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SUPREME COURT

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STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2017-0225

Brian M. Perreault &a. v. Town of New Hampton

Appeal by Petition pursuant to RSA 541:6  
Belknap Superior Court

Brief for Petitioner/Appellant, Brian M. and Margaret A. Perreault

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Table of Statutes

**§ 674:33. Powers of Zoning Board of Adjustment**

- I. The zoning board of adjustment shall have the power to:
- (a) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16 ; and
  - 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.

## Table of Cases

1. Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001).  
Pages 4, 5, 8, 11, 12, 13, 14, 15, 16, 19, 21, 22, 23, 24 and 25.
2. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508  
(2011). Pages 4, 5, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24 and 25.

### Questions Presented

1. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001) to Perreaults' request for a variance? (Transcript Unavailable)
2. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 (2011) to Perreaults' request for a variance? (Transcript Unavailable)
3. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of RSA 674:33, I (B), to Perreaults' request for a variance? (Transcript Unavailable)
4. Did the Court err, as a matter of law, when it affirmed the ZBA's decision denying Perreaults' variance? (Transcript Unavailable)

Statement of the Case and Statement of Facts Material to the Questions Presented.

Statement of the Case:

Brian and Margaret Perreault are the owners of a parcel of land approximately .3 acres in size, with a home thereon, located on the shore of Lake Waukegan in New Hampton, New Hampshire. Their lot, per the Town of New Hampton Zoning Ordinance is substandard. Much of the buildable lot is either occupied by their home and deck or has steep slopes.

On, or about, March 17, 2016, the Perreault's applied to the Town of New Hampton for a building permit to build a shed so they could securely store canoes, kayaks, paddleboats, deck furniture, lawn furniture, a grill, fuel, lawn mowers, beach chairs and other recreational items. The only place they could reasonably place the shed was on a level area abutting a neighbor located within the setback.

The Town of New Hampton denied the Perreaults' request for a building permit and sent them to the Zoning Board of Adjustment for a variance pursuant to RSA 674:33 I. The Perrault's applied for a variance. Attended two hearings and their request for a variance was denied. Subsequently they appealed for a re-hearing, which was granted, citing as grounds for granting their request for a variance the cases of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). During the rehearing the Perreaults introduced testimony and evidence to demonstrate their request for a variance would not alter the essential character of the neighborhood, because numerous surrounding properties had sheds and other out buildings in their setbacks. They demonstrated their request would not threaten the public health, safety or welfare, because again, neighboring and other similarly situated properties enjoyed the privilege of storage in buildings within setbacks in a manner that was being denied the Perreaults. Too, they showed the general public would realize no appreciable gain by denying their request for a variance, because again, neighboring properties enjoyed storage in buildings within their setbacks and denying a similar benefit to the Perreaults produces no public gain. And, finally, the proposed shed, in its proposed location, was a reasonable use of the property given the property's special conditions.

At the conclusion of the rehearing the Town of New Hampton Zoning Board of Adjustment again, denied the Perreaults' request for a variance. The Perreaults appealed to the Belknap Superior Court where the Court affirmed the Town of New Hampton Zoning Board of Adjustment's denial of their variance request.

Specifically the Court found the Perreaults' request not to be in the public interest and contrary to the spirit of the ordinance. Siding with the Town, the Court agreed that granting the variance "...would jeopardize the goal of the setback requirement which was to prevent safety issues and overbuilding of lots...and further found the "...ZBA reasonably considered the cumulative effect that such variances may have on the area."

(See Order of the Belknap Superior Court. Brian M. Perreault et. al., dated. March 28, 2017. at Page 8.)

The Court did not find the evidence of previously granted variances persuasive because those variances “were based on very different facts and were unique to those properties”. (See Order of the Belknap Superior Court. Brian M. Perreault et. al., dated. March 28, 2017. at Page 8.)

With respect to substantial justice, the Court opined the Town’s assertion, “...that the loss to...[Perreaults]...by the denial of the variance is negligible because a conforming location for the proposed shed exists on the property or alternatively... [Perreaults]...can continue to store equipment in the three plastic sheds currently...on the property”. The Court further agreed, “...the public would benefit from the denial because the setback requirements were being preserved and Perreaults were not being denied use of the property, but instead were only being limited where they could construct the proposed shed” and concluded writing...“the fact remains the Perreaults could build the shed without jeopardizing the purposes of the Town’s setback requirements” (See Order of the Belknap Superior Court. Brian M. Perreault et. al., dated. March 28, 2017. at Page 10.)

This appeal followed.

Statement of Facts Material to the Questions Presented:

Brian and Margaret Perreault, are the owners of a parcel of land approximately .3 acres in size, with a home thereon, located on the shore of lake Waukegan at 94 Seminole Ave., New Hampton, New Hampshire, 03256 also known as Town of New Hampton, Tax Map U10, Lot 8. (See record Tab A, Page 000004). The dimensions of Perreaults' lot are 93.6' along the road, 147' along the western lot line, 90' along the lake shore and 137' along the eastern lot line. (See record Tab A, Page 000004 and Tab B, Page 000016). The setbacks for Perreaults' lot are 35' along the road, 20' along the western lot line, 20' along the lake shore (50' per the Shore land Protection Act), and 20' along the eastern lot line. (See record Tab A, Page 000004 and Tab B, Page 000016). Per the Town of New Hampton Zoning Ordinance, the Perreaults' lot is a non-conforming lot. (See record Tab B, Page 000015 and Tab H, Page 000029).

The Perreaults' home and deck occupy the majority of their property that is not within the setbacks. (See record Tab A, Page 000004, Tab B, Pages 000015 and 000016 and Tab H, Page 000029). The land between the house and the road, where the steps are located and along the eastern portion of the property is steep and largely covered by grass. (See record Tab H, Pages 000085 and 000086). The land along the shore, but within the 50' setback, is steep and rocky along the shore but relatively level and grassy between the house and the slope to the shore and is also relatively level along portions of the western lot line where the land is undisturbed ground.

The Perreaults want to build a 10' x 16' shed on their property but due to the steep slopes, and the land not subject to setbacks being occupied largely by their home, they planned to build their shed in the level area along the western lot line with the shed's backside 1' away from a neighbor's shed which is within that neighbor's 20' setback. (See record Tab A, Page 000004, Tab B, Pages 000015 and 000016 and Tab H, Page 000029). The purpose for the shed is to securely store canoes, kayaks, paddleboats, deck furniture, lawn furniture, a grill, fuel, lawn mowers, beach chairs and recreational items.

The Perreaults' applied to the Town of New Hampton on, or about, March 17, 2016 for a building permit to build a 10' x 16' shed in the 20' setback of their land and their application was denied. (See Record Tab A, Page 000002 and 000003). They then filed an application for variance from Article IV, Section A.4.iii of the Town of New Hampton zoning ordinance requesting relief from the 20' side setback so they could construct their 10'x16' shed. The Perreaults argued: (1) granting the variance was not contrary to public interest because they proposed removing three plastic sheds and replacing them with a structure that fits better with the character of the neighborhood, (2) their request did not violate the spirit of the ordinance because they would be removing three sheds, one of which was non-conforming, (3) substantial justice would be done as the location is the only reasonable one and they need a shed for storage, (4) surrounding values would not be diminished because the new shed is an improvement as any view of it is blocked by the abutters shed, it fits the character of the neighborhood far better than the three plastic sheds and is hidden from lake by trees, (5) literal enforcement of the ordinance would result in an unnecessary hardship because: their lot is small and non-



conforming with limited space inside setbacks, the proposed location is the only relatively level location on the lot 50' from the lake and their proposal is reasonable due to the fact that it fits the neighboring properties which both have sheds in the setbacks among other things, and (6) in answer to RSA 674:33 5 B, they wrote, special conditions distinguish their property from others as it is a small, non-conforming lot which much less area with no other really level location to place a shed. (See Record Tab B, Page 000008 and 000009).

The Town of New Hampton Zoning Board of Adjustment, after two hearings on Perreaults' request for a variance, one on April 16, 2016 and the other on June 13, 2016, denied the same by notice dated June 14, 2016. (See Record Tab F, Page 000023, Tab J, Page 000034 and Tab K, Page 000039).

Perreaults' appealed the denial and requested a re-hearing on their request for a variance, on, or about, July 11, 2016. Perreaults' appeal incorporated the grounds given in support of the five criteria for a variance provided in their previous application, emphasized the steepness of the slopes, the need for storage of fuels outside the home, the impracticalities of attaching a shed to the home or erecting it on a steep slope, the impact placing the shed on the lawn immediately in front of the home between it and the lake would have on use and enjoyment of the home and cited as new grounds for granting their request for a variance the cases of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). (See Record Tab L, Page 000044-000049).

The request for rehearing was granted on August 3, 2016. A hearing was held on September 14, 2016 and a site visit and hearing were conducted on October 5, 2016. (See Record Tab P, Page 000098-000100, Tab V, Pages 000128-000133 and Tab Z, Pages 000155-000161).

