance Mr. Sweeney is unable to replace his septic and with the new septic he needs a new driveway and garage for storage.*

The board agreed the request for a garage was reasonable.

The values of surrounding properties are not diminished because: Mr. Hays wrote: *The new septic system will benefit the lake quality.*

The board agreed this is an improvement to the lake.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area: (A)ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because: Mr. Hays wrote: *existing non-conforming building lot.*

Mr. Tierney expressed his agreement. Mrs. Erler asked if other properties in the area had garages. Mr. Hays advised that there were other homes that had garages, some being attached and some detached, depending on what their lot allowed. Mrs. Erler noted that the lot across the road, between Seminole Avenue and the railroad tracks, was too narrow for construction of a building across from Mr. Sweeney's lot. Mr. Smith asked about the water supply and Mr. Hays said it is drawn from the lake, similar to other properties in the area. Mr. Hays pointed out well radii distances that DES is requiring from the abutter's well and a proposed site for a future well on Mr. Sweeney's lot.

The proposed use is a reasonable one because: Mr. Hays wrote: *It fits all the neighboring properties.*

The board agreed it was reasonable.

If the paragraphs in 5(A) are not established what are the special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary reasonable a reasonable use of it. Mr. Hays

Variance - Property - 3"

Craig Weisman
42 West Shore Rd.

TOWN OF NEW HAMPTON
ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
TOWN OFFICES
NEW HAMPTON, NH 03256

September 5, 2012

MEMBERS PRESENT Mrs. Erler, Mr. Hofling, Mr. Orvis, Mr. Tierney, Mr. Frazier (7:02 pm)

OTHERS PRESENT Mrs. Vose

CALL TO ORDER Mrs. Erler called the meeting to order at 7:00 PM.

Mrs. Erler appointed Mr. Tierney to vote in place of Mr. Frazier.

PUBLIC HEARING
Craig Weisman, 42 West Shore Road, Tax Map U-15, Lot 6 for a Variance, Article IV, Sections A.4.iii, of the New Hampton Zoning Ordinance

Mrs. Erler advised that the applicant, Craig Weisman, has requested a Public Hearing in accordance with RSA 676:7, for a Variance under Article IV, Section A.4.iii, of the New Hampton Zoning Ordinance for property belonging to Craig and Cindy Weisman. The applicant's proposal is to construct an 8 ft. by 14 ft. shed within the 20-foot setback of a property line, on the side property line. The property is located at 42 West Shore Road, Tax Map U-15, Lot #6, in the General Residential, Agricultural and Rural District and Waukewan Watershed Overlay District.

Mrs. Vose advised that all abutters were notified and that none were heard from.

Craig Weisman was present to represent the application. He showed where the property is on the tax map. He reminded the board he had previously come to the board for variances. He said the lot is very narrow. He said there is about 15 feet from the side of the new log cabin, to the side setback, which was recently surveyed. He advised he would like a shed to store items and keep the property neat. He said that because of the areas of steep slopes and to avoid the septic area and buried propane tank he is proposing a location at the side property line. He said that it would put the shed at 7 feet from the house. Mr. Weisman spoke with the abutter (Maddix) on the side where the shed was proposed and had told her he would show her exactly where he wanted to place it. He said the siding would match the log home. He explained that the Maddix home is quite a distance from his home and there is a lot of vegetation in between.

000118

Mrs. Erler asked why he chose this particular location. Mr. Weisman said that besides the slopes, septic and propane tank, this side of the lot was a slightly wider space between the house and the side property line, than the other side. He advised the sheds would likely be put on sonatubes.

The board agreed that they would like to perform a site visit.

Mrs. Vose pointed out an incorrect statement in the variance request that stated that the applicant is looking for an 8' side property variance, when it Mr. Weisman is actually looking for a 19+ foot variance. The applicant and board agreed. The board reviewed the criteria.

The Variance will not be contrary to the public interest because: Mr. Weisman wrote: *we have a very small, non-conforming lot, which is only 50' wide and need a shed to store our lawn mower, snow blower, and various yard tools, and will make a nice, neat site.*

The board had no questions.

The spirit of the ordinance is observed because: Mr. Weisman wrote: *we will matching to the siding of the log home; should be very attractive and keep the yard clean.*

Mr. Tierney pointed out that this doesn't really answer the question. The spirit of the ordinance is to keep buildings away from property lines. Mrs. Erler said that the reason for this variance may be apparent when they perform the site visit.

Substantial justice is done because: Mr. Weisman wrote: *we have a very small site, with very steep topography. This is the only good spot for the shed; we want to keep the yard very neat and don't want the site to look junky.*

The board agreed with this statement.

The values of surrounding properties are not diminished because: Mr. Weisman wrote: *We are actually cleaning up the yard with a very attractive log sided shed to improve property value.*

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area:
(A)ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because: Mr. Weisman wrote: *The lot is 57 feet wide, non-conforming site; septic and driveway*

in front, very steep topography in back; only good location

The proposed use is a reasonable one because: Mr. Weisman wrote: *If we are allowed this we will be able to put stuff away and improve the look of the site and the usefulness for us.*

Mr. Orvis advised that he would like to have the shed moved away from the side property line, at least a foot, so it's not right on the line.

Mr. Tierney advised he would like to discuss the necessary hardship. He asked if there is a basement under the house and Mr. Weisman said it was a finished basement. Mr. Weisman said he wouldn't be able to keep items, such as a lawn mower or snow blower, out of the weather. Mr. Tierney asked if this was a year round residence and Mr. Weisman advised that he will be occupying year-round, but is currently living in Sanbornton. Their intent is to sell in the future, then move here.

Mrs. Erler made a motion, seconded by Mr. Hofling, to continue the hearing to a site visit on September 12, 2012 at 6:00 pm. Vote was unanimous.

MINUTES

A motion was made by Mr. Hofling, seconded by Mr. Frazier, to accept the minutes of May 2, 2012, with the following change:

1. Under Annual Election of Officers, change the 2nd motion to "nominate Mr. Hofling as Vice Chair".

Vote passed

OTHER BUSINESS

Mr. Frazier asked of the status of Mr. Sharp's appeal. Mrs. Vose advised that the time period had expired for Mr. Sharp to appeal to the Supreme Court.

Mrs. Vose advised that there was an application received for next month.

ADJOURNMENT

Mr. Tierney made a motion, seconded by Mr. Orvis, to adjourn at 7:35PM. Vote was unanimous.

Respectfully Submitted,

Pam Vose
Secretary

000120

PERREAULT Rehearing: TABLE 2

Seminole	Map/Lot	Owner	Outbldgs noted by Mr. Perreault	Pre-Zoning?	Details	Was permit obtained?
6	U11-6	Tallman *#1*	garage	Y		na
8	U11-7	Marsh *#2*	garage	Y		na
12	U11-9	Marsh	garage 1	Y		na
	#3 & #4		garage 2	N		Y - met setbacks
14	U11-10	Hassan/Hone	garage	Y		na
	#5 & #6		shed	N	Current record lists a 96 sq. ft. shed; violation of setback?	N - *not req.* ⓘ
20	U11-12	Corr	garage 1	N	Garage attached to reconstructed home (2005)	Y - met setbacks
	#7 ... #11		garage 2	N	Permit in 2005 for garage didn't include leanto or shed-westerly side of Seminole	Y - met setbacks
	several photos		garage 3	N	Question reference to garage; current record lists ***168*** sq. ft. shed(next to house?)	N - *not req.* ⓘ
	are confusing		shed 1	N	Current record lists 50 sq. ft. shed	N - *not req.* ⓘ
			shed 2	N	Current record lists ***130*** sq. ft. shed; unclear from photo where shed is	N - *not req.* ⓘ
24	U11-14	King	garage	N		Y - met setbacks
			shed	Y *	* Records seem to indicate shed was prior to zoning; records not clear but current record lists 140 sq. ft. shed and 24 sq. ft. shed with 1980 construction	na
	#12					
28	U11-16	Hays	garage 1	N	Westerly side of Seminole	Y - met setbacks
			garage 2	N	Next to house	Y - met setbacks
	#13 ... #15		1+ sheds	N	Photo #13 & 14 show small shed; believed to meet setbacks; no other sheds noted on current record	N - *not req.* ⓘ
46	U11-19	Jones	2+ sheds	Y *	* Records seem to indicate sheds were pre-zoning; current record lists construction as 1970	na
	#16 ... #18					
64	U10-1	DiCicco	garage	Y		na
	#19					

ⓘ **Not required, either due to size being 120 sq. ft. or less, or based on assessed value being $5,000 or less.**

(Note: Current requirements require permit for accessory structures in excess of 192 sq. ft.)

Lack of requirement for building permit does not negate the required setbacks and any other zoning regulations.

TOWN OF NEW HAMPTON
ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
Upstairs Town Meeting Room, 6 Pinnacle Hill Road
NEW HAMPTON, NH 03256

September 14, 2016

MEMBERS PRESENT Regular members: Mr. Tierney, Ms. Karnis, Mr. Orvis, Mr. Frazier, and alternate member Mr. Smith.

OTHERS PRESENT Administrative Assistant Mrs. Vose and Town Attorney Laura Spector-Morgan.

CALL TO ORDER Mr. Tierney called the meeting to order at 7:30 PM.

Mr. Tierney appointed Mr. Smith to act as a voting member in place of Mrs. Erler.

Mr. Tierney advised that as he is undergoing surgery on 9/15/16 and the Marsh's site visit and subsequent hearing deliberations were scheduled for that evening. He suggested that based on this and some issues relative to the septic designs and what was approved, that the board authorize Town Administrator Mrs. Lucas to ask the applicants, David & Debra Marsh, if they are willing to reschedule the site visit and hearing that had been continued at the public hearing on 9/7/16. He said the town could request the septic designer and installer be available for that meeting also.

Ms. Karnis made a motion, seconded by Mr. Frazier, to authorize Mrs. Lucas to request a rescheduling from the applicants. Vote was unanimous.

MINUTES There were none.

REHEARING
Brian Perreault, 94 Seminole Avenue, Tax Map R-10, Lot 8, for a Variance, Article IV, Section A.4.iii, of the New Hampton Zoning Ordinance

Applicant Mr. Perreault and his attorney Alvin Nix, Jr., were present.