At the rehearing, in addition to testimony and evidence enumerated in their original application, Perreaults' introduced testimony and evidence including plans showing the neighbors abutting them to the west, have a shed on their lot line and that it is this shed that Perreaults' want to abut with their shed. (See record Tab B, Page 000015 and 000016 and Tab H, Page 000029). Similar to their neighbor on the western side of their property, Perreaults demonstrated the neighbor on the east has a shed within that neighbor's 20' setback. (See record Tab B, Page 000015 and 000016 and Tab H, Page 000029). Perreaults entered photographic evidence that other properties on Perreaults' road, Seminole lane, New Hampton, New Hampshire have buildings within the setbacks. These include a garage at 6, 8 and 12 Seminole lane. (See record Tab N, Pages 000057, 000058 and 000059, a barn at 12 Seminole lane. (See record Tab N, Page 000060), a garage and shed at 14 Seminole lane. (See record Tab N, Pages 000061 and 000062), a garage and shed at 20 Seminole lane. (See record Tab N, Pages 000063, 000064, 000065, 000066 and 000067) a shed at 28 Seminole lane. (See record Tab N, Pages 000069 and 000070), two sheds at 46 Seminole Lane. (See record Tab N, Pages 000072, 000073 and 000074), a garage at 64 Seminole Lane. (See record Tab N, Page 000075), sheds at 70, 74, 76 and 82 Seminole Lane. (See record Tab N, Pages 000076, 000077 and 000078), a

recently approved, by variance, garage, at 84 Seminole Lane. (See record Tab N, Page 000079), two sheds on the land of Perreaults' neighbor to the west at 90 Seminole lane, one being the shed Perreaults would like to abut with their shed. (See record Tab N, Pages 000080 and 000081), three sheds on the land of Perreaults' neighbor to the east at 96 Seminole Lane, one which is within a few feet, in not one foot, from Perreaults' lot line. (See record Tab N, Pages 000082, 000083 and 000084):

Other evidence of Perreaults demonstrated that numbers 6, 8, 12, 14, 20, 24, 28 and 46 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-11-6, U11-7, U11-9, U11-10, U11-12, U11-14, U11-16 and U11-19 respectively. (See Record Tab T, Pages 000122 and 000123). Further evidence showed numbers 64, 70, 74, 76, 82, 84 90 and 96 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-10-1, U10-2, U10-3, U10-4, U10-5, U10-6, U10-7 and U10-9 respectively and that Perreault's property, 94 Seminole Lane is Town of New Hampton Tax Map and Lot Number U-10-8. (See Record Tab A, Page 000005 and Tab T, Pages 000106, 000122 and 000123).

In addition to evidence regarding sheds and garages of neighbors being in the setbacks, Perreaults offered evidence of variances granted by the Town of New Hampton Zoning Board of Adjustment to other waterfront properties in the town where sheds and garages were permitted to be built within setbacks and close to abutter's property lines. In particular, 42 West Shore Rd., Tax Map U-15-6, is nearly identical to Perreaults' situation. In that case a variance for a similar sized shed to be built 1' from the property line was granted. (See Record Tab N, Page 000052 and Tab T, Pages 000000108, 000111-000113, 000114-000117, 000118-000120, and Tab Y, Pages, 000152-000153).

Perreaults also submitted evidence from the manufacturer noting the highest point on the ground to the lowest point on the ground where the shed is to be placed cannot drop greater than 12 inches Perreaults testified the steep slopes made placement of the shed unreasonable and that the only reasonable location was the place selected and identified on the plans. They also cited a letter from the Town of New Hampton Fire Department stating it would rather see storage items that could potentially increase the fire load of the primary living unit ...in an outside storage building...and...[the fire department]..would have no issue with the proposed construction.... (See Record Tab Y, Page 00137, Tab Y 00129 and Tab X, Page 000135).

There was no evidence to prove the diminution of value to surrounding properties, however the neighbor abutting Perreaults, upon whose property the shed Perreaults' would build their shed back to back to, was completely in favor of the project and urged the Board to approve the requested variance. (See Record Tab U, Page 000126). All other testimony is incorporated herein as the record. (See Record Tab V, Pages 000128-000133 and Tab Z, Pages 000155-000161):

Perreaults' request for a variance was denied by letter dated October 6, 2016. In their letter the Town wrote, among other things:

“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.

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.” (See Record Tab AA, Page 000166-000167).

The Perreault subsequently appealed the decision to the Belknap Superior Court where the same was again denied and this appeal followed.

## Summary of Argument

The crux of this case rests in whether this Court agrees the Superior Court incorrectly applied the older and much less flexible standard of unnecessary hardship to the Perreaults request for a variance from the 20' side setback on their property. This is especially so considering the language of RSA 674:33 I(5) and the laws of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) permitted them to apply a more recent and broader standard under their circumstances.

The Perreaults want to build a 10' x 16' shed on their property to securely store canoes, kayaks, paddleboats, deck furniture, lawn furniture, a grill, lawn mowers, fuel, beach chairs and other recreational items. Their land is approximately .3 acres in size.

The Perreaults' home and deck occupy the majority of their property that is not within the setbacks. Due to steep slopes and that part of their land not subject to setbacks being occupied largely by their home, they planned to build their shed in the level area along the western lot line with the shed's backside 1' away from a neighbor's shed which is within that neighbor's 20' setback.

In order to obtain a permit to build their shed the Perreaults requested a variance from the 20' setback requirement from the Town of New Hampton Zoning Board of Adjustment pursuant to RSA 674:33. The Town of New Hampton Zoning Board of Adjustment denied their request citing their failure to meet four of the five criteria required for a variance from terms of the zoning ordinance. They appealed to the Belknap County Superior Court where the court ruled the same as the Town of New Hampton Zoning Board of Adjustment.

In support of their request for a variance, the Perreaults entered testimony and evidence into the record demonstrating their lot is small and non-conforming, the lot is largely steep, it is unreasonable to build the shed as an attachment to the home, building the shed on the meager front lawn in front of the house and between the house and the shore line for safety and enjoyment reasons did not make sense, there is limited space within the setbacks to build a shed, the shed is reasonably necessary for the storage of fuels and recreation equipment, the proposed location is the only relatively level location on the lot 50' from the lake, the location is the only reasonable one, three plastic storage sheds already in use would be replaced by a new shed which is an improvement that fits better with the character of the neighborhood and its construction in the setback is consistent with other outbuildings in the neighborhood and Town as their abutting neighbors have five sheds in the setbacks, eight neighbors have nine sheds in the setbacks, seven neighbors have garages in the setbacks and one neighbor has a barn in the setback.

The Perreaults also presented evidence of other waterfront properties in the town where sheds and garages were permitted to be built within setbacks and close to abutter's property lines.

In the case of Harborside, when reviewing the five criteria for the grant of a variance, the Court wrote with respect to public interest and the spirit of the ordinance, "...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.". Mere conflict with the terms of the ordinance is insufficient... We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's "basic zoning objectives. "one way is to examine whether granting the variance would "alter the essential character of a neighborhood.". Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 515. (2011).

On the matter of substantial justice the Harborside court opined, "Perhaps the only guiding rule on...[substantial justice]...is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." writing further..."We also look "at whether the proposed development [is] consistent with the area's present use." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 516. (2011).

Finally the Harborside Court concluded "... unnecessary hardship exists if, "owing to special conditions of the property that distinguish it from other properties in the area." (1) there is "[n]o fair and substantial relationship" between the "general public purposes of the ordinance" and the "specific application" of the ordinance to the property at issue, and (2) "[t]he proposed use is a reasonable one." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 518. (2011).

The Harborside decision came ten years after the decision in Simplex which found, "... applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 at 723 and 733 (2001).

Per Harborside the Perreaults' request for a variance would not alter the essential character of the neighborhood. Abutting neighbors have five sheds in the setbacks, eight neighbors have ten sheds in the setbacks, seven neighbors have garages in the setbacks and one neighbor has a barn in the setback. Neither will it threaten public health or safety. Their shed will not pose a threat to the lake, environment or their surroundings and is appropriate for the area. The mere fact that other "within" the setbacks buildings exist in the immediate area and that fact that an abutting neighbor and the Town's own fire department, which would prefer to see fuels stored in locations other than dwellings, do not object to the Perreaults' shed, demonstrates there is no threat to the public health, safety or welfare.

Similarly, substantial justice would be done by granting the Perreaults request for a variance. Fifteen neighbors along their street enjoy the use of sheds, garages and outbuildings within their setbacks for the purpose of storing boats, kayaks, lawn mowers, flammables, recreational equipment and more. To deny the Perreaults a similarly located shed used for the same purposes as those of surrounding neighbors, pursuant to Harborside, deprives them of the right to use their property in a manner enjoyed by others, provides no benefit to the public as there already exist twenty two outbuildings within the setbacks in their neighborhood and is an injustice especially when their request to build and locate a shed in the only location that makes sense for their property is consistent with the area's present use meaning: the Perreaults would be one of twenty two neighbors with a storage building in their setback.

The application of the 20' setback based, on the unique qualities of the Perreaults' property compelled the Town of New Hampton Zoning Board of Administration to require the Perreaults build their shed in between their home and the lake in the only area the family can use for reasonable recreation save the lake.

According to the first prong of Simplex, the application of the 20' setback zoning restriction interferes with the Perreaults reasonable use of their property because it compels them to build their shed in between their home and the lake in the only area the family can use for reasonable recreation save the lake thereby concluding in an unreasonable result. Too, as in Harborside, the Perreaults have demonstrated they seek to construct their shed in an inconspicuous location on a part of the only reasonably available flat spot on their property. The application of the setback interferes with the Perreaults reasonable use of their property thus creating for them an unnecessary hardship.