Mrs. Vose advised that the Board of Adjustment granted a Motion for Rehearing on August 3, 2016 and will hold a Public Hearing on Wednesday, September 14, 2016, at 7:30 PM to reconsider the application submitted by Brian Perreault. The applicant's proposal is to construct a 10' by 16' shed within the 20-foot setback of a side property line, the shed being one foot from the property line. In accordance with RSA 677:2-3, as requested by Brian Perreault there

will be a Rehearing of the Public Hearing for Brian Perreault's variance request under Article IV, Section A.4.iii of the New Hampton Zoning Ordinance. The property belongs to Brian & Margaret Perreault and is located on 94 Seminole Avenue, Tax Map U-10, Lot #8, in the General Residential, Agricultural, and Rural District and the Waukewan Watershed Overlay District.

Mrs. Vose advised that all abutters were notified and the office had received an email from abutters Mr. and Mrs. Ruescher stating their support, which was read into record.

Mr. Tierney advised that as this is a rehearing new testimony is taken and reviewed. Attorney Nix advised he was present to represent the applicants. He reviewed that the applicant has a home in an area that is very dense. He reviewed the plot plan from the building permit application and the survey, stating the applicants wish to construct a 10'x16' shed in an area next to the northern property line. This area was chosen due to it being a somewhat level area on the parcel and the recommendations made by the shed manufacturer that the shed not vary by any more than one foot across its plane. Attorney Nix advised the purpose of the shed is to store and protect recreational items and yard equipment and to avoid having the small Rubbermaid containers the Perreaults currently use.

The variance will not be contrary to the public interest; Atty. Nix reviewed what Mr. Perreault had written: "*...removal of plastic sheds, replacing them with a structure that fits better with the character of the area. Mostly hidden from view in the locality in which it is.*" This will put the shed in an appropriate location.

The spirit of the ordinance is observed; Atty. Nix said the applicant is trying to place the shed in the most appropriate place on the property, giving the property a cleaner appearance.

Substantial justice is done; Atty. Nix said there are properties around the Perreaults that have places to store things and the applicants want a similar opportunity to keep items out of the weather.

The values of surrounding properties are not diminished; Atty. Nix said this would improve the property, not diminish it. He pointed out that no abutters have come forward to argue this variance and one has offered his support.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because special conditions of

the property distinguish it from other properties in the area; no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because; Atty. Nix reviewed some history of the unnecessary hardship requirements and how they've been applied over the years. He referred to the Harborside Assoc. vs Parade Residents Hotel case and how it relates to this variance saying the unnecessary hardship exists when special conditions of the land render the use for which the variance is sought - reasonable. He explained that though some lakefront owners have larger lots Mr. Perreault and his neighbors have substandard lots and this variance addresses what they have and what they want to do and whether this shed is reasonable. Relative to the spirit of the ordinance Atty. Nix asked if granting the variance would alter the essential character of the neighborhood and if substantial justice is done would the general public realize an appreciable gain from denying this variance.

Atty. Nix pointed out through photos taken and submitted by Mr. Perreault, that properties near the applicant have garages and sheds for storing their items and he wishes to have the similar benefit. The photos were of all properties from the beginning of Seminole Avenue to the property after Mr. Perreault's. Mr. Nix said the photos indicated garages and sheds, some of which appeared to be in the setback distance of the ROW, side, or rear property lines. He advised that #84 Seminole Ave had their garage approved through a variance - to be built within the front ROW setback.

Atty. Nix showed pics of Mr. Perreault's property showing the steps they take to get from the parking at the road down to the house, due to the slope. Some were photos of the southerly and lakeside of the home where the foundation is constructed into the hill, and the 3 Rubbermaid sheds presently being used and how they deteriorate over time. Atty. Nix pointed out the applicant is requesting to have a shed in the setback that many of the neighbors in his immediate area have, with the neighbors enjoying a benefit of their properties that the Perreaults would like to have.

Relative to the unnecessary hardship criteria, Atty. Nix said the 20' setback is to keep congestion down while keeping the area safe and healthy, however to hold this setback for the Perreaults is not consistent with what's occurring in the neighborhood and the benefit the other neighbors are receiving. The Perreaults want to place the shed in a location that is not near the road or lake, alongside the abutter's shed, keeping it more hidden from view, while allowing storage of items. Atty. Nix said it is reasonable to grant the variance because allowing this shed in this location would not alter the

essential character of the neighborhood or violate the basic objective of the ordinance. He advised the general public will not get an appreciable gain by denying the variance pointing out that the area around the Perreaults are substandard lots, with storage as a benefit.

Atty. Nix pointed out other variances granted for outbuildings on similar size properties, as submitted by Mr. Perreault in Table 1.

Mr. Tierney provided to members, the applicant, and Atty. Nix, copies of responses to Mr. Perreault's Table 1 (Variances granted) and Table 2 (list of outbuildings on properties in area) that had been prepared by the Selectmen's Office based on the town's records.

In Table 1, Mr. Tierney advises that prior to the variance approval date of 8/5/09, variances where decided on a different set of criteria. Atty. Spector-Morgan stated that the Boccia case made it much easier to get an area variance vs. a use variance, which was criteria in place from 2004-2009. For this reason, Mr. Tierney advised the board would only review the more recent variance approvals noted by Mr. Perreault as they were under the same criteria as what is being used currently.

1. Variance approval 10/3/13 on Tax Map U9, Lot 13 notes the shed the variance was granted for, had been in the setback (pre-zoning), on the other side of the property, and had to be moved to accommodate a new septic system which required the land to be built up. The property was out on a point, with one abutter being a condominium development, and the other a 1.1 acre lot.
2. Variance approval 2/13/13 on Tax Map U10, Lot 6 notes the garage was approved for a variance as a new septic design had to be done which limited where the garage could go. Mr. Tierney said minutes from that meeting also reflected the fact that the driveway had previously zigzagged down the slope towards the house which is where septic ended up going.
3. Variance approval 9/12/12 on Tax Map U15, Lot 6 notes this property as being long and narrow, with the shed 1' from the side property line with properties on either side being .85 and 1.14 acres.

For these reasons Mr. Tierney said there were no close similarities to the Perreault lot.

In Table 2, Mr. Tierney reviewed Mr. Perreault's listed outbuildings on properties. The table prepared by the town noted whether they were grandfathered non-conforming structures, whether a building permit had been obtained and shown to meet setback distances, or

whether a permit would not have been required based on size and value, but would have been required to meet the setback distances. Atty. Spector-Morgan pointed out that the grandfathered structures would not be comparable to the Perreault variance. Structures that were constructed without a building permit, as it wasn't necessary, but meet setbacks, are not comparable. She said there were some structures that did not require a permit and may not meet the setback requirements but the town was not aware that these violations may exist until Mr. Perreault brought it to the town's attention. She said the Selectmen can now take this under advisement and determine whether or not any enforcement action is needed. Atty. Spector-Morgan pointed out that lack of a need for a permit for any structures that are in the setback does not mean the town permitted them in that location.

Atty. Nix said he understood the position of the board on these structural issues as discussed in the town's response to Table 2. He asked the board to look at the neighborhood, disregarding what's grandfathered, permitted, or in violation, in that owners are able to use outbuildings for storage. He said neighbors are enjoying the benefits of their property in having storage and that's what the Perreaults are looking for, so he asked the board to look at the personal aspect of the variance request.

Mr. Tierney asked Atty. Nix if he was asking the board to ignore the unnecessary hardship criteria and Atty. Nix he was not, but this request was different than, for example, requesting to have a commercial use in a residential neighborhood where surrounding properties are very different. Atty. Nix said granting this variance will not make the neighborhood any different than it is now. All other properties in the area are the same, relative to outbuildings for storage, except the Perreault's.

Mr. Tierney asked if there was another location on the property where this shed could be located and conform to the setbacks. Atty. Nix said he knew the board may have discussed other locations when they performed their site visit on 6/13/16. He said he would have to place it between the house and the road, or between the house and the lake, but felt that may not be reasonable to the applicant. Atty. Nix said if the shed was constructed under the deck it would block a window; if it was constructed on the east side of the house it would block more windows. He asked the board to consider what is reasonable under the circumstances for the applicant. Mr. Perreault said that the shed company requirements prevent the shed from being put in several other locations due to the slope as indicated by a link noted in his request for rehearing. Ms.

Karnis suggested the link be printed for the record and Mr. Perreault attested to the fact that the requirements from the shed company were what he stated.

Ms. Karnis advised that discussion is taking place about the site, for which Mr. Smith did not visit. Mr. Smith said he finds it hard to believe there is no other location, but is also concerned with any safety concerns the Fire Chief may have. It was the consensus of the board to get input from the Fire Chief on a shed being placed 1' from the abutter's shed and 9' from the house, and for the board to perform another site visit. Mr. Tierney asked Mr. Perreault for permission for the Fire Chief to visit the property. Mr. Perreault agreed.

Ms. Karnis made a motion, seconded by Mr. Orvis, to continue the rehearing to October 5, 2016 beginning at 5:00 pm at 94 Seminole Avenue, following by deliberations at the upstairs town meeting room, 6 Pinnacle Hill Road. Vote was unanimous.

OTHER BUSINESS There was none.

CORRESPONDENCE There was none.

ADJOURNMENT Ms. Karnis made a motion, seconded by Mr. Orvis, to adjourn at 7:53 pm. Vote was unanimous.

Respectfully Submitted,

Pam Vose
Administrative Assistant

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TOWN OF NEW HAMPTON
ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
Site Visit – 94 Seminole Avenue
Upstairs Town Meeting Room, 6 Pinnacle Hill Road
NEW HAMPTON, NH 03256

October 5, 2016

MEMBERS PRESENT Mr. Tierney, Ms. Karnis, and Mr. Smith.

OTHERS PRESENT Administrative Assistant Mrs. Vose, Town Attorney Laura Spector-Morgan, Mr. Perreault, and Attorney Alvin Nix, Jr.

SITE VISIT Mr. Tierney called the meeting to order at 5:10 pm. A site visit was performed at the applicant's property on 94 Seminole Avenue.