Similarly, the application of the 20' setback to the Perreaults does not bear any fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property because if the purpose of the ordinance is to prevent overdevelopment, the Perreaults are replacing the three temporary storage sheds with one permanent shed, are building their storage shed in the only reasonable location they have available, provides them with safe storage of fuels and other recreation equipment and their "overdevelopment" if you will, is less than the type of overdevelopment on lots that abut and surround, their property. According to the second prong of Simplex and the case of Harborside, this disconnect in the relationship between the ordinances purpose and the limited area for reasonable construction of their shed creates an unnecessary hardship for the Perreaults.

Finally, the purpose, per the Town of New Hampton Zoning Board, for the 20' setback is to prevent overcrowding. Two abutters and thirteen neighbors already enjoy the benefit of storage buildings within their setbacks. It cannot be said the public and private rights of others will be injured when all the Perreaults are asking is to share a similar benefit enjoyed by their neighbors. Per the third prong of Simplex denying the Perreaults a right enjoyed by their neighbors and others in the Town of New Hampton creates an unnecessary hardship for them.

Diminution in value is not addressed here as evidence regarding the same was not entered in the record and the Court agreed there was no evidence of the same.

Of final importance is the Town of New Hampton Zoning Board of Adjustment's and the Court's position that previously granted variances should not count is wrong. First of all, as the Court notes in Footnote (1) of its order, "...these variances were granted when a different criteria applied...". While that may be so, that criteria was more stringent than that laid out in Simplex and Harborside and is the old traditional standard that if you had any use of your property you could not claim unnecessary hardship. And if this is the case those previously granted variances should apply because it was harder then to obtain a variance than it should be in the present case. On a different note, whether the previously granted variances were granted based on a different criteria is immaterial. What matters is the changing character of the neighborhood. No matter how it got there.

The Perreaults have met the requirements of RSA 674:33. The Court should have found the denial unreasonable and legally erroneous. When the Court wrote, "...the loss to...[Perreaults]...by the denial of the variance is negligible because a conforming location for the proposed shed exists on the property or alternatively...[Perreaults]...can continue to store equipment in the three plastic sheds currently...on the property", "...the public would benefit from the denial because the setback requirements were being preserved and Perreaults were not being denied use of the property, but instead were only being limited where they could construct the proposed shed" and "the fact remains the Perreaults could build the shed without jeopardizing the purposes of the Town's setback requirements" the Court applied the traditional standard that if you had any reasonable use at all of your property you were not entitled to a variance, especially a finding that the literal application of the zoning ordinance would result in an unnecessary hardship.

Here in the face of the facts and circumstances presented to it by the Perreaults, specifically the number of sheds, garages and outbuildings enjoyed by abutters and neighbors, which are situated in the setbacks and used for purposes similar to that proposed by the Perreaults, the Court should have found per Simplex and Harborside, their request for a variance should be granted.

## Argument

### Questions Presented

1. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) to Perreaults' request for a variance? (Transcript Unavailable)
2. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) to Perreaults' request for a variance? (Transcript Unavailable)
3. Did the Court err, as a matter of law, by failing, as did the ZBA, to properly apply the law of RSA 674:33, I (B), to Perreaults' request for a variance? (Transcript Unavailable)
4. Did the Court err, as a matter of law, when it affirmed the ZBA's decision denying Perreaults' variance? (Transcript Unavailable)

The 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. This is especially so considering the language of RSA 674:33 I (5) and the laws of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) permitted them to apply a more recent and broader standard under their circumstances.

Prior to Simplex, Zoning Boards of Adjustment, when reviewing applications for variances, pursuant to RSA 674:33, routinely denied the requests finding literal enforcement of the zoning ordinance would not cause an unnecessary hardship because the applicant was, commonly, already using their property for some lawful purpose.

Due to the harsh effect such routine denials were having on the individual rights of landowners to use their property the current RSA 674:33 was implemented and the matters of Simplex and Harborside were decided.

In the case of Simplex, it owned land zoned industrial but surrounded by land zoned commercial. Simplex wanted to develop some of its land with commercial enterprises, i.e. a Barnes and Noble bookstore and restaurant. In order to do so Simplex needed variance to conduct commercial activities in its industrially zoned land. The Town of Newington denied Simplex's request for a variance finding Simplex did not meet five criteria for a variance. Simplex said the decision was unreasonable in light of the fact that their property was nearly surrounded by activity permitted in the commercial zone. The Supreme Court agreed with Simplex.



In its analysis of the Simplex case the Court wrote. "We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property. Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 at 723 and 733 (2001).

In the matter of Parade Residence Hotel, LLC, it requested a variance from the City of Portsmouth to erect marquee and parapet signs on its property. Even though marquee signs were allowed in Parade's sign district, Parade wanted a larger sign than allowed. On the other hand, Parapet signs were not allowed in Parade's sign district and therefore a variance from that prohibition was requested. The City of Portsmouth granted the variance request saying it was reasonable and resulted in no change in the essential character of the neighborhood or harm to health, safety and welfare and that to deny the request would provide no benefit to the public that would outweigh the hardship on the applicant. The trial Court, however affirmed the variance for the marquee signs but reversed the grant of variance for the parapet signs noting the signs benefit to the public did not outweigh the clear provision of the ordinance. The Supreme Court interpreted this finding to mean either, "...the ZBA erred when it found that granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance, or that the ZBA erred when it found that granting the variance would work a substantial justice. See RSA 674:33 I (b) (1), (2), (3)." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 515. (2011).

In rendering its decision in Harborside, the Court analyzed four of the five variance criteria under RSA 674:33: public interest, spirit of the ordinance, substantial justice and unnecessary hardship. In addressing the public interest and spirit of the ordinance factors the Court wrote, "...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." Id. (quotation omitted). Mere conflict with the terms of the ordinance is insufficient. See id... We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's "basic zoning objectives." "one way is to examine whether granting the variance would "alter the essential character of a neighborhood." Id. (quotation omitted). Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare." Id. [Where Id refers to Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581, 883 A.2d 1034 (2005)]. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 515. (2011).

The Court then went on to review substantial justice. In this analysis the Court wrote, "We next address the substantial justice factor. "Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109, 920 A.2d 1192 (2007) (quotation and brackets omitted). We also look "at whether the proposed development [is] consistent with the area's present use." *Id.* We have addressed this factor on just a few occasions. For instance, in *Malachy Glen Associates*, we upheld the trial court's conclusion that the proposed storage facility project worked a substantial justice because it "pose[d] no further threat to the wetlands [...] ... [was] appropriate for the area [...] and [did] not harm its abutters [: ] [therefore,] the general public [would] realize no appreciable gain from denying this variance." *Id.* *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 at 515 at 516. (2011).

Finally in contending with the criteria of unnecessary hardship under RSA 674:33, I(b)(5), the Court concluded, "... unnecessary hardship exists if, "owing to special conditions of the property that distinguish it from other properties in the area," (1) there is "[n]o fair and substantial relationship" between the "general public purposes of the ordinance" and the "specific application" of the ordinance to the property at issue, and (2) "[t]he proposed use is a reasonable one." RSA 674:33, I (b) (5) (A). *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 at 515 at 518. (2011).

Thus, Parade merely had to show that its proposed signs were a "reasonable use" of the property, given its special conditions. See RSA 674:33, I(b)(5)(A); see also *Rancourt v. City of Manchester*, 149 N.H. 51, 54, 816 A.2d 1011 (2003) ("Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'" (citation omitted). *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 at 515 at 520. (2011).

The Perreaults want to build a 10' x 16' shed on their property to securely store canoes, kayaks, paddleboats, deck furniture, lawn furniture, a grill, lawn mowers, fuel, beach chairs and other recreational items. Their land is approximately .3 acres in size. Its dimensions are 93.6' along the road, 147' along the western lot line, 90' along the lake shore and 137' along the eastern lot line. Per the Town of New Hampton Zoning Ordinance, the Perreaults' lot is a non-conforming lot. The setbacks for Perreaults' lot are 35' along the road, 20' along the western lot line, 20' along the lake shore (50' per the Shore land Protection Act), and 20' along the eastern lot line.

The Perreaults' home and deck occupy the majority of their property that is not within the setbacks. Their land between the house and the road, where the steps are located and along the eastern portion of the property is steep and largely covered by grass. That portion of their land along the shore, but within the 50' setback, is steep and rocky along the shore but relatively level and grassy between the house and the slope to the shore and is also relatively level along portions of the western lot line where the land is undisturbed ground.

Due to steep slopes and that part of their land not subject to setbacks being occupied largely by their home, the Perreaults planned to build their shed in the undisturbed level area along the western lot line with the shed's backside 1' away from a neighbor's shed which is within that neighbor's 20' setback.

In order to obtain a permit to build their shed the Perreaults requested a variance from the 20' setback requirement from the Town of New Hampton Zoning Board of Adjustment and needed to provide grounds and evidence demonstrating they could meet the five criteria for a variance set out by RSA 674:33.