Mr. Perreault pointed out windows in the basement that provide light or egress to the house and where a line goes from the house down towards the lake to his well. The board reviewed the southern side property line and measured setback distance from that line towards the house. The board looked at the site proposed for the shed, with Mr. Perreault pointing that he wanted to avoid taking any more trees down to accommodate the shed. He reviewed all the items he wants to store in the shed and mentioned other properties on Seminole Avenue have storage buildings placed near property lines. The board looked at the location by the lake that was somewhat level, where the shed could be located and meet setbacks. Mr. Perreault advised that there are limitations on permeable surfaces within 50' of the lake and whether that would be an issue. The board took measurements from the water to several locations along the northern side property boundary.

Mr. Perreault said he visited the property at 42 West Shore Road where the board granted a variance for a shed, one foot from the side property line. He said that property was similar to his and there had been room in between the house and the roadway where that shed could have been placed and meet setbacks.

RECESS Ms. Karnis made a motion, seconded by Mr. Smith, to continue the meeting at the Town Office upstairs meeting room. Vote was unanimous.

CALL TO ORDER Mr. Tierney reconvened the meeting in the Town Office upstairs meeting room at 5:56 PM. Everyone present at the site visit was

present at the Town Office.

Mr. Tierney advised that it was Mr. Perreault's decision as to whether or not he wanted to continue deliberations without the full five member board present. Mr. Perreault advised that he wanted to continue with the members present. Mr. Tierney advised that regardless of the outcome of the hearing Mr. Perreault could not appeal any decision based on the fact there were only 3 voting members. Mr. Perrault said he was aware of that.

CONTINUATION OF REHEARING
Brian Perreault, 94 Seminole Avenue, Tax Map R-10, Lot 8, for a Variance, Article IV, Section A.4.iii, of the New Hampton Zoning Ordinance

Atty. Nix advised that Mr. Perreault is submitting written responses to the Table 1 comments from the town. He said they addressed the same issues mentioned during the hearing on 9/14/16 where variances were granted on substandard lots for storage buildings, which is what Mr. Perreault would like. He pointed out the variance granted for Tax Map U15, Lot 6 where there was adequate room in front of the house for a shed but it was allowed to be five feet from the side property line. Mr. Perreault showed two photos taken of this house and shed, on his laptop computer.

Atty. Nix advised that Mr. Perreault is submitting written responses to Table 2 comments from the town.

Atty. Nix pointed out that the site visit reflects that the Perreaults have a lawn area that is used by his children and guests and the area proposed for the shed is unused for any other purpose, it is mostly level, therefore it is a reasonable location. He expressed concern with placing the shed close to the lake as that seems to go against what Shoreland Protection is trying to accomplish. He agreed that a variance looks at the uniqueness of the property but asked what benefit is there to the ordinance or the neighborhood when everybody has storage whether they pre-existed or were granted by a variance. All the other properties in the neighborhood have shed/garages.

Mr. Perreault said putting the shed in another location would mean placing it in between the house and the lake which would spoil the view and would block the view of children playing in the yard or lake, from the house. It would spoil the view from the water. It would be closer to the lake which would require review by (NHDES) Shoreland Protection and there are limitations relative to the square footage of impervious surface. It would take up the small grass area used by his children. Atty. Spector-Morgan asked if the shed would put him over the (impervious surface) limit allowed by Shoreland Protection and Mr. Perreault said he did not know. Mr. Perreault pointed out the previously granted variance for Map U9,

Lot 13 (Table 1) and the fact that the minutes from that hearing reflect the property owner saying there was a location to place the shed that would not be within the setbacks but it wasn't convenient for them. Mr. Perreault pointed out the variance granted to Map U10, Lot 6 for a garage near the ROW. This included a variance for a septic system. There had not been a garage there before, yet the board granted a variance for the septic *and* the garage as storage was needed for that property. He asked the board to consider what they would do if they were in his position. He said it is in the character of the neighborhood as all the properties have storage within a setback. Mr. Perreault referred to the Simplex ruling that states the zoning ordinances must be consistent with the character of the neighborhoods they regulate. He pointed out that the Fire Chief provided documentation that he did not object to the location of the proposed shed.

The board read the letter from the Fire Chief. Mrs. Vose advised the board she had items emailed to her by Mr. Perreault on 10/3/16. These included site specifications from the shed manufacturer and minutes from hearings where variances where granted 9/12/12, 2/13/13, and 10/3/13. Mrs. Vose noted the minutes had already been provided to board members as they were noted in Table 1 - part of Mr. Perreault's request for rehearing.

Mr. Tierney advised the hearing was closed and the board would go into deliberations reviewing and discussing each of the variance criteria.

Board members took some time to reread various pieces of evidence.

The variance will not be contrary to the public interest; Mr. Perreault had originally written "*it allows the removal of plastic sheds replacing them with a structure that fits better with the character of the area. It will be mostly hidden from view from the closest neighbor by the neighbor's own shed which sits right on the property line. Location about 50 feet from the lake behind existing trees improves the view from the lake as compared with existing sheds. The affected abutter approved of the shed*".

Mr. Tierney advised that the 1st and 2nd criteria should be considered together.

The spirit of the ordinance is observed; Mr. Perreault had originally written "*The 3/10's acre, non-conforming, sloping, small lot significantly limits the locations for the shed. The addition of a*

new shed also allows for the removal of existing sheds, one of which already violates the same setback requirement".

Mr. Tierney asked the board to consider whether granting the variance would alter the essential character of the locality and whether granted the variance would threaten the public health, safety, or welfare. Mr. Tierney stated that the Fire Chief has submitted a letter stating he has no concerns with the proposed shed and its proposed location.

Mr. Smith pointed out that the abutter and Fire Chief do not have a problem with the location.

Ms. Karnis expressed concern with the character of the location and looking at not only this application, but the cumulative impact to granting similar variances to others in the neighborhood. She said the character of the what neighborhood is supposed to be and the goals of the setback requirements are to not only protect the public safety but to prevent overbuilding on lots, so looking at the cumulative effect of constantly granting variances would alter the essential character of the neighborhood. She said when she was onsite, looking from the water towards the Perreault's house and the abutters properties – towards the right she saw a shed on the property line, a large house, a shed on the line; on the applicant's property – another potential shed on the line, large house; on the next lot – another shed right on the line and a house and sheds. There are a number of these that appear, which could be sheds being placed without permits, but the cumulative effect you see as you drive along the road is one of overbuilding. The nature and character of the neighborhood is beginning to look like Canobie Lake as opposed to New Hampton. Ms. Karnis said she sees the gain to the public is that the area is being preserved by adhering to the setback requirements. The lots in the area are small but if the town had wanted to create smaller setbacks for smaller lots they would have done so. For this reason she said granting this variance would be contrary to the public interest. Regarding the slope, there are slopes to other properties in the area, some to the same degree, and some having not as much slope. Ms. Karnis said that relative to Mr. Perreault wanting to avoid putting the storage up against the house because of the location of windows and doors, she noted an area under the deck where a storage area could be created while avoiding those windows and doors. There are other locations but they are less desirable to the applicant. Ms. Karnis said she saw substantial differences between this application and the other variances noted by Mr. Perreault, and why they were granted.

Mr. Smith said he is concerned with the constant building in the area but understood why Mr. Perreault would have chosen the location he did. He said just because others have built on the property line it doesn't make it right for Mr. Perreault. Mr. Smith said he did not think granting the variance would not be contrary to the public interest and the spirit of the ordinance would be observed.

Mr. Tierney advised that for previous variances granted, each case was unique and the ZBA bases everything on the evidence presented, interpreting the zoning ordinance and the rules that guide the board. He said he didn't feel the previously granted variances were relevant to this case as they are unique and do not set precedents. Each variance stands on its own and are related to that particular property. He said he remembered the variance granted on Pemi Point and that it was very different than this application. Mr. Tierney referred to the variance granted on Seminole Avenue and its unique reasons for the approval. He said he did not think the conditions on Mr. Perreault property are that unique. He said the variance would be contrary to the public interest because granting it would allow the congestion and density in the area to continue.

Substantial justice is done; Mr. Perreault had originally written "*Without the Variance he would not be able to reasonably build a new shed which is needed for storage which is on the property line*".

Mr. Tierney pointed out the consideration on whether the loss to the individual outweighs the gain to the public interest or whether it is an injustice to Mr. Perreault not have that shed in that location, and whether that causes a deprivation of the use of his property. Mr. Tierney said it is the ZBA's responsibility to uphold the ordinance and there is nothing stated in the ordinance that asks the board to use reason in considering a variance request, but instead to use facts and evidence. For this reason he feels denying the application is not denying substantial justice.

Ms. Karnis said there is a gain to the public to preserve the character. There is a detriment to the public caused by the cumulative effect of overbuilding, pointing out that this is New Hampton, not a southern lake community where properties are built to their corners. She referred to the setbacks approved by the town and that they were to limit overbuilding. Relative to whether there is a loss to the applicant that is not outweighed by the gain, when you look at a shed where there are other alternatives the denial is to the applicant placing the shed where he most desires it. Therefore she said it was not a loss to the applicant but a gain to the public interest.

Mr. Smith advised he felt it would only be a gain to the homeowner, not a gain to the public interest.

The values of surrounding properties are not diminished.

Ms. Karnis said she did not see evidence that values would be diminished if the variance was granted. She said her opinion was that a property that appears crowded may not be as valuable as one that looks more pristine and unadulterated.

Mr. Smith said that placing the shed where the applicant is proposing would probably have the least effect on the neighbors.

Mr. Tierney said he didn't think the shed would diminish property values.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because special conditions of the property distinguish it from other properties in the area; no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property, and the proposed use is a reasonable one.

Ms. Karnis said that the special conditions noted by the applicant were that it was small and non-conforming, but all the properties in the neighborhood were small and non-conforming so this is not a unique and special condition of the property. The fact that it is sloping in parts, is not terribly unique as compared to other properties as it is not the only one with a slope. She said she sees a substantial relationship between the setback requirements and the spirit of the ordinance because one of the aspects, besides public safety, is preserving the integrity of the area. When you look at the two of them combined, overbuilding – particularly on the small lots, would be contrary to what the goals are. For this reason she said there is a fair and substantial relationship between zoning and this particular area. Ms. Karnis said that if the town wanted different setback requirements for small lots it would have done so, but chose not to. She pointed out another area in town where the town *did* change the setback requirements, along the (Pemigewasset) river.

Mr. Tierney said he asks "where is the unique hardship" and if there is a place where the shed could be put but the applicant does not desire it, that then he believe a hardship does not exist. Therefore based on the current regulations there is no hardship.

Mr. Smith said he felt the slope creates a hardship for where the applicant can place the shed, and putting it in front of the house could make it a hardship for the neighbors. He said he did not like two sheds close together but pointed out that the Fire Chief's, in his letter, did not have a problem with it.

Mrs. Vose read Fire Chief Drake's letter into record, where he stated that he would prefer to have storage items, which could potentially increase the fire load, in the proposed shed and not in the house.

Special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Ms. Karnis said she does not see any special conditions of the property that make it different from others in the area. Mr. Smith agreed that most of the properties in the area have the same issue. Mr. Tierney agreed with their statements.

Mr. Tierney asked for any further discussion before making a motion.

Mr. Smith said the other variances granted, as noted by Mr. Perreault, are different that this situation but are unique to each property.

Ms. Karnis made a motion, seconded by Mr. Smith, to deny the variance request based on the facts presented and the hearing discussion. Vote was unanimous.

MINUTES

Ms. Karnis made a motion, seconded by Mr. Smith, to continue a vote on the minutes until the meeting of 10/14/16. Vote was unanimous.

ADJOURNMENT

Ms. Karnis made a motion, seconded by Mr. Smith, to adjourn at 7:04 pm. Vote was unanimous.

Respectfully Submitted,

Pam Vose
Administrative Assistant

Town of New Hampton

Zoning Board of Adjustment

6 Pinnacle Hill Road, New Hampton, New Hampshire 03256 • 744-3559

NOTICE OF DECISION

Case No: **10052016 - PERREAULT**

DENIED

October 6, 2016

Brian Perreault
28 Deer Field Lane
Stow, MA 01775

Re: Variance Request
Article IV, Section A(4)iii

Dear Mr. Perreault:

The Zoning Board of Adjustment at its meeting on September 14, 2016, site visit and meeting on October 5, 2016, and after due Public Hearing, completed its consideration of your request for a Rehearing for a Variance under the New Hampton Zoning Ordinance Article IV, Section A(4)iii, regarding your request to construct a 10' by 16' shed within the 20-foot setback of a side property, the shed being one foot from the property line.

The property is shown on Tax Map U-10 as Lot 8 in the General Residential, Agricultural and Rural District, and Waukewan Watershed Overlay District, located at 94 Seminole Avenue.

The request for a variance was denied based on the following:

> Granting the variance would be contrary to the public interest because the essential character of the neighborhood and the cumulative impact of granting this and similar variances to others in the neighborhood jeopardizes the goals of the setback requirements in the Zoning Ordinance, to prevent safety issues and in this case, overbuilding on lots. Previous variances that were granted, as pointed out by the applicant, were based on very different facts and were unique to those properties, and therefore cannot be compared to this application.

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The loss to the individual does not outweigh the gain to the public interest as substantial justice is done in that setbacks would be preserved. The applicant is not being denied use of his property, he is not being allowed to create storage where he desires to place it.

The board felt there was not an unnecessary hardship owing to special conditions of the property that distinguish it from other properties in the area as other lots in the neighborhood are small and non-conforming in size, and have similar slopes. The board determined that a fair and substantial relationship between the setback requirements and the spirit of the ordinance exists and that by denying the variance the integrity of the area would be preserved and overbuilding on small lots would be prevented. The board determined there was no unique hardship as the applicant is not being denied storage, but storage is being denied where he desires it.

Please be advised that you have the right to petition to the superior court as provided under RSA 677:4. Said petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable.

Paul J. Tierney, Chair
Zoning Board of Adjustment

Cc: Board of Selectmen
Town Clerk
Planning Board

7015 0640 0007 7659 6984

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OCT - 7 2016

Sent To: Brian Perreault
Street and Apt. No., or PO Box No.: 28 Deer Park Lane
City, State, ZIP+4®: Stow, MA 01775

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

000167

CHAPTER 307

SB 147-FN – FINAL VERSION

03/11/09 0665s

03Jun2009... 1743h

03Jun2009... 2043h

06/24/09 2221CofC

06/24/09 2355eba

2009 SESSION

09-1005

01/05

SENATE BILL ***147-FN***

AN ACT relative to the data collection practices of health care providers, relative to the development of an uninsured health care database, and defining "unnecessary hardship" for purposes of zoning variances.

SPONSORS: Sen. Hassan, Dist 23; Sen. Cilley, Dist 6; Sen. Fuller Clark, Dist 24; Sen. Gilmour, Dist 12; Sen. Houde, Dist 5; Sen. Kelly, Dist 10; Sen. Merrill, Dist 21; Sen. Reynolds, Dist 2; Rep. Hammond, Hills 3; Rep. Donovan, Sull 4; Rep. Butler, Carr 1

COMMITTEE: Commerce, Labor and Consumer Protection

AMENDED ANALYSIS

This bill:

I. Requires hospitals, community health centers, and hospital-owned providers to submit data to the department of health and human services for any person who is uninsured and whose care is not paid for by a governmental program.

II. Requires the commissioner of the insurance department and the commissioner of the department of health and human services to enter into a memorandum of understanding for collaboration in the development of a comprehensive uninsured health care database. The bill grants rulemaking authority to the commissioners for the purposes of the collaborative effort.

III. Defines an unnecessary hardship for a zoning variance.

- -

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

03/11/09 0665s

03Jun2009... 1743h

03Jun2009... 2043h

06/24/09 2221CofC

06/24/09 2355eba

09-1005

01/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT relative to the data collection practices of health care providers, relative to the development of an uninsured health care database, and defining "unnecessary hardship" for purposes of zoning variances.

Be it Enacted by the Senate and House of Representatives in General Court convened:

307:1 Statement of Purpose. The purpose of this act is to create a system to capture information on the provision of health care services to uninsured persons to obtain a better understanding of the impact of uninsured persons on public health, health care providers, and the commercial insurance market. With the increase in uninsured persons in New Hampshire and the escalating problem of the affordability of health insurance, the existing safety net, which relies on community health centers and hospitals, both with limited capacity, may not be sustainable. New Hampshire's health care safety net is an integral and essential part of its health care financing and delivery system. It is vitally important to monitor each part of the system through the collection of data that identifies and quantifies how safety net services are accessed and used in New Hampshire. To the extent allowed by HIPAA, this data shall be available as a resource for insurers, employers, providers, purchasers of health care, and policymakers to review health care utilization and expenditures.

307:2 New Paragraphs; Health Care Data Collection; Waiver. Amend RSA 126:25 by inserting after paragraph III the following new paragraphs:

IV.(a) Health care data shall be submitted in accordance with rules adopted pursuant to RSA 126-S for the following entities:

(1) Licensed hospitals, as defined in RSA 151-C:2, XX, and pursuant to the memorandum of understanding entered into by the insurance department and the department of health and human services.

(2) Licensed health care providers, as defined by RSA 151-C:2, XXX, employed or legally controlled by a hospital with the exception of long-term care facilities.

(3) Hospital-owned physician practices which shall include all physician practices that are owned or controlled by a hospital or a financial intermediary of a hospital.

(4) Federally qualified community health centers as defined by section 330 of the Federal Public Health Service Act, 42 U.S.C. section 254b.

(5) Community health centers. For the purposes of this paragraph, "community health centers" are non-profit community based providers of comprehensive primary and preventive health care services to the state's uninsured and Medicaid populations regardless of the patient's ability to pay, and are governed by boards of directors that are at least 51 percent composed of health center patients.

(b) Hospitals shall submit the health care data required under this paragraph for the entities identified under subparagraphs (a)(1)-(3). Community health centers as identified under subparagraphs (a)(4) and (5) shall submit their health care data directly. The health care data shall include information for each service that includes dates of service, patient demographics, provider information, charge information, and clinical diagnosis, and procedure codes. Neither the state nor its agents shall collect or otherwise obtain direct personal identifiers in connection with any health care data relating to uninsured individuals. For the purposes of this section, "direct personal identifiers" includes information relating to an individual that contains primary or obvious identifiers such as the individual's name, street address, e-mail address, telephone number, and

social security number. An individual's day of birth shall not be collected.

V.(a) A hospital may submit an application to the insurance commissioner for a one-year exemption from some or all of the reporting requirements set forth in paragraph IV. The commissioner shall grant the exemption if the hospital establishes that the data reporting would:

(1) Impose an undue economic burden on the hospital;

(2) Adversely impact the hospital's ability to serve its patients; and

(3) Cause the hospital to reduce the amount of health care services that are delivered.

(b) To establish adverse impact and undue economic burden, the hospital shall demonstrate that it had an average operating margin of lower than one percent over the 3 preceding years.

(c) A hospital may request an extension of the reporting requirements as set forth in paragraph IV of up to one year to make the technical changes required to meet such reporting requirements, if it establishes that there are special circumstances that make compliance impracticable.

307:3 New Chapter; Uninsured Health Care Database. Amend RSA by inserting after chapter 126-R the following new chapter:

CHAPTER 126-S

UNINSURED HEALTH CARE DATABASE

126-S:1 Database Development and Use.

I. The commissioner of the insurance department and the commissioner of the department of health and human services shall enter into a memorandum of understanding for collaboration in the development of an uninsured health care database. The memorandum of understanding shall include a description of the uninsured database, the criteria and procedures for the collection and the release of the uninsured data set, the requirements for reporting information on the uninsured, and the sharing of the hospital discharge data set as described in RSA 126:25, I(d) and RSA 126:25, IV.

II. To the extent allowed by the Health Information Portability and Accountability Act (HIPAA), the data shall be available as a resource tool for policy analysts, insurers, legislators, employers, health care providers, purchasers of health care, and state agencies to review the uninsured population's utilization of health care, the cost of services provided to the uninsured, and the effect of that utilization on the commercial insurance market.

III. The uninsured health care database shall not include any data that contains direct personal identifiers. For the purposes of this section, "direct personal identifiers" shall include information relating to an individual that contains primary identifiers, such as the individual's name, street address, e-mail address, telephone number, and social security number.

IV. No provider shall be required to submit data until such time as the collection rules adopted pursuant to RSA 126-S:2 become effective.