In their application for a variance and at the hearings, the Perreaults presented the following as justification for their request:

1. Granting the variance was not contrary to public interest because they proposed removing three plastic sheds and replacing them with a structure that fits better with the character of the neighborhood:
2. Their request did not violate the spirit of the ordinance because they would be removing three sheds, one of which was non-conforming:
3. Substantial justice would be done as the location is the only reasonable one and they need a shed for storage:
4. Surrounding values would not be diminished because the new shed is an improvement, any view of it is blocked by the abutters shed, it fits the character of the neighborhood far better than the three plastic sheds and is hidden from lake by trees:
5. Literal enforcement of the ordinance would result in an unnecessary hardship because: their lot is small and non-conforming, there is limited space within the setbacks to build a shed, the lot is largely steep, the shed is reasonably necessary for the storage of fuels and recreation equipment, it is unreasonable to attach the shed to the home, erect it on a steep slope or build it on the lawn immediately in front of the home as that would diminish the use and enjoyment of the home, its value and prevent parents from observing children swimming in the lake, the proposed location is the only relatively level location on the lot 50' from the lake and it is reasonable to build their shed within the setback because two abutting neighbors and thirteen others in the neighborhood as well as other lakefront owners in the Town have sheds, garages and outbuildings in the setbacks in a manner similar to what the Perreaults are requesting but are being denied.

In addition to testimony and evidence enumerated in their original application as grounds for the granting the variance, Perreaults' introduced testimony and evidence including plans showing the neighbors abutting them to the west, have a shed on the lot line and that it is this shed that Perreaults' want to abut with their shed. Similar to their neighbor on the western side of their property, Perreaults demonstrated the neighbor on the east has a shed within that neighbor's 20' setback. Perreaults entered photographic

evidence that other properties on Perreaults' road, Seminole lane, New Hampton, New Hampshire have buildings within the setbacks. These include a garage at 6, 8 and 12 Seminole lane, a barn at 12 Seminole lane, a garage and shed at 14 Seminole lane, a garage and shed at 20 Seminole lane, a shed at 28 Seminole lane, two sheds at 46 Seminole Lane, a garage at 64 Seminole Lane, sheds at 70, 74, 76 and 82 Seminole Lane, a recently approved, by variance, garage, at 84 Seminole Lane, two sheds on the land of Perreaults' neighbor to the west at 90 Seminole lane, one being the shed Perreaults would like to abut with their shed, three sheds on the land of Perreaults' neighbor to the east at 96 Seminole Lane, one which is within a few feet, in not one foot, from Perreaults' lot line. Overall, the two abutters have a total of five sheds in their setbacks and thirteen others have sheds, garages or a barn in their setbacks.

Other evidence of Perreaults demonstrated that numbers 6, 8, 12, 14, 20, 24, 28 and 46 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-11-6, U11-7, U11-9, U11-10, U11-12, U11-14, U11-16 and U11-19 respectively. Further evidence showed numbers 64, 70, 74, 76, 82, 84 90 and 96 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-10-1, U10-2, U10-3, U10-4, U10-5, U10-6, U10-7 and U10-9 respectively and that Perreault's property, 94 Seminole Lane is Town of New Hampton Tax Map and Lot Number U-10-8.

In addition to evidence regarding sheds and garages of neighbors being in the setbacks, Perreaults offered evidence of variances granted by the Town of New Hampton Zoning Board of Adjustment to other waterfront properties in the town where sheds and garages were permitted to be built within setbacks and close to abutter's property lines. In particular, 42 West Shore Rd., Tax Map U-15-6, is nearly identical to Perreaults' situation. In that case a variance for a similar sized shed to be built 1' from the property line was granted.

The Perreaults believe they submitted sufficient evidence to the Town of New Hampton Zoning Board of Adjustment as required by RSA 674:33 and the cases of, Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) for their request to be granted a variance. Similarly, the Perreaults believe the Superior Court erred, when after reviewing the record before it in this matter, the Court affirmed the Town of New Hampton Zoning Board of Adjustments denial of their request for a variance and that the Court should have found the denial unreasonable and legally erroneous.

To begin, Petitioners request for a variance would not alter the essential character of the neighborhood. The Perreaults immediate neighbors on either side have a total of five sheds within their setbacks. (One of which the Perreaults want to locate their shed a foot away from on their side of their property.) All along their street there are eight properties with sheds, seven properties with garages and one with a barn in their setbacks.

The Court in Harborside wrote, "...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." Id. (quotation omitted). Mere conflict with the

terms of the ordinance is insufficient. See *id.*... We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's "basic zoning objectives. "one way is to examine whether granting the variance would "alter the essential character of a neighborhood." *Id.* (quotation omitted). Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 515. (2011).

Where two of Perreaults' immediate neighbors and thirteen others, along with other lakeside owners, in the town enjoy the benefit of sheds and garages within their setbacks for purposes of storing flammables, recreational equipment and more, the Perreaults' request to do the same will not change the essential character of the neighborhood nor will it threaten public health, safety or welfare, and per Harborside, the Courts denial of their request for a variance should be reversed.

Granting the Perreaults a variance to construct their shed in the setback in the location they have requested will not violate the spirit of the ordinance. In Harborside, again, the Court wrote, "... We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's "basic zoning objectives. "one way is to examine whether granting the variance would "alter the essential character of a neighborhood." *Id.* (quotation omitted). Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 515. (2011).

Once more, if the objective of the ordinance is to keep structures out of the setbacks: the horse is out of the barn in this neighborhood! Well not completely. The point is both abutting neighbors and thirteen other neighbors, as well as lakeside residents in town, have sheds, garages and outbuilding for storage in their setbacks no different than that being requested by the Perreaults. The mere fact these "within" the setbacks buildings exist and that fact that an abutting neighbor and the Town's own fire department do not object to the Perreaults' shed, demonstrates there is no threat to the public health, safety or welfare. For this reason, as well, per Harborside, the Courts denial of their request for a variance should be reversed.

Substantial justice will be done if the Perreaults request for a variance is granted. The Court opined in Harborside, "Perhaps the only guiding rule on...[substantial justice]... is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." writing further..."We also look "at whether the proposed development [is] consistent with the area's present use," and concluding by comparing the Harborside matter to the case of *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109, 920 A.2d 1192 (2007), where it concluded in that case, "...the proposed storage facility project worked a substantial justice because it "pose[d] no further threat to the wetlands[.] ... [was] appropriate for the area [.] and [did] not harm its abutters[: ] [therefore,] the general public [would] realize no appreciable gain from denying this variance." Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 516. (2011).

The Perreaults case is no different than Harborside's. Their shed will not pose a threat to the lake, environment or their surroundings. It is appropriate for the area as two abutters and thirteen neighbors along their street, as well as others in the community, enjoy the benefit of sheds, garages and outbuildings within their setbacks for the purpose of storing boats, kayaks, lawn mowers, flammables, recreational equipment and more. And their abutting neighbor, whose shed will be back to back, save a foot, from the Perreaults' shed, welcomes their improvement. The public will receive no appreciable gain by denying the shed and its location because, abutters on both sides and a good number of neighbors already have sheds, garages and outbuildings in the setbacks.

To deny the Perreaults a similarly located shed used for the same purposes deprives them of the right to use their property in a manner enjoyed by fifteen neighbors, provides no benefit to the public as there already exist twenty two out buildings within the setbacks in their neighborhood and is an injustice especially when their request to build and locate a shed in the only location that makes sense for their property is consistent with the area's present use meaning: the Perreaults would be one of twenty two neighbors with a storage building in their setback. Because substantial justice will be done by granting the Perreaults request for a variance, the Courts denial of their request for a variance should be reversed.

Evidence was not introduced proving the diminution of value to surrounding properties due to the Perreaults' request for a variance, therefore their request for a variance, as regards this element of RSA 674:33, should be granted.

Finally, and almost always, the success or failure of applications for variances come down to whether or not literal enforcement of the terms of the ordinance will cause an unnecessary hardship to applicants like the Perreaults.

In contending with this prong of the variance analysis the Court in Simplex wrote, "... applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 at 723 and 733 (2001).

Ten years later, contending with the criteria of unnecessary hardship under RSA 674:33, I(b)(5), the Court concluded in Harborside, "... unnecessary hardship exists if, "owing to special conditions of the property that distinguish it from other properties in the area," (1) there is "[n]o fair and substantial relationship" between the "general public purposes of the ordinance" and the "specific application" of the ordinance to the property at issue, and (2) "[t]he proposed use is a reasonable one." RSA 674:33, I(b)(5)(A). Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 at 515 at 518, (2011).

The Perreaults occupy a non-conforming .3 acre lot that is narrow, has steep slopes, and a rugged shoreline. The majority of buildable area on their lot is occupied by their home, its deck and a small area of lawn where children and adults can play and recreate. These factors make the Perreaults property unique and place reasonable limits on where they can build a shed to replace the three storage boxes they use for the storage of fuels and recreational equipment. Specifications for the shed's construction prohibit its location on the steep slopes, attaching a shed to the home interferes with light and well piping coming into the basement, is not safe for the storage of fuels and placement of the shed in the lawn between the home and the lake, (which is also within the 50' setback per the Shore land Protection Act), in the small flat grassy area prohibits recreation and creates a serious safety hazard for parents attempting to watch children swimming in the lake. The only reasonable place to locate their shed is in the undisturbed level area along the western lot line in the 20' setback as they have requested.

The application of the 20' setback based, on the unique qualities of the Perreaults' property compelled the Town of New Hampton Zoning Board of Administration to require the Perreaults build their shed in between their home and the lake in the only area the family can use for reasonable recreation save the lake. Per the first prong of Simplex, the application of the zoning restriction interferes with the Perreaults reasonable use of their property because it concludes in an unreasonable result. Too, as in Harborside where Parade merely had to show that its proposed signs were a "reasonable use" of the property, given its special conditions, the Perreaults have demonstrated they seek to construct their shed in an inconspicuous location on a part of the only reasonably available flat spot on their property. Therefore, their request is reasonable. The application of the setback interferes with the reasonable use of their property creating an unnecessary hardship for the Perreaults and because of this unnecessary hardship, the Courts denial of their request for a variance should be reversed.

Similarly, the application of the 20' setback to the Perreaults does not bear any fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property because, again, if the purpose of the ordinance is to prevent overdevelopment, the Perreaults are replacing the three temporary storage sheds with one permanent shed, are building their storage shed in the only reasonable location they have available, provides them with safe storage of fuels and other recreation equipment and their "overdevelopment" if you will, is less than the type of overdevelopment on lots that abut and surround their property. According to the second prong of Simplex and the case of Harborside, this disconnect in the relationship between the ordinance's purpose and the limited area for reasonable construction of their shed creates an unnecessary hardship for the Perreaults and because of this unnecessary hardship, the Courts denial of their request for a variance should be reversed.

Too, as stated repeatedly, both abutters and thirteen neighbors already enjoy the use of sheds, garages and outbuildings on their properties as do other lakefront owners in New Hampton. The purpose, per the Town of New Hampton Zoning Board, for the 20' setback is to prevent overcrowding. When neighboring properties already enjoy the benefit of storage building within the setback it cannot be said the public and private

rights of others will be injured when all the Perreaults are asking is, to share a similar benefit enjoyed by their neighbors.

So, again, per the third prong of Simplex denying the Perreaults a right enjoyed by their neighbors and others in the Town of New Hampton creates an unnecessary hardship for the Perreaults and because of this unnecessary hardship, the Courts denial of their request for a variance should be reversed.

Of final importance is the Town of New Hampton Zoning Board of Adjustment's and the Court's position that previously granted variances should not count is wrong. First of all, as the Court notes in Footnote (1) of its order, "...these variances were granted when a different criteria applied...". While that may be so, that criteria was more stringent than that laid out in Simplex and Harborside and is the old traditional standard that if you had any use of your property you could not claim unnecessary hardship. And if this is the case those previously granted variances should apply because it was harder then to obtain a variance than it should be in the present case. On a different note, whether the previously granted variances were granted based on a different criteria is immaterial. What matters is the changing character of the neighborhood. No matter how it got there.

The Perreaults have met the requirements of RSA 674:33. When the Court wrote "...the loss to...[Perreaults]...by the denial of the variance is negligible because a conforming location for the proposed shed exists on the property or alternatively... [Perreaults]...can continue to store equipment in the three plastic sheds currently...on the property", "...the public would benefit from the denial because the setback requirements were being preserved and Perreaults were not being denied use of the property, but instead were only being limited where they could construct the proposed shed" and "the fact remains the Perreaults could build the shed without jeopardizing the purposes of the Town's setback requirements. (See Order of the Belknap Superior Court, Brian M. Perreault et. al., dated, March 28, 2017, at Page 10.), the Court applied the traditional standard that if you had any reasonable use at all of your property you were not entitled to a variance, especially a finding that the literal application of the zoning ordinance would result in an unnecessary hardship.

Here in the face of the facts and circumstances presented to it by the Perreaults, specifically the number of sheds, garages and outbuildings enjoyed by abutters, neighbors and others in town, which are situated in the setbacks and used for purposes similar to that proposed by the Perreaults, the Court should have found per RSA 674:33, Simplex and Harborside, their request for a variance should be granted.

For the foregoing reasons, the Perreaults request this Court reverse the lower Court's ruling denying their request for a variance and grant them a variance to build a 10'x16' shed in the 20' setback as they have requested pursuant to RSA 674:33.



## Conclusion

The Perreaults have met the five criteria for a variance required by RSA 674:33 and in accordance with the laws of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). This Court should therefore reverse the Belknap Superior Court's ruling denying the same.

Abutting neighbors have five sheds in the setbacks, eight neighbors have nine sheds in the setbacks, seven neighbors have garages in the setbacks and one neighbor has a barn in the setback. The Perreaults shed will not alter the essential character of the neighborhood because there already exists twenty two out buildings in the setbacks.

Their shed does not pose a threat to the lake, environment or surroundings. It is appropriate for the area as it replaces three plastic storage sheds with a clean and presentable structure and its location within the setback will be similar to out buildings enjoyed by two abutters and thirteen neighbors along their street, as well as others in the community, for purposes of storing flammables, recreation equipment and more. Further, their abutting neighbor, whose shed will be back to back, save a foot, from the Perreaults' shed, welcomes their improvement and the Town's own fire department, which would prefer to see fuels stored in locations other than dwellings, do not object to the Perreaults' shed. All of which demonstrates there will not be any threat to the public health, safety or welfare due to the construction of a 10' x 16' shed by the Perreault's in the 20' setback as requested.

The public will receive no appreciable gain by denying the Perreaults' request. On the other hand, granting it will do substantial justice because fifteen neighbors along their street enjoy the use of twenty two sheds, garages and outbuildings within their setbacks for the purpose of storing boats, kayaks, lawn mowers, flammables, recreational equipment and more. To do otherwise, would deprive them of the right to use their property in a manner enjoyed by their immediate neighbors, provides no benefit to the public as there already exist twenty two outbuildings within the setbacks in their neighborhood and is an injustice especially when their request to build and locate a shed in the only location that makes sense for their property is consistent with the area's present use.

Further, the application of the 20' setback zoning restriction interferes with the Perreaults reasonable use of their property because they seek to construct their shed in an inconspicuous location on a part of the only reasonably available flat spot on their property. A literal application of the 20' setback compels them to build their shed in between their home and the lake in the only area the family can use for reasonable recreation, save the lake, thereby concluding in an unreasonable result in a manner that creates an unnecessary hardship for them.

Similarly, application of the 20' setback to the Perreaults does not bear any fair and substantial relationship between the general purposes of the zoning ordinance and the

specific restriction on their property. The Perreaults are attempting to reduce development on their property by replacing the three plastic storage sheds with one permanent shed, by building their storage shed in the only reasonable location they have available and providing them with safe storage of fuels and other recreation equipment and their "overdevelopment" if you will, is less than the type of overdevelopment on lots that abut and surround their property. This disconnect in the relationship between the ordinance's purpose and the limited area for reasonable construction of their shed, again, creates an unnecessary hardship for the Perreaults.

Finally, the purpose for the 20' setback is to prevent overcrowding. Two abutters and thirteen neighbors already enjoy the benefit of storage buildings within their setbacks. It cannot be said the public and private rights of others will be injured when all the Perreaults are asking is to share a similar benefit enjoyed by their neighbors. Denying the Perreaults a right enjoyed by their neighbors and others in the Town of New Hampton too, creates an unnecessary hardship for them.

Simply because the Perreaults have use of their property is not grounds to deny them a variance. RSA 674:33, Simplex and Harborside mandate their request for a variance be granted. The Perreaults' request for a variance is not contrary to the public interest, observes the spirit of the zoning ordinance, does substantial justice, does not diminish the values of surrounding properties and relieves them of the unnecessary hardship imposed on them by the literal enforcement of the 20' setback because, in addition to the reasons stated in their application for a variance, their construction of a 10' x 16' shed in their setback will be no different than what is enjoyed by two abutters who have five sheds in the setbacks and thirteen neighbors who enjoy seventeen buildings in their setbacks all for the same purposes proposed by the Perreaults.

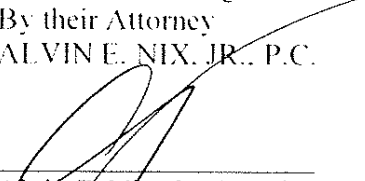
The Perreaults therefore respectfully request this Court reverse the lower Court's ruling denying their request for a variance and grant them a variance to build a 10'x16' shed in the 20' setback as they have requested pursuant to RSA 674:33.

Statement/Signature/Certification

I, Alvin E. Nix, Jr., Esq., Counsel for Brian M. and Margaret A. Perreault request oral argument and represent my oral argument shall be no longer than 15 minutes and certify the appealed decision is in writing and is appended to this brief.

Respectfully submitted,  
Brian M. and Margaret A. Perreault  
By their Attorney  
ALVIN E. NIX, JR., P.C.

Dated: August 25, 2017




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**CERTIFICATION**

I hereby certify that I have this day forwarded two copies of the within Brief and Appendix to Laura Spector-Morgan, Esq., Counsel for The Town of New Hampton Zoning Board of Adjustment.

Dated: August 25, 2017



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STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2017-0225

Brian M. Perreault &a. v. Town of New Hampton

**APPENDIX**

A. Order dated March 28, 2017.....A1-A12  
B. Request for Rulings of law and Findings of Fact ..... B1-B7

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

Belknap Superior Court  
64 Court St.  
Laconia NH 03246

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

**NOTICE OF DECISION**

**File Copy**

Case Name: **Brian M. Perreault, et al v Town of New Hampton ZBA**  
Case Number: **211-2016-CV-00272**

Enclosed please find a copy of the court's order of March 28, 2017 relative to:

Order on the Merits

March 28, 2017

Abigail Albee  
Clerk of Court

(477)

C: Alvin Earl Nix, JR; Laura Spector-Morgan, ESQ

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Brian M. Perreault, et al

v.