126-S:2 Rulemaking Authority.

I. The release of the health care data shall be subject to the same requirements as the release of the commercial claims data collected under RSA 420-G:11-a. The commissioner of the department of health and human services shall amend the existing rules adopted pursuant to RSA 541-A relative to the release of commercial claims data to include the release of uninsured data.

II. The insurance commissioner, in consultation with the commissioner of the department of health and human services, shall adopt rules under RSA 541-A, relative to the collection and submission of uninsured health care data. The insurance commissioner shall seek input on the data collection rules from an advisory group that includes representatives from provider organizations that are required to submit these data. The data collection rules shall require that the uninsured health care data be submitted to the insurance department and shall address:

(a) The description of the data to be submitted.

(b) The submission schedule for providing the data.

(c) The contents of the data, which shall reflect data elements typically submitted to a commercial carrier on a CMS-1500 or UB-04 claim forms or any successor forms.

(d) The filing format to be used.

(e) The specific data elements for submission.

(f) The description of the data codes and sources.

(g) Procedures for providing incomplete data.

(h) Procedures and criteria for encrypting the data and ensuring that the data do not contain direct personal identifiers.

III. The insurance commissioner shall ensure that the data collection rules adopted pursuant to this section under RSA 541-A provide licensed health care providers the following options for the submission of health care data for the uninsured:

(a) The submission of hospital discharge data by licensed health care providers under RSA 126:25, I(d) shall be deemed to satisfy the data submission requirements set forth in RSA 126:25, IV.

(b) Electronic data sets submitted by licensed providers of health care and licensed health care providers not subject to submission pursuant to the hospital discharge data set in RSA 126:25, I(d) may contain similar data elements as required under the hospital discharge data set in RSA 126:25, I(d), and RSA 126:25, IV. The insurance department shall allow flexibility in the actual electronic format of such data to minimize the burden and costs to licensed providers of health care and licensed health care providers choosing to submit data in this format.

126-S:3 Report. The insurance commissioner shall make an annual report to the oversight committee on health and human services, established in RSA 126-A:13, and the house commerce and consumer affairs committee relative to the implementation of this chapter and the data analysis collected pursuant to this chapter.

307:4 Appropriation. For the purposes of implementing the provisions of RSA 126-S as inserted by section 3 of this act, the New Hampshire insurance department is hereby authorized and directed to seek governor and council approval to enter into an agreement with Bi-State Primary Care Association to administer an equitable system to distribute funds to community health centers subject to RSA 126-S to help defray its data submission costs. The sum of $70,000 for fiscal year 2010 and the sum of $50,000 for fiscal year 2011 shall be appropriated to the insurance department, class code 102 contracts for program services. The source of funds for this appropriation shall be the insurance department's annual assessment pursuant to RSA 400-A:39.

307:5 Statement of Intent. The intent of section 6 of this act is to eliminate the separate "unnecessary hardship" standard for "area" variances, as established by the New Hampshire supreme court in the case of *Boccia v. City of Portsmouth*, 155 N.H. 84 (2004), and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), as those standards have been interpreted by subsequent decisions of the supreme court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the *Simplex* decision, as exemplified by cases such as *Governor's Island Club, Inc. v. Town of Gilford*, 124 N.H. 126 (1983).

307:6 Powers of Zoning Board of Adjustment; Variance. RSA 674:33, I(b) is repealed and reenacted to read as follows:

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(1) The variance will not be contrary to the public interest;

(2) The spirit of the ordinance is observed;

(3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and

(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and 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 therefore necessary to enable a reasonable use of it.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

307:7 Applicability. Section 6 of this act shall apply to any application or appeal for a variance that is filed on or after the effective date of this act.

307:8 Effective Date. This act shall take effect January 1, 2010.

Approved: July 31, 2009

Effective Date: January 1, 2010

LBAO

09-1005

01/21/09

SB 147-FN - FISCAL NOTE

AN ACT relative to the data collection practices of health care providers, relative to the development of an uninsured health care database, and defining "unnecessary hardship" for purposes of zoning variances.

FISCAL IMPACT:

The Department of Health and Human Services and the Department of Insurance state this bill would increase state expenditures, and may increase state revenue by an indeterminable amount in FY 2010 and each year thereafter. This bill will have no fiscal impact on county and local revenue or expenditures.

METHODOLOGY:

The Department of Health and Human Services (DHHS) states this bill requires health care providers to submit health care claim data to the Department for any person who receives health care services and does not have health insurance, and whose care is not paid for by a governmental program. The bill also requires the Department of Insurance and DHHS to enter into a memorandum of understanding for collaboration in the development of a comprehensive uninsured health care database and to adopt administrative rules necessary to provide for the reporting and release of uninsured health data. The bill would give broad rulemaking authority to specify what data is submitted and how it is submitted. The Department is unable to determine the cost of the new system. The Department currently manages a system to collect similar data on the insured that costs $148,000 per year collecting data from approximately 30

insurance carriers. Additionally, the startup costs for this system were approximately $150,000. It is unknown how many different providers would be covered by this bill, so it is impossible to use this past experience to estimate the costs of the new system. The Department assumes that the number of providers subject to data submission under this bill will be many times larger than the universe of insurance carriers. To develop and manage the new system, a new full-time Business System Analyst (LG 28) would be required with salary and benefit costs of approximately $75,608 annually. The exact fiscal impact cannot be determined at this time.

The Department of Insurance assumes that this bill will increase a provider's administrative costs for services provided to uninsured patients. The Department believes that revenues from uninsured patients are less than uninsured patients' healthcare costs and that this shortfall

must be funded from other sources, typically other payors (cost-shifting). The state collects premium taxes on health insurance premiums, and to the extent that insurers increase their premiums to reflect any increased provider costs, and to the extent these costs are absorbed by employers, the state would realize an increase in revenue. The Department states it is not clear whether DHHS or the Department would be responsible for collecting this data. The Department assumes that the claims processing (collection) would be handled via a state contract. The Department estimates that the cost to process claims from providers would be 15 cents a claim and that there might be 500,000 claims per year, for a total cost per year of $75,000. The 15 cents would be subject to inflationary pressures. Both the Department and DHHS have contracts with the Maine Health Information Center (MHIC) to receive processed provider claims. The Department estimates that a one-time MHIC contract cost would be $45,000 to create the infrastructure to process these claims in addition to what is processed today. It is not clear which funds (general funds or insurance funds) would be responsible for these costs.

This bill does not establish positions or contain an appropriation.

State of New Hampshire

HOUSE RECORD

First Year of the 161st General Court
Calendar and Journal of the 2009 Session

Vol. 31 **Concord, NH** **Friday, June 19, 2009** **No. 46**
Contains: Committees of Conference Statements, Meetings and Notices

HOUSE CALENDAR

MEMBERS OF THE HOUSE:

The next House session will be held on **Wednesday, June 24th** at 10:00 a.m. when the House will vote on Committee of Conference reports, including the state budget. Members should save **Thursday, June 25th** in case we do not complete our work on Wednesday.

There will be a briefing on HBs 1 and 2 at 10:00 a.m. on **Tuesday, June 23rd** in Representatives Hall. All members are encouraged to attend. The Continuing Education session planned for **Tuesday, June 23rd** has been cancelled.

The Speaker's Annual Ice Cream Social for members and staff will also take place on **Tuesday, June 23rd**, at 12:30 p.m. in the driveway of the Upham-Walker House, or in case of inclement weather, in the LOB.

Terie Norelli, Speaker

NOTICE

There will be a meeting of committee Chairmen and Vice Chairmen on **Tuesday, June 23** at 8:30 a.m. in Rooms 301-303, LOB.

Terie Norelli, Speaker

NOTICE
BUDGET BRIEFING

Tuesday, June 23, 2009
Representatives Hall

11:00 a.m.

NOTICE

There will be a Democratic Caucus on Tuesday, **June 23** at **1:30 p.m.** and on Wednesday, **June 24** at **9:00 a.m.** in Representatives Hall.

Rep. Mary Jane Wallner, Majority Leader

NOTICE

There will be a Republican Informational Forum on Tuesday, **June 23** at **9:00 a.m.** and a Republican Caucus on **June 24** at **8:45 a.m.** both in Rooms 305-307, LOB.

Rep. Sherman A. Packard, Republican Leader

PROPOSED AMENDMENT TO HOUSE RULE 64

DEADLINES

PROPOSED BY THE RULES COMMITTEE

Add the following to House Rule 64:

Monday, September 21, 2009	First day to file legislation for 2010 Session
Friday, September 25, 2009 at 4:00 p.m.	Last day to file legislation for 2010 Session
Thursday, November 12, 2009 at 4:00 p.m.	Last day to sign off on 2010 legislation
Wednesday, December 2, 2009	Last day for committees to report retained bills

Legislative action in the second-year session shall be subject to the following deadlines:

Wednesday, January 6, 2010	Last day to introduce House bills for 2010 Session

NOTICE

The Calendar closes at 3:00 p.m. on Wednesdays for scheduling and notices. Members and staff who need to schedule meetings should make arrangements with the Clerk's Office for room availability/assignment and publication of meeting notices.

Karen O. Wadsworth, Clerk of the House

WEDNESDAY, JUNE 24

COMMITTEE OF CONFERENCE STATEMENTS

SENATE BILLS

SB 33, allowing lobbyists and those connected with lobbyists to sit on committees established by the judicial branch. The committee of conference was unable to reach agreement.

Rep. David E. Cote

SB 40, relative to protecting workers and local governments with advance notice of impending plant closings and layoffs. The House and Senate agreed to make the following changes: The threshold number of employees that a business must have in order to be affected by this law was reduced from 80 to 75. The definition of "employer" was redefined as follows: For purposes of this chapter, any entity that directly or indirectly owns and operates a business enterprise in New Hampshire that satisfies the criteria in paragraph IV(a) is an "employer." The rest of the definition regarding parent corporations was removed as it merely duplicated the above and was unnecessary.

Rep. James W. Craig

SB 46, relative to group life insurance.
The Senate conferees concurred with the House position on this bill which updates the group life insurance statute to allow affinity groups such as AARP or the AMA who are not employers to offer group life insurance to their members. It also eliminates the minimum group size which was previously 10.

Rep. Susi Nord

SB 52, making technical corrections to laws relative to courts and court procedures.
The Senate agreed with the House position on this bill.