Town of New Hampton

Docket No.: 16-CV-272

**ORDER**

Merits hearing held (2/7/17) on the petitioners' Appeal of Decision of Town of New Hampton, Zoning Board of Adjustment Pursuant to RSA 677:4 (filed 10/31/16), the respondent's Trial Memorandum (filed 2/7/17), and the petitioners' Proposed Findings of Fact and Rulings of Law (filed 2/7/17). Subsequent to review, the Court renders the following determination(s).

By way of brief background, the petitioners, Brian and Margaret Perreault, appeal a October 6, 2016 decision by the Town of New Hampton Zoning Board of Adjustment ("Town" or "ZBA") denying the petitioners' application for a variance. The petitioners own property located at 94 Seminole Avenue, New Hampton, New Hampshire (the "Property"). The petitioners requested a variance from the Town's setback requirements so that a storage shed could be built on the Property. The petitioners contend that the ZBA's decision denying this variance was unlawful and/or unreasonable.

**FACTUAL HISTORY**

The Court takes the following facts from the certified record ("CR"). The Property is located on the shore of Lake Waukegan in New Hampton and is approximately .3 acres in size. (CR at 4, 6.) The Property is subject to the following setbacks: a twenty foot side yard setback; a thirty-five foot front setback along the road; and a fifty foot setback along the lake shore per the Shoreland Protection Act. (CR at 16.) The petitioners currently have three plastic, moveable

sheds on the Property for the purposes of storing various recreational and home items. (CR at 24.) The petitioners hope to replace these plastic sheds with a larger permanent structure.

On or around March 13, 2016, the petitioners submitted a building permit application to the Town proposing construction of a ten foot by sixteen foot shed on the Property. (CR at 1.) The proposed shed would be constructed on the western property line within the twenty foot side setback, the same location as the existing plastic sheds. (CR at 3-4.) If permitted, the shed would be located approximately one foot from the abutting property's existing shed, which was built on the property line prior to enactment of the Town's setback ordinance. (CR at 24.) Because the proposed location of the shed is within the Property setback, the petitioners also submitted an application to the ZBA for a variance from the setback requirements set forth in Article IV, Section A.4.iii of the New Hampton Zoning Ordinance. (CR at 1, 7-16.)

On April 6, 2016, the ZBA held a public hearing on the matter. (CR at 22-26.) While no abutters spoke at the hearing, the ZBA did receive a letter in support of the petitioners' request for a variance from the affected abutters to the Property. (CR at 21, 23.) The petitioners presented information and answered questions from the ZBA. See (CR at 23-25.) During the hearing, the petitioners confirmed there were possible locations on the Property for the shed that were outside of the setback, but explained that these alternatives would either be difficult to achieve given the steep slope of the Property or would be undesirable because of the distance from the lake. (CR at 25.) After some discussion, the ZBA concluded that a site visit of the Property should be performed prior to making a determination on the petitioners' application. (Id.) The ZBA also requested that the petitioners obtain a current survey of the Property for the purposes of confirming property lines. (CR at 25-26.) For these reasons, the ZBA voted to continue the matter. (CR at 26.)

On June 13, 2016, the ZBA conducted a site visit of the Property and held a public hearing. (CR at 33-38.) While visiting the Property, the ZBA discussed alternative locations for the proposed shed. (CR at 34-35.) One member, however, pointed out that “the proposed location seemed to be the only somewhat flat area to put a shed while keeping it a distance from the water.” (CR at 35.) During deliberations, the ZBA generally agreed that the proposed shed would not negatively affect the abutters. (CR at 37.) With respect to the Property’s physical characteristics, the ZBA was not convinced that the Property was unique compared to other properties in the same area. See (CR at 36-37.) Consistent with the April 6 hearing, the ZBA again considered the fact that the proposed shed could be built in a location that complies with the Town’s setback ordinance. (CR at 37.) Ultimately, the ZBA voted 4 to 1 “to deny the variance request as there is no unnecessary hardship due to unnecessary conditions of the property.” (CR at 37.) By way of letter dated June 14, 2016, the petitioners were informed that their request was denied based on the following stated reasons:

- 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 sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.

(CR at 39.)

On July 12, 2016, the petitioners filed a Request for Rehearing, which the ZBA granted on August 3, 2016. (CR at 51-96, 102.) A subsequent public hearing was held on September 14, 2016, where the ZBA addressed the petitioners’ contention that it is unfair that the ZBA has



granted similar variances for lakeside lots in the past. (CR at 52, 131.)<sup>1</sup> The ZBA received information that two of the previously granted variances were granted to accommodate new septic systems and one other variance was granted because of the “long and narrow” characteristics of the property. (CR at 131.) For these reasons, the previously granted variances were distinguishable from the petitioners’ request for a variance. (Id.)

The petitioners also presented the ZBA with evidence of sixteen properties on Seminole Avenue, the same road the Property is located on, having outbuildings similar to the proposed shed. (CR at 54.) The petitioners asserted that many, if not all of the outbuildings constructed on these properties violated the Town’s setback requirements. (Id.) After reviewing the properties referenced by the petitioners, the ZBA learned that many of the properties either had grandfathered structures or were in compliance with the setback requirements. (CR at 132.) Ultimately, the ZBA unanimously voted to continue the matter so that the ZBA could perform a second site visit and so the Fire Chief could visit the Property and provide input on any potential safety concerns with the proposed location of the shed. (CR at 133.)

Prior to the final site visit and public hearing, the ZBA received a letter from Michael Drake, Fire Chief of the Town. (CR at 135.) After visiting the Property and considering the setbacks and closeness of the proposed shed to the existing shed on the abutter’s property, Mr. Drake stated that the Fire Department “would have no issue with the proposed construction of an outside storage building.” (Id.) Specifically, Mr. Drake wrote that “it is [the Fire Department’s] desire to see storage items which could potentially increase the fire load of the primary living unit reduced by storing accessory items in an outside storage building.” (Id.)

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<sup>1</sup> The petitioners provided information regarding seven variances previously granted by the ZBA. However, four of these variances were granted when different variance criteria applied. As a result, the ZBA chose only to consider the three recent variances that were decided under the same criteria that is applied to the petitioners’ request. See (CR at 131.)

On October 5, 2016, the ZBA conducted a final site visit of the Property and held a public hearing. (CR at 155–65.) During deliberations, members of the ZBA concluded that the requested variance would be contrary to the public interest because the ordinance is meant to prevent overbuilding and the proposed shed would contribute to congestion already in the area. (CR at 158–59.) However, all members agreed that the proposed shed would not diminish the values of surrounding properties. (CR at 160.) With respect to whether enforcement of the ordinance would result in unnecessary hardship to the petitioners, the ZBA emphasized the fact that the proposed shed could be built on the Property in alternative locations that comply with the setback ordinance. (CR at 159.)

After deliberations, the ZBA unanimously voted to deny the petitioners' request for a variance. (CR at 161.) By way of letter dated October 6, 2016, the petitioners were informed that they failed to establish that: (1) the variance would not be contrary to the public interest; (2) substantial justice is done by granting the variance; and (3) literal enforcement of the ordinance would result in unnecessary hardship. See (CR at 166–67.) The petitioners filed the present appeal on October 31, 2016.

#### **STANDARD OF REVIEW**

“In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment . . . to show that the order or decision is unlawful or unreasonable.” RSA 677:4 (2016). When reviewing a decision of the ZBA, “the trial court must treat all factual findings [ ] as *prima facie* lawful and reasonable, and may not set them aside absent errors of law, unless it is persuaded by a balance of the probabilities on the evidence before it that the ZBA decision is unreasonable.” 1808 Corp. v. Town of New Ipswich, 161 N.H. 772, 775 (2011); see RSA 677:4. The standard of review is not whether the court would find as the ZBA did, but whether the evidence reasonably supports the ZBA findings. See

Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). If any of the ZBA's reasons "supports its decision, then [the petitioner's] appeal must fail." Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 173 (2003).

## **DISCUSSION**

The ZBA has the authority to grant a variance from a 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. RSA 674:33, I(b)(1)–(5). The applicant for a variance bears the burden of establishing these conditions. See Nine A, LLC v. Town of Chesterfield, 157 N.H. 361, 365 (2008). Here, the ZBA found that the petitioner failed to establish that: (1) the variance will not be contrary to the public interest; (2) that substantial justice is done by granting the variance; and (3) that literal enforcement of the ordinance would result in an unnecessary hardship. The petitioners contend that each of these findings by the ZBA were unlawful and/or unreasonable.<sup>2</sup>

### **Public Interest and Spirit of the Ordinance**

The Court will first address the petitioners' arguments with respect to the ZBA's finding that granting the requested variance would be contrary to the public interest and the spirit of the ordinance. The petitioners specifically argue that the proposed shed would not alter the essential character of the neighborhood because the ZBA has granted similar variances for properties in the area. The petitioners also contend that granting their requested variance would not cause a threat to public health, safety, or welfare. In support of these assertions, the petitioners note that

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<sup>2</sup> The Court notes that the petitioners also appeal the ZBA's determination that the requested variance would diminish the value of surrounding properties. (Pet'r's Appeal ¶ 3). However, after reviewing the certified record, it appears to the Court that the ZBA found that granting the variance would not diminish the value of surrounding properties. See (CR at 160). For this reason, the Court will not address the petitioners' arguments regarding same.

many properties in the area have constructed similar storage sheds or other buildings within property setbacks.

The Town argues that the ZBA properly determined that granting the requested variance would be contrary to the public interest and would violate the spirit of the ordinance. More specifically, the Town asserts that the cumulative effect of constantly granting this type of variance would alter the essential character of the neighborhood. With respect to previously granted variances in the area, the Town contends that these other variances are unique and distinguishable from the variance presently being sought by the petitioners.