Rep. David E. Cote

SB 65, relative to the acceptance of in lieu payments for the restoration or creation of wetlands.
Upon receiving an explanation of the funding, the committee was satisfied. In addition, both Senate and House members of the conference committee agreed to remove sections 1 and 2 of SB 65 because the same issues were covered in another bill that had more specific language. Other changes agreed upon in SB 65 were technical only, including punctuation, spelling and adding another RSA referencing rivers and streams.

Rep. Marcia G. Moody

SB 67-FN, relative to funding certain AIDS services organizations and relative to certain operating budget reductions for fiscal year 2009.
The Senate agreed with the House position on this bill.

Rep. Robert G. Bridgham

SB 98, establishing a commission to study state regulations governing installation of boilers, pressure vessels, and related high performance HVAC equipment.
The Senate agreed with the House position on this bill. The House clarified the need to study the state regulations governing the installation of European boilers using a study committee instead of a commission as well as explaining the rationale behind studying air emissions as they relate to these boilers.

Rep. Laurie Harding

SB 108, establishing a committee to study the imposition of assessments to retirement system employers for excess benefits paid to retirees.
The House conferees agreed to changes in SB 108 that focus the study committee for employers' excess benefits paid to retirees on earnable compensation and excludes a review of death benefits. The Senate conferees have agreed that two of the four House of Representatives members on the study committee should be members of the Executive Departments and Administrative Committee.

Rep. Patricia M. McMahon

SB 112, establishing a commission to study community and residential-based treatment programs for certain adults with developmental disabilities.
The Senate agreed with the House version of the bill. The conferees adopted an amendment adding the Commissioner of Health and Human Services or his designee to the commission.

Rep. Thomas E. Donovan

SB 114, relative to the threshold for notification for lead levels and a window replacement program.
The Senate agreed with the House position on this bill.

Rep. Suzanne S. Butcher

SB 115, relative to eligibility for the healthy kids program.
SB 115 allows the Healthy Kids corporation to design a health insurance product to cover young adults up to age 26. The amendment agreed to by all conferees maintains 3 important modifications made by the House: 1) makes the legislation enabling rather than mandating; 2) requires that the commissioner of the insurance department review the final plan design in order to determine that it does not adversely effect the commercial market; and 3) requires a report on the progress and impact of the expansion program at the end of two years

Rep. Edward A. Butler

SB 119, relative to provider contract standards.
Every health insurance card issued after January 1st, 2010 will have a logo or other identifying language if the policy is under

the jurisdiction of the insurance commissioner. Minor changes were made to clarify which insurance policies are affected, but the compromise is basically the House position.

Rep. Joel F. Winters

SB 131, relative to state hiring of veterans.
The House conferees agreed with the Senate wording limiting the preferential hiring of veterans to those who served "in time of war."

Rep. Daniel J. Sullivan

SB 133-FN, authorizing purple heart special number plates for veterans still on active duty.
SB 133 provides for Purple Heart plates for active duty military personnel who have earned this distinguished honor. The Senate wanted to include the few remaining Pearl Harbor survivors to the list of veterans who receive their special plates minus the $4 plate fee. The House conferees agreed with the Senate that these survivors of the "Day of Infamy" should be recognized and granted this waiver of fees.

Rep. Michael B. O'Brien, Sr.

SB 142, relative to registration of criminal offenders and relative to involuntary commitment of sexually violent predators.
The Senate agreed to the House version of this bill with a change to the effective date from "upon passage" to September 1, 2009. The Senate requested that this bill contain a change in the effective date of another bill, HB 471, from January 1, 2010 to "upon passage." The House conferees agreed to this request.

Rep. Stephen J. Shurtleff

SB 147-FN, relative to the data collection practices of health care providers and relative to the development of an uninsured health care database.
The base bill of SB 147 requires hospitals, hospital-owned providers and community health centers to submit data to the department of health and human services, and to the insurance department through HHS, for care provided to anyone who is uninsured and whose care is not paid for by a government program. The Senate agreed with the House version of this part of the bill.
Using a new House rule and through a floor amendment, the subject matter of HB 446 was attached to the base bill. That subject matter deals with use and area zoning variances as they relate to unnecessary hardship. The conferees agreed to an amendment presented by the Senate which still achieves the purpose of the original bill as passed by the House Municipal and County Committee and then full House, which clarifies this confusing variance issue.

Rep. Edward A. Butler

SB 167-FN, relative to employee leasing companies
This bill enforces the co-employment relationship between employee leasing companies and client companies. It clarifies the party responsible for wages, benefits and other compensation, and workers compensation insurance. The House Labor Committee recommended one set of changes and the Ways and Means Committee made an additional recommendation to amend the bill. Both were supported by the full House. The Senate objected only to the Ways and Means Committee change, which attempted to make even stronger the bill's intent to protect the rights of an employee relative to a client company. After further consideration, both the departments of labor and insurance felt that this change could have severe consequences that are exactly contrary to its intention. The committee of conference agreed to revert to the version of the bill as amended by the House Labor Committee.

Rep. John Knowles

SB 176-FN, establishing a fee for probationers and parolees who apply to be supervised in another state.
The House and Senate agreed on a final version of the bill that includes language from the Senate version which establishes an application fee for probationers and parolees to request a transfer of supervision to another state and establishes a probation receipts fund to offset the annual dues and extradition costs incurred by the department of corrections pursuant to the interstate compact for adult offender supervision. The Senate agreed to language in the House version of the bill which enables the commissioner to waive the application fee when appropriate. The Senate also agreed to a technical statutory reference change made in the House version.

Rep. Laura C. Pantelakos

SB 178, relative to the operation of the special school district for the education of eligible offenders held in facilities operated by the department of corrections, and establishing the director of community corrections position in the department of corrections.
The Senate agreed to the House position of requiring the salary of the Director of Community Corrections to be assigned

Date: May 14, 2009
Time: 9:46 a.m.
Room: LOB Room 103

The Senate Committee on Public and Municipal Affairs held a hearing on the following:

House Bill 446 defining "unnecessary hardship" for purposes of zoning variances.

Members of Committee present: Senator DeVries
Senator Houde
Senator Sgambati
Senator Roberge
Senator Barnes

The Chair, Senator Betsi DeVries, opened the hearing on House Bill 446 and invited the prime sponsor, Representative Neal Kurk, to introduce the legislation.

Representative Neal Kurk: Good morning, Madam Chairman, and good morning to members of the Committee. I'm Neal Kurk, representing the towns of Goffstown and Weare in Hillsborough County, and I'm the sponsor of this bill.

A bit of background: The Supreme Court, in a series of decisions – the Simplex decision and the Boccia decision – rewrote variance law in the state of New Hampshire from what had been long-standing constitutional tradition. The purpose of this bill was to codify some of that and change some of that. We're codifying the new standard set forth in the Simplex decision and eliminating the confusing standard that the Supreme Court created, ex cathedra, with respect to area and use variances and eliminating the distinction between the two, which caused a great deal of difficulty and problems for volunteer planning boards, because the distinction was almost incomprehensible and very, very confusing.

But in the process of doing this, and it passed the House almost without objection ... In the process of doing this, we ... As we established the Simplex standard in law, some disagreement among legal minds as to whether what

So, I am very much in favor of this. And I hope that whatever Committee or group amendments might come out of this keeps this as intact as it is now.

Senator Betsi DeVries, D. 18: Thank you, Mr. Clinton...

Mr. Clinton: Thank you.

Senator Betsi DeVries, D. 18: ...for your testimony today. Questions? Seeing none, Nancy, I see you were hiding behind there. Did you wish to give testimony today on behalf of the Milton ZBA?

Nancy Johnson: (Speaking from the back of the room) I can be in here next week.

Senator Betsi DeVries, D. 18: You can be here. Thank you so much. Asking Attorney, I need some help ... Waugh? Waugh?

Attorney H. Bernard Waugh: Waugh. I'm not sure I can be here next week, Madam Chair. And I'm here on my own time, so...

Senator Betsi DeVries, D. 18: That's fine. Please come forward.

Attorney Waugh: Thank you. I appreciate being able to. My name is Bernie Waugh, for those that I don't know. I am an attorney. I am a partner in the firm of Gardner, Fulton, and Waugh, which is in Lebanon. I've been there for nine years. Prior to that, I was chief counsel for the New Hampshire Municipal Association. Our firm represents only towns and cities in the state. I am also ... have experience, having served on the Hanover Zoning Board of Adjustment for a number of years since 1986, although I'm now only an alternate.

And I guess, right now ... I realize the time is short, but I'd just like to reiterate the need for this bill. And I have told Representative Kurk that I will make every effort to attend his meeting to work on the wording. I like the wording the way it is, as long as there's some kind of statement on the floor that, you know ... What the purpose of this bill is, is to undo Boccia. I've heard people say, "Well, we've all learned to live with Boccia." I guess we've learned to live with the confusion, but we haven't, certainly, alleviated it.

The board I sit on oftentimes will get a variance case, and we don't know whether it's a – just as the last gentleman said – we don't know whether it's a use variance or an area variance. And we'll go through the analysis twice and see which one we like. I mean, it's ridiculous.

An example, a prime example, of this is a wetlands setback. In the Vigeant v. Hudson case, a variance from a wetlands setback was deemed to be an area variance where Boccia applied. In the more recent case of Schroeder v. Windham, a variance from a wetlands setback was deemed to be a use variance, and that was because their ordinance was written so that it was an overlay district as opposed to written as a setback. Although the intent was exactly the same, we have two different legal standards that were applied. And it doesn't make any sense.

The still undecided issue that, I think, has the worst potential for more confusion and, perhaps, disaster is this whole issue of what is the density in a cluster development. Is that going to be an area variance or is that going to be a use variance? Most density regulations ... I mean, first of all, cluster developments are pretty much supported by everybody. They're cheaper; they're a better way to save open space; and so forth; but the reason they haven't been more widely adopted in New Hampshire, I think, is because citizens don't trust them. They say, "Well, that may be open space today, but, you know, somebody'll figure out a way to fill it in." And if, in fact, the area variance test applies to density in a cluster, then that fear is justified, because the main thing about the, to understand about the, Boccia test is that it's almost impossible to flunk.

My typical, hypothetical example is that, if you can imagine a very tiny 200 by 200 foot grandfathered lot – I'm sorry about my voice – and pretend the owner wants to build a 200 by 200 foot building; in other words, to satisfy no setbacks whatsoever. Under Boccia, that person has to show hardship, would have to show two items. The variances needed to enable the applicant's proposed use, given the special conditions of the property, in this case, its size. It meets that one. And b, the benefit sought – in other words, the 200 by 200 foot building – cannot be achieved by some other method reasonably feasible for the applicant to pursue. And it can't.

So, it really meets that test. And of course, the court really, after Boccia, has gone more into, "Well, does he meet the other tests?" And there's not a lot of law on the other tests, and so that's been even more confusing.

So, I think the double standard created by the Supreme Court is based on the notion that somehow dimensional requirements are not as serious; that the voters, when they passed them, didn't mean them or something. And it's just not true. And especially with modern forms of planning, which are more than, you know ... which this Legislature has indicated an intent to encourage smart growth, things like that. Dimensional requirements can be just as important.

And so, I support the bill. I support the intent of the bill. I'll try and meet with Representative Kurk, if I can, but it's an important thing, and I would urge the Committee to treat it importantly.

Thank you.

Senator Betsi DeVries, D. 18: Questions from the Committee? I have one, and let me see if I can form it for you. We heard that the ... Well, in the Keene decision, it's indicating that the criteria for ... and I'm trying ... I don't know the five-part test by heart, so that's why I'm grappling here. The unnecessary hardship test is confusing. And I'm just wondering if you ... Can you speak to that and help to clarify any of the Keene decision on why that prong of the test is redundant?

Attorney Waugh: Oh, yeah. The ... I read that case just briefly, yesterday.

Senator Betsi DeVries, D. 18: I apologize. I'm just catching some of the ... I'm just catching up on some of the written testimony that...

Attorney Waugh: Yes.

Senator Betsi DeVries, D. 18: We might be ... It might be better asked of those speaking next week.

Attorney Waugh: No, I think I can say it. In other words, the ... Do you have a copy of it? Yeah. The Simplex test, which this bill would enshrine in legislation as opposed to the two double-standard test ... The third prong of that is that the variance would not injure the public or private rights of others. And that is not in the wording of the bill as it currently is drafted, and the reason for that is that the people who drafted the bill thought that it was redundant with ... I mean, this whole bill is about one of the five standards, namely, the unnecessary hardship test.

The people who drafted the wording of this bill thought that the "shall not injure the public or private rights of others" was redundant with some of the other variance tests, namely, the spirit of the ordinance test and the substantial justice test. And the court, in this case, said exactly that; that it is redundant with those other tests, and therefore, it really isn't needed to be singled out specifically.

Senator Betsi DeVries, D. 18: Okay. Questions from the Committee? Thank you.

Attorney Waugh: Thank you.

Senator Betsi DeVries, D. 18: We have ... It looks like we are skipping down to Judy Day, representing herself, speaking in opposition. Judy?

Representative Judy Day: For the record, I'm Representative Judy Day. I represent Rockingham 13: Exeter, Stratham, North Hampton, but...

Senator Betsi DeVries, D. 18: I'm sorry.

Representative Day: That's all right.

Senator Betsi DeVries, D. 18: I should have noticed the tag, Representative. I would have called on you earlier.

Representative Day: I live in North Hampton, so you have heard from my planning board chair, also. And I will ... I believe I can come next week. I'm not sure. So, I'm just going to say that I'm not in opposition to the concept. I am in opposition to the language. For me, it's not clear, and when I tried to read it, I kept thinking: I was on the planning board; if I were on the zoning board, I would not know how to comprehend this to make it work as a zoning board member. So, I'm really appreciative that you're going forward to look more at how to clarify the language.

And I do have some written testimony, but I can e-mail it to you, because I don't have it all organized to give to you right now.

Please see Attachment #6 - Representative Day's e-mailed testimony.

Senator Betsi DeVries, D. 18: That is absolutely fine. And we are planning on continuing the public hearing, so feel free to join us. Watch for the date and time in the calendar.

Representative Day: Thank you very much.

Senator Betsi DeVries, D. 18: Thank you, Representative. We have, wishing to speak, Kenn Ortmann from Rochester.

Kenn Ortmann: I'm sorry, Madam Chair. I don't think I'll be able to be here next week.

Senator Betsi DeVries, D. 18: That is absolutely fine.

Mr. Ortmann: Again, my name is Kenn Ortmann. I'm the Director of Planning and Development in the city of Rochester. We provide staff support

for both the Zoning Board of Adjustment and the planning board. And I wanted to convey to you the Rochester Zoning Board of Adjustment has voted unanimously to ask you to support the bill as it's presented. You have and will be hearing from attorneys about some of the finer points in terms of constitutional and legislative issues. My perspective that I wanted to convey is where the rubber meets the road, and Attorney Waugh did some of that as well.

We've got volunteers trying to fulfill their quasi-judicial responsibilities as best they can, and this artificial distinction between area and use variances has just been an absolute nightmare, both from a staff standpoint in terms of advising the zoning board, as well as for the zoning board members.

And let me just give you three recent, real examples. Somebody wants a fence that's eight feet tall, where our ordinance restricts it to six feet tall. Is that an area variance or is it a dimensional variance or a use variance? Fences are allowed; its use is allowed; but eight-foot tall fences are not allowed. So, is that a use or do we simply talk about area? But area usually talks about setbacks and lot coverage; that doesn't seem to apply either. So, we had a real dilemma there.

We also have had an issue recently where a business wanted a sign that was 120 square feet, where what we allowed was 96 square feet. Again, signs are allowed. So it's not, if you look at that way, it's not a use variance that's being requested. On the other hand, 120 foot, square-foot, signs in that particular zone are not allowed, so maybe it is.

Another example would be: an applicant wanted to put four units where the land area would only allow three. And again, you can make the same argument that four ... The density required by four units is a use that is not allowed or you can argue that the area did not allow four units where it only allows three.

And part of the dilemma from the zoning board, from a staff standpoint, is whatever direction we go, if the applicant isn't happy with our decision, it's likely they're going to appeal the decision using the same issues that you'd use the other test. And it just clogs up the system. It's very, very difficult.

And let me just close with a real horror show that we just went through. We had an applicant that had a lot that was larger than what the minimum requirement was in that zone. And what this applicant wanted to do was to split the lot into two separate lots. Now, when we talk about this hardship test, and I think Bernie mentioned it, covered this pretty well as well ... When we look at the hardship test, basically what the court said to this

applicant was, "Okay. You need a variance to do what you want to do; so you met that test using the Boccia and the area. And there's no other way to do it, so therefore, you have met this hardship test." And you were, they were, allowed to subdivide.

I mean, there was nothing about this lot - in terms of a stream running through it; in terms of steep slopes; in terms of outcrops of granite; in terms of its size; its shape - that made it more difficult to develop. It's just that the person couldn't do what they wanted to do. So, this whole hardship test, basically, has gone away.

So, bottom line from our standpoint, is when you do have something ... When you can figure out that something clearly is an area variance, and you have to use the Boccia test, that the hardship test has become a meaningless test. And I think what Representative Kurk, sort of tongue-in-cheek, but I think it's very serious from our standpoint is: you need to do something. And even if, even if this esteemed group of attorneys can't agree on one particular piece of the language, if you can move ahead with what has come out of the House.

And you know, if a year or two from now there is a piece that needs to be fine-tuned or tweaked, you can do that, but we really have to get rid of this issue that makes it so hard for our volunteers to figure out which direction they should go ... Our zoning board volunteers ... And even if they do, in the area standpoint, the fact that the hardship test has been gutted ... It's just not, I don't think, what anybody has intended.

Thank you.

Senator Betsi DeVries, D. 18: Thank you for your testimony. Do we have questions before you? Thank you, sir.

Mr. Ortmann: Thank you.

Senator Betsi DeVries, D. 18: I have nobody else signed up to speak today that cannot come back next week. Were there members of the audience wishing to speak that cannot return that did not sign up with me? That being said, Representative Kurk, I'm hoping, if there are any work sessions that occur over the course of time, that you include myself, possibly my Vice Chair...

Representative Kurk: With this group of attorneys?

Senator Betsi DeVries, D. 18: ...in the scheduling with any group just so that I have the privilege of hearing how this might evolve.

Attachment #1

New Hampshire Municipal Association

May 14, 2009

Hon. Betsi DeVries, Chair
Senate Committee on Public and Municipal Affairs
State House, Room 106
Concord, New Hampshire 03301

Re: House Bill 446, defining "unnecessary hardship" for purposes of zoning variances

Dear Sen. DeVries:

I write to express the Municipal Association's support for **HB 446**, as passed by the House. This bill implements one of the policy positions adopted by our members at our Legislative Policy Conference in September 2008.

Some background and history on the granting of variances will be helpful. Under RSA 674:33, a zoning board of adjustment has the power to "authorize . . . such variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

Stated a little more neatly, this statute establishes four criteria that must be satisfied for a ZBA to grant a variance:

1. The variance will not be contrary to the public interest;
2. Owing to special conditions (of the land), a literal enforcement of the ordinance would result in ***unnecessary hardship***;
3. The variance is consistent with the spirit of the ordinance; and
4. Substantial justice is done by granting the variance.

The New Hampshire Supreme Court long ago added a fifth criterion:

5. The variance would not diminish the value of surrounding properties.

Over the years, most of the questions about these criteria have centered on the "unnecessary hardship" criterion. For decades, the Supreme Court defined "unnecessary hardship" to mean that due to unusual conditions of the land, a strict application of the zoning ordinance would deprive the owner of "any reasonable use" of the land. This was a very strict standard, as almost any piece of property can be put to *some* reasonable use. Thus, a ZBA that followed the law faithfully would almost never grant a variance.

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In 2001, in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), the Supreme Court concluded that its then-existing test for unnecessary hardship was so difficult to satisfy that it did not provide sufficient protection for constitutional property rights. The Court held that henceforth, an unnecessary hardship could be established if (a) due to special conditions of the property, the proposed use of the land is reasonable, (b) no fair and substantial relationship exists between the purpose of the zoning ordinance and the specific restriction on the property, *and* (c) granting the variance would not injure the public or private rights of others. The practical result of the *Simplex* decision was to make a variance much easier to obtain. Although this was a major change in the law, zoning boards gradually got used to it.