“As the provisions of [an] ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto.” Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011) (quotation omitted and emphasis in original).

Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, we must determine whether to grant the variance would unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.

Id. (quotations and citations omitted). The New Hampshire Supreme Court has recognized two methods for ascertaining whether granting a variance would violate an ordinance’s “basic zoning objectives”: (1) examining whether granting the variance would alter the essential character of the neighborhood; or (2) examining whether granting the variance would threaten the public health, safety or welfare. Id. “The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.” Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007).

Upon review, the Court concludes that the ZBA reasonably and lawfully determined that granting the requested variance would be contrary to the public interest. The ZBA specifically found that allowing the requested variance would jeopardize the goal of the setback requirement.

which the ZBA concluded was “to prevent safety issues” and “overbuilding on lots.” (CR at 166.) With respect to safety issues, the ZBA acknowledged that the Town’s Fire Chief did not have concerns with the proposed location, despite the fact that the shed would be constructed approximately one foot from an existing shed on the abutter’s property. (CR at 135, 158.) However, the ZBA reasonably considered the cumulative effect that such variances may have on the area. (CR at 158); see Bacon v. Town of Enfield, 150 N.H. 468, 473 (2004) (explaining that while one variance “might not greatly affect the shorefront congestion . . . , the cumulative impact of many such projects might well be significant”). While many of the ZBA’s concerns focused on the aesthetic environment of the neighborhood and the desire to avoid the appearance of overcrowding, the ZBA is entitled to rely on aesthetics alone in making its determination. See Asselin v. Town of Conway, 137 N.H. 368, 371–72 (1993) (“[M]unicipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare.” (emphasis in original)).

Moreover, the Court is unpersuaded that the evidence of previously granted variances on similarly sized properties in the area or evidence of neighboring properties with similar outbuildings required the ZBA to grant the petitioners’ request for a variance. The ZBA concluded that the petitioners’ requested variance was not comparable to the previously granted variances because those variances “were based on very different facts and were unique to those properties.” (CR at 166.) Having reviewed the record, the Court finds factual support for this conclusion. See (CR at 131.) As such, these existing variances did not require the ZBA to grant the petitioners’ request.

The petitioners also provided the ZBA with a list of sixteen properties located on Seminole Avenue with similar buildings as the proposed shed. See (CR at 54, 56-89.) The

petitioners contend that the overwhelming majority of these buildings are located within property setbacks and that these buildings are evidence that the petitioners are being denied a benefit that others in the area have been allowed to enjoy. However, out of the thirty-two outbuildings located on these properties, ten of them are lawful preexisting structures, as they were built prior to enactment of the Town's setback ordinance, and seven structures are not constructed within any property setback. (CR at 121-23.) As for the remaining fifteen, the Town was unaware of these structures and is currently in the process of determining the legality of same. (Id.); (Resp't's Trial Memo. at 4.) Based on this information, the Court concludes that evidence of other similar outbuildings in the area did not require the ZBA to grant the petitioner's variance.

For these reasons, the Court concludes that the petitioners have failed to establish that the ZBA unlawfully and/or unreasonably determined that the requested variance did not satisfy the public interest and spirit of the ordinance factors.

### **Substantial Justice**

While the above finding is sufficient for the Court to affirm the ZBA's decision, the Court will briefly address whether the ZBA properly found the petitioners failed to establish that granting the variance would do substantial justice. When considering the "substantial justice" factor, "two critical inquiries 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 Dev. Co. v. City of Somersworth, 162 N.H. 553, 559 (2011).

The petitioners argue that the ZBA erred in finding that substantial justice would be done by denying the requested variance. Specifically, the petitioners contend that "there would be no appreciable gain to the general public by denying their request for a variance to place a shed within the setbacks on their .3 non-conforming parcel of property when similar benefits are

already being enjoyed by [others].” (Pet’r’s Appeal ¶ 12.) In response, the Town argues that the ZBA properly weighed the competing interests of the petitioners and the public. The Town asserts that the loss to the petitioners by the denial of the variance is negligible because a conforming location for the proposed shed exists on the Property or, alternatively, the petitioners can continue to store equipment in the three plastic sheds currently located on the Property. With respect to the public’s interest, the Town reiterates the ZBA’s finding that the public benefits from the denial of the variance, as the decision would preserve the character of the area and prevent the negative cumulative impact of granting these types of variances.

Upon review, the Court concludes that the petitioners failed to establish that the ZBA unreasonably or unlawfully determined that denying the variance would result in substantial justice. The ZBA specifically found that the public would benefit from denial of the variance because the setback requirements were being preserved, which would promote public safety and limit overcrowding. (CR at 167.) 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. (Id.) 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. See (CR at 25, 37, 132, 160.) The Court also finds it important to note that the petitioners acknowledged the existence of these potential alternative locations. See (CR at 25, 156.) While the petitioners may feel that these alternative locations 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. Given these facts, the Court concludes that the ZBA lawfully and reasonably determined that the public would benefit from denial of the petitioners’ request for a variance and that said benefit outweighs any loss or hardship to the petitioners.

**Unnecessary Hardship**

As stated above, the Court concludes that the petitioners have failed to establish that granting the variance would not be contrary to the public interest or would result in substantial justice. In light of these findings, the Court need not address whether the ZBA properly determined that literal enforcement of the ordinance would not result in an unnecessary hardship to the petitioners, as all five criteria must be met for a variance to be granted.

**CONCLUSION**

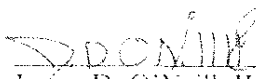
In sum, the Court finds that the petitioners have failed to demonstrate by a balance of the probabilities that the ZBA's decision denying the petitioners' request for a variance was unlawful and/or unreasonable. Accordingly, this decision is AFFIRMED and the petitioners' Appeal per RSA 677:4 is DENIED, consistent with the above.

**Requests for Findings of Fact and Rulings of Law**

Pursuant to RSA 491:15, the narrative order above constitutes the Court's specific findings of fact and rulings of law. Any requests by the parties for findings of fact and rulings of law not GRANTED or DENIED herein, either expressly or by implication, are determined to be unnecessary for resolution in light of the Court's determination(s).

SO ORDERED.

3/28/17  
Date \_\_\_\_\_

  
James D. O'Neill, III  
Presiding Justice



***THE STATE OF NEW HAMPSHIRE***

***BELKNAP, SS.***

***SUPERIOR COURT***

Brian M. and Margaret A. Perreault

V.

Town of New Hampton  
Zoning Board of Adjustment

Docket No. 211-2016-CV-00272

**PETITIONERS'  
PROPOSED FINDINGS OF FACT AND RULINGS OF LAW**

**NOW COME** Petitioners, Brian M. and Margaret A. Perreault, of Stow, Massachusetts and submit the following proposed findings of fact and rulings of law in support of their request to have the Town of New Hampton Zoning Board of Adjustments decision denying their request for a Variance overturned:

**FINDINGS OF FACT**

1. Petitioners are the owners of a parcel of land approximately .3 acres in size, with a home thereon, located on the shore of lake Waukewan at 94 Seminole Ave., New Hampton, New Hampshire, 03256 also known as Town of New Hampton, Tax Map U10, Lot 8, (See record Tab A, Page 000004);
2. The dimensions of Petitioners' lot are 93.6' along the road, 147' along the western lot line, 90' along the lake shore and 137' along the eastern lot line, (See record Tab A, Page 000004 and Tab B, Page 000016);
3. The setbacks for Petitioners' lot are 35' along the road, 20' along the western lot line, 20' along the lake shore (50' per the Shoreland Protection Act), and 20' along the eastern lot line, (See record Tab A, Page 000004 and Tab B, Page 000016);
4. Petitioners' lot is approximately .3 acres and, per the Town of New Hampton Zoning Ordinance, is a non-conforming lot, (See record Tab B, Page 000015 and Tab H, Page 000029);

5. Petitioners' home and deck occupy the majority of Petitioners' property's that is not within the setbacks, (See record Tab A, Page 000004, Tab B, Pages 000015 and 000016 and Tab H, Page 000029);
6. The land between the house and the road, where the steps are located and along the eastern portion of the property is steep and largely covered by grass, (See record Tab H, Pages 000085 and 000086);
7. The land along the shore, but within the 50' setback is steep and rocky along the shore but relatively level and grassy between the house and the slope to the shore and is also relatively level along portions of the western lot line where the land is undisturbed ground;
8. Petitioners desire to build a 16' x 10' shed on their property but due to the steep slopes, and the land not subject to setbacks being occupied largely by their home, they planned to build their shed in the level area along the western lot line with the shed's backside 1' away from a neighbor's shed which is within the neighbor's 20' setback, (See record Tab A, Page 000004, Tab B, Pages 000015 and 000016 and Tab H, Page 000029);
9. Petitioners' purpose for the shed is to securely store canoes, kayaks, paddleboats, deck furniture, lawn furniture, a grill and associated equipment, lawn mowers, beach chairs and recreational items;
10. Petitioners' applied to the Town of New Hampton on, or about, March 17, 2016 for a building permit to build a 10' x 16' shed in the 20' setback of their land and his application was denied, (See Record Tab A, Page 000002 and 000003);
11. Petitioners' then filed an application for variance from Article IV, Section A.4.iii of the Town of New Hampton zoning ordinance requesting relief from the 20' side setback so they could construct their 10' x 16' shed in which they addressed the five criteria necessary to obtain a variance, the terms of which are accepted as written, (See Record Tab B, Page 000008 and 000009);
12. The Town of New Hampton Zoning Board of Adjustment, after two hearings on Petitioners' request for a variance, one on April 16, 2016 and the other on June 13, 2016, denied the same by notice dated June 14, 2016, (See Record Tab F, Page 000023, Tab J, Page 000034 and Tab K, Page 000039);