In 2004, the Supreme Court again changed the law dramatically, in *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004). In that case the court drew a distinction, for the first time, between a "use" variance and an "area" variance. A use variance allows the landowner to engage in a *use of the land* that is prohibited by the zoning ordinance. In contrast, an area variance involves a use that is permitted by the ordinance, but grants the landowner an exception from *physical standards*, such as setbacks or size limits.

The court in *Boccia* announced a different standard for finding "unnecessary hardship" in an area variance case: (a) due to special conditions of the property, a variance is necessary to allow the applicant to construct the development as designed; *and* (b) the owner cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.

The court's decision in *Boccia* created two problems: First, the distinction between a use variance and an area variance is not nearly as clean as the court suggested. This often leaves zoning boards struggling with which standard to apply—*Simplex* or *Boccia* (or sometimes both, if the applicant is requesting multiple variances)—before they even get to the merits of the case.

Second, the *Boccia* test is almost impossible *not* to satisfy. The first criterion is merely a statement of the obvious: the applicant cannot do exactly what he wants without a variance. The second criterion requires the applicant to show that any other design *of the same use* would impose an undue financial burden. To find against an applicant, the ZBA would essentially have to perform its own economic analysis of the proposed design and of the alternatives. It is much easier to simply grant the variance in reliance on the applicant's representations about the financial burden.

HB 446 addresses these problems by eliminating the distinction between use and area variances and applying the same criteria, based on the *Simplex* test, to all variance requests. It also improves and clarifies the *Simplex* test by using language that the Supreme Court has employed in subsequent cases to explain the confusing language of *Simplex* itself.

Under **HB 446,** an unnecessary hardship will be deemed to exist if, "owing to special conditions of the property that distinguish it from other properties in the area, ***either*** (i) there is no reasonable and economically viable use that can be made of the property that would be in strict compliance with the ordinance; ***or*** (ii) no fair and substantial relationship exists

between the general purposes of the zoning ordinance and the specific application of the ordinance to the property, and the proposed use is otherwise a reasonable one." (Emphasis added.) As the last sentence of the bill makes clear, this test would apply to both use and area variances.

Clause (ii) in this definition is the same as the *Simplex* standard (as clarified by subsequent cases). It omits the third prong in that standard—no injury to the public or private rights of others—because subsequent case law (*e.g., Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009) indicates that this prong is merely redundant of the other variance criteria under RSA 674:33 (cited at the beginning of this letter). Thus, including them in the unnecessary hardship test is confusing.

Clause (i) is the pre-*Simplex* standard—the one that, as discussed earlier in this letter, was almost impossible to satisfy. This is included as an alternative to the *Simplex* standard because there may be very rare cases where the *Simplex* test is not met, but the pre-*Simplex* test is: *i.e.*, the zoning ordinance prohibits any reasonable and economically viable use of the property. In those rare cases, allowing the ZBA to grant a variance may be necessary to avoid an unconstitutional taking of property.

Apart from clarifying the test for an unnecessary hardship, HB 446 puts all of the criteria for granting a variance into a logical order, including the judicially created criterion regarding surrounding property values. Please remember that *all five* of those criteria—not just the unnecessary hardship test—must be satisfied in all variance cases.

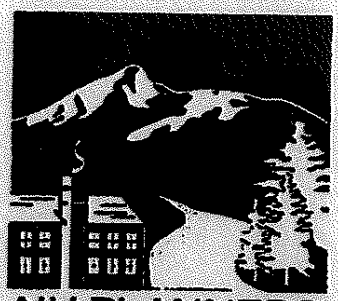
Although the language of **HB 446** appears somewhat complex, it is actually much simpler than the aggregate of all the information that zoning boards currently must keep in mind in deciding variance cases. Boards will no longer have to distinguish between a use variance and an area variance, nor will they have to read several conflicting court decisions to try to understand what standards to apply. The applicable standards will be set forth in one place, in RSA 674:33. We believe this will make the job of zoning boards much easier.

For these reasons, I ask you to recommend **HB 446** as ***Ought to Pass.*** Thank you for your time and consideration in taking on this difficult issue.

Sincerely,

Cordell Johnston
Government Affairs Attorney

Attachment #2



NH PLANNERS ASSOCIATION

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May 14, 2009

The Honorable Betsi DeVries, Chair
Senate Public and Municipal Affairs Committee
Legislative Office Building, Room 103
Concord, NH 03301

Subject: ***HB 446, defining "unnecessary hardship" for purposes of zoning variances.***

Dear Senator DeVries:

The New Hampshire Planners Association is pleased to express its strong support for HB 446, which will clarify the extremely complex state of zoning variance law in New Hampshire.

The variance has been described as the constitutional safety valve for zoning and is meant to preserve constitutionally-protected property rights. Historically speaking, the threshold for the unnecessary hardship criteria for a variance was difficult to reach—that there existed no reasonably viable use for the land without the variance.

HB 446 provides alternative analyses for a Zoning Board of Adjustment (ZBA) to grant a variance. ***Both alternatives already exist*** as interpretations of the N.H. Constitution by the Court. The first alternative is largely a codification of the Court's opinion in Simplex Technologies v. Newington, 145 N.H. 727 (2001). The second alternative may be used in those rare circumstances in which the Simplex standards may not be met by the applicant, but where rigid application of a zoning provision would result in an unconstitutional taking of private property. Both are necessary.

In working to capture the essence of Simplex, HB 446 includes clarifying language that the Court used in subsequent decisions. HB 446 also eliminates a portion of the Simplex analysis (the variance would not injure the public or private rights of others), which the Court has essentially found to be redundant, as it is "coextensive" with other variance criterion (see, for example, Farrar v. City of Keene, decided May 7, 2009). Enacting the provisions included in HB 446 will provide clear guidance to ZBAs about the correct standards under the N.H. Constitution.

A few years after its Simplex decision, the Court decided Boccia v. Portsmouth, 151 N.H. 85 (2004), in which the Court distinguished between "use" and "area" variances. While Simplex was decided by the Court as an interpretation of the Constitution, the Court's opinion in Boccia finds no similar fundamental legal basis. Rather, the Court held that there should be different standards for uses and dimensional variances because the Court "believe[d] that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met."

But administering these separate standards is difficult and confusing. It is oftentimes unclear whether a use or area variance is necessary in a given situation. Additionally, the relative ease with which an applicant may meet the Boccia area variance standard seems to render dimensional standards almost meaningless in some circumstances. HB 446 attempts to strike a balance among the issues raised by the Court in these cases and reunifying the process into one analysis with a more clear set of criteria for local zoning boards to administer.

The New Hampshire Planners Association urges your committee to recommend passage of HB 446. Thank you for your consideration of our testimony.

Sincerely,

Richard Sawyer, AICP
Legislative Liaison

Date: May 21, 2009
Time: 10:05 a.m.
Room: LOB Room 103

The Senate Committee on Public and Municipal Affairs held a hearing on the following:

House Bill 446 defining "unnecessary hardship" for purposes of zoning variances.

Members of Committee present: Senator DeVries
Senator Sgambati
Senator Roberge
Senator Barnes

The Chair, Senator Betsi DeVries, reconvened the hearing on House Bill 446 and recognized the prime sponsor, Representative Neal Kurk.

Representative Neal Kurk: Good morning, Madam Chairman, and good morning to members of the Committee. For the record, I'm Neal Kurk, representing Hillsborough District 7: Weare and Goffstown.

As the Chair will recall when the public hearing was recessed previously ... That's good timing, Mr. Meyers. When the public hearing was recessed, it was for the purpose of trying to get some consensus about the exact form, everybody having agreed that this was something that should go forward. There was a meeting last night of a working group. To do this, they came to some sort of consensus. That consensus has been changed this morning, and I think that it certainly is acceptable to me. I think I understand the situation better, but let me explain, for members of the Committee, very briefly, because others behind me are more knowledgeable about this.

Senator Betsi DeVries, D. 18: We'll get hot, but it'll be easier to hear.

Representative Kurk: Okay. The ... A number of years ago, the Supreme Court made a variety of decisions dealing with variances that ... some of which dealt with constitutional changes and some of which, basically, represented judicial legislation. And the problem with it was that it engendered a great deal of confusion, because the Supreme Court, from a

Attorney Johnston: And I guess there's no hard and fast answer to that question.

Senator Betsi DeVries, D. 18: No, that's fine. I just needed to get his attention.

Attorney Johnston: Okay. I don't think there's any hard and fast answer to that question. The ... I think most people agree that, when the court decided the Boccia case, it created a standard for area variances that is somewhat easier to satisfy than the standard for use variances. So, I have to be honest to say that, as a general matter, it is now easier to get an area variance than it was before 2004, when the Boccia case was decided.

The intent of this bill ... The motivation behind this bill is not to make it easier or harder to get a particular kind of variance. The motivation for it is that setting up this separate standard has just created mass confusion with ZBAs; and not only with ZBA members but with applicants not knowing whether they have to apply for a use variance or an area variance. And there are so many cases where it's not clear whether what's called for is a use variance or an area variance.

And I've been told by a number of people who are on ZBAs or represent ZBAs, the ZBA has two different forms: one for the ... that you fill out if you want a use variance; one that you fill out if you want an area variance. Sometimes, the applicant doesn't really know. The ZBA ... And sometimes the applicant fills out the wrong form, and the ZBA says, "No, this is an area variance not a use variance." There are cases where they have them fill out both, because they don't really know what it is.

There are at least two or three cases that have gone to the Supreme Court solely on the issue of: Was this a use variance or an area variance? So, it's just ... And so, the whole thing goes to the Supreme Court before you even get to the question of: What standard are we going to apply in considering this variance?

So, the purpose of the bill is to make it easier to understand, not to make it easier or harder. But the reality is, at least in some cases, it will make it somewhat harder to get an area variance, because the standard that the Court created in Boccia was so ... essentially, almost impossible not to satisfy. The standard that the Court established in Boccia, as I've summarized it toward the middle of my hand-out, is: "1. Due to special conditions of the property, a variance is necessary in order to allow the applicant to construct the development as designed." In other words, I need a variance because the