13. Petitioners' appealed the denial and requested a re-hearing on their request for a variance, on, or about, July 11, 2016. Petitioners' appeal incorporated the grounds given in support of the five criteria for a variance provided in their previous application and included new grounds for consideration of approving their request for a variance based on New Hampshire case law, (See Record Tab L, Pages 000043-000049);

14. Petitioners' cited as new grounds for granting their request for a variance the cases of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011), (See Record Tab L, Page 000044);

15. The request for rehearing was granted on August 3, 2016, a hearing was held on September 14, 2016 and a site visit and hearing were conducted on October 5, 2016, (See Record Tab P, Page 000098-000100, Tab V, Pages 000128-000133 and Tab Z, Pages 000155-000161);

16. In addition to testimony and evidence enumerated in their original application Petitioners' introduced testimony and evidence to demonstrate their request for a variance would not alter the essential character of the neighborhood, would not threaten the public health, safety or welfare, that the general public would realize no appreciable gain by denying their request for a variance and that the proposed shed was a reasonable use of the property given the property's special conditions.

17. Petitioners' testimony and evidence included plans showing the neighbor abutting them to the west, have a shed on the lot line and that it this shed that Petitioners' want to abut with their shed, (See record Tab B, Page 000015 and 000016 and Tab H, Page 000029);

18. Similar to their neighbor on the western side of their property, Petitioners demonstrated the neighbor on the east has a shed within that neighbor's 20' setback, (See record Tab B, Page 000015 and 000016 and Tab H, Page 000029);

19. Petitioners entered photographic evidence that other properties on Petitioners' road, Seminole lane, New Hampton, New Hampshire have buildings within the setbacks. These include a garage at 6, 8 and 12 Seminole lane, (See record Tab N, Pages 000057, 000058 and 000059, a barn at 12 Seminole lane, (See record Tab N, Page 000060), a garage and shed at 14

Seminole lane, (See record Tab N, Pages 000061 and 000062), a garage and shed at 20 Seminole lane, (See record Tab N, Pages 000063, 000064, 000065, 000066 and 000067) a shed at 28 Seminole lane, (See record Tab N, Pages 000069 and 000070), two sheds at 46 Seminole Lane, (See record Tab N, Pages 000072, 000073 and 000074), a garage at 64 Seminole Lane, (See record Tab N, Page 000075), sheds at 70, 74, 76 and 82 Seminole Lane, (See record Tab N, Pages 000076, 000077 and 000078), a recently approved, by variance, garage, at 84 Seminole Lane, (See record Tab N, Page 000079), two sheds on the land of Petitioners' neighbor to the west at 90 Seminole lane, one being the shed Petitioners would like to abut with their shed, (See record Tab N, Pages 000080 and 000081), three sheds on the land of Petitioners' neighbor to the east at 96 Seminole Lane, one which is within a few feet, in not one foot, from Petitioners' lot line, (See record Tab N, Pages 000082, 000083 and 000084);

20. Other evidence of Petitioners demonstrated that numbers 6, 8, 12, 14, 20, 24, 28 and 46 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-11-6, U11-7, U11-9, U11-10, U11-12, U11-14, U11-16 and U11-19 respectively, (See Record Tab T, Pages 000122 and 000123);

21. Further evidence showed numbers 64, 70, 74, 76, 82, 84 90 and 96 Seminole lane are Town of New Hampton Tax Map and Lot Numbers U-10-1, U10-2, U10-3, U10-4, U10-5, U10-6, U10-7 and U10-9 respectively and that Petitioner's property, 94 Seminole Lane is Town of New Hampton Tax Map and Lot Number U-10-8, (See Record Tab A, Page 000005 and Tab T, Pages 000106, 000122 and 000123);

22. In addition to evidence regarding sheds and garages of neighbors being in the setbacks, Petitioners offered evidence of variances granted by the Town of New Hampton Zoning Board of Adjustment to other waterfront properties in the town where sheds and garages were permitted to be built within setbacks and close to abutters property lines. In particular, 42 West Shore Rd., Tax Map U-15-6, is nearly identical to Petitioners' situation. In that case a variance for a similar sized shed to be built 1' from the property line was granted, (See Record Tab N, Page 000052 and Tab T, Pages 000000108, 000111-000113, 000114-000117, 000118-000120, and Tab Y, Pages, 000152-000153);

23. Petitioners also submitted evidence from the manufacturer noting the highest point on the ground to the lowest point on the ground where the shed is to be placed cannot drop greater than 12 inches Petitioners testified the steep slopes made placement of the shed unreasonable and that the only reasonable location was the place selected and identified on the plans and a letter from the Town of New Hampton Fire Department stating it would rather see storage items that could potentially increase the fire load of the primary living unit ...in an outside storage building...and...[the fire department}..would have no issue with the proposed construction..., (See Record Tab Y, Page 00137, Tab Y 00129 and Tab X, Page 000135);

24. Evidence to substantiate the values of surrounding properties are not diminished was not admitted and is not part of the record, however the neighbor abutting Petitioners, upon whose property the shed Petitioners' would build their shed back to back to, was completely in favor of the project and urged the Board to approve the requested variance, (See Record Tab U, Page 000126);

25. All other testimony is incorporated herein as the record, (See Record Tab V, Pages 000128-000133 and Tab Z, Pages 000155-000161);

26. Petitioners' request for a variance was denied by letter dated October 6, 2016 and the instant appeal to the Belknap Superior Court followed, (See Record Tab AA, Page 000166-000167);

#### **RULINGS OF LAW**

27. The applicable laws in this matter are RSA § 674:33 (b), Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011);

28. Petitioners request for a variance would not alter the essential character of the neighborhood because abutting, and neighboring properties, on the same street as Petitioners have sheds, and in one case three, and garages within the setbacks.

29. Petitioners request for a variance does not violate the ordinance's basic zoning objective where the objective is to keep buildings, like sheds, out of the setback the mere fact that a multitude of Petitioners immediate neighbors have buildings within the setbacks demonstrates there is no threat to the public health, safety or welfare;

30. Petitioners request for a variance, therefore, will not be contrary to the public interest and will observe the spirit of the ordinance. (See Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011));

31. Where Petitioners immediate neighbors and others in the community enjoy the benefit of sheds and garages within the setbacks for purposes of storing boats, kayaks, lawn mowers, flammables, recreational equipment and more, in this neighborhood, to deny a similar benefit to Petitioners produces no public gain;

32. Granting Petitioners request for a variance does substantial justice because the general public would realize no appreciable gain by denying Petitioner a benefit enjoyed by his immediate and surrounding neighbors, (See Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011));

33. Petitioners' request for a variance does not diminish the value of surrounding properties as the only evidence as to value is an abutters letter requesting the variance be approved;

34. The .3 acre lot size, narrowness, slopes and rugged shoreline of Petitioners property create a unique setting and places limits on where they can place an outbuilding to replace the three storage boxes they use. The zoning ordinance, as applied to Petitioners, that prohibits them from constructing a shed, much like those of their neighbors, interferes with their reasonable use of the property. (See Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001));

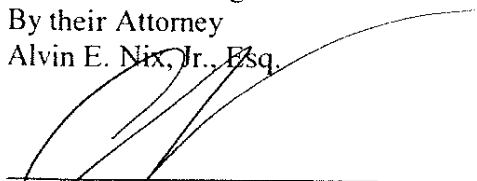
35. Although Petitioners could conceivably place their shed in the flat area in between their home and the lake, (which is also within the 50' setback per the Shoreland Protection Act), the only reasonable recreational area for their children and guests and a location that plops the shed right in front of their view of the lake in a manner that obstructs their ability to keep a safe watch on their family and guests, Petitioners request to locate the shed in the 20' setback as shown on their plans is reasonable. (See Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001));

36. The special conditions of Petitioners land render the construction of a 10'x16' shed in the 20' setback as indicated on the plans reasonable and therefore literal enforcement of the provision of the ordinance from which relief is sought results in an unnecessary hardship. (See Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) and Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011));

37. For the foregoing reasons, the decision of the Town of New Hampton Zoning Board of Adjustment is reversed and Petitioners request for a variance is granted.

Respectfully submitted,  
Brian M. and Margaret A. Perreault  
By their Attorney  
Alvin E. Nix, Jr., Esq.

Dated: February 7, 2017

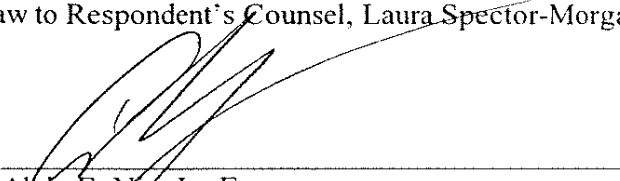


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#### **CERTIFICATE OF SERVICE**

I hereby certify that I have on this 7<sup>th</sup> day of February, 2017 delivered, in hand, the foregoing Findings of Fact and Rulings of Law to Respondent's Counsel, Laura Spector-Morgan, Esquire.



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