THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0536

DAVID F. DIETZ and KATHERINE W. DIETZ

v.

TOWN OF TUFTONBORO

&

SAWYER POINT REALTY, LLC (Intervenor)

BRIEF OF INTERVENOR SAWYER POINT REALTY, LLC

February 16, 2018

SAWYER POINT REALTY, LLC

By its attorneys

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I. STATEMENT OF THE CASE

This case arises out of efforts by Appellants David F. Dietz and Katherine W. Dietz ("Dietz") to force Sawyer Point Realty, LLC[1] to remove two additions to Sawyer Point's home, one made in 1999 and the other 2008/2009. Despite owning their abutting home since 1995, and being well aware of Sawyer Point's additions when they were built, Dietz raised no objection until 2015, in retaliation for Sawyer Point notifying them that their driveway and dock encroached onto Sawyer Point's property.

At the time the additions were constructed, Sawyer Point worked with the Town of Tuftonboro (the "Town") to obtain the necessary permits and approvals. This included securing a building permit for the 1999 addition, and a variance for the 2008/2009 addition. However, in 2015 it was discovered for the first time that the 1999 addition also required a zoning variance (front yard setback), and that the variance obtained for the 2008/2009 addition (front yard setback) underestimated the square footage of the addition within the setback.

When these issues came to light, Sawyer Point applied to the Tuftonboro Zoning Board of Adjustment ("ZBA") for an equitable waiver, pursuant to RSA 674:33-a. The ZBA granted Sawyer Point's application on November 29, 2016. Dietz appealed that decision to the Superior Court, which upheld the ZBA in a thorough, twenty-nine (29) page order addressing each of Dietz's arguments in detail. This appeal followed.

The ZBA and Superior Court correctly ruled that Sawyer Point met the statutory requirements for an equitable waiver, and their decisions should be upheld.

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[1] For ease of reference, this brief refers collectively to "Sawyer Point." Sawyer Point is a New Hampshire family-owned limited liability company, formed by the Luby family. Its current members are Carol Luby, Dianne Luby, Laurel Luby, Thomas Beland (Laurel's husband) and Luby children. Prior to the formation of the LLC, the Sawyer Point property was held in a Trust named the Sawyer Point Realty Trust.

II. STATEMENT OF THE FACTS

Sawyer Point owns the property known as 39 Sawyer Point Road, Tuftonboro, New Hampshire. Sawyer Point has owned the property since 1991. Dietz owns abutting property, known as 41 Sawyer Point Road. Dietz purchased their property in 1995. See Certified Record ("C.R.") 113-114.

At all relevant times to this case, the Town had a zoning ordinance in effect which prohibited buildings and structures within 50' of Lake Winnipesaukee.[2] See Zoning Ordinance §4.2 (1990), Table of Dimensional Requirements, at C.R. 83.

A. 1999 Addition

In 1999, Sawyer Point sought to add a second floor addition over the eastern portion of its existing home. See C.R. 35. That addition did not change the footprint of the home. Id. And, the façade of the addition sat back further from the lake than the façade of the then-existing first floor. See June 1, 2017 Transcript ("Tr.") 51:20-25. The northern facade of the home facing the lake has been within the 50' setback for decades. See Tr. 39:10-13; C.R. 19.

Prior to undertaking the addition, Sawyer Point sought a building permit from the Town. See C.R. 35. The sketch submitted with the application indicated that the construction would be within the front yard setback, showing the home's eastern corner 20' away from the lake, and its western corner 35' from the lake. See id.

Pursuant to Section 16.1.1 of the Tuftonboro Zoning Ordinance, the Town's Code Enforcement Officer is charged with reviewing applications for building permits:

> 16.1.1 Code Enforcement Officer: The duty of administering the provisions of this Ordinance and the Building Code is hereby conferred upon the Code Enforcement Officer. It shall be the duty of the Code Enforcement Officer to:

[2] The Sawyer Point property is located in the Lakefront Zoning District. In the Lakefront Zoning District, the Lake is treated as the front of the lot, rather than the street (i.e. the front setback is the distance from the Lake).

(a) Review all applications for Building, Demolition, or other permits to determine that the purpose for which the permit is sought will conform to the provisions of this Section.

(b) Investigate promptly all possible Zoning Ordnance violations and report his findings in writing to the Board of Selectmen

Tuftonboro Zoning Ordinance §16.1.1 (available at: https://www.tuftonboro.org/planning-board/pages/zoning-ordinance-regulations). Further, the Ordinance provides that the Code Enforcement Officer may not issue any building permit unless and until he determines that the proposed construction meets the requirements under the Ordinance. See id. §16.2.1 ("Before a permit shall be issued by the Code Enforcement Officer, he shall determine whether the proposed construction or Alteration conforms to all the conditions of this Ordinance.").

The Town, through its then-Code Enforcement Officer, issued the building permit for the 1999 addition. See C.R. 35. He did not require any zoning variance or other relief, noting his apparent justification that there was "no change in footprint." Id.

It is undisputed that the 1999 addition created a second floor within the 50' setback. See C.R. 144. Sawyer Point was aware of this in 1999, and made the Town aware of this in its building permit application. See C.R. 35. However, because the addition did not change the building footprint, or encroach further into the setback than the existing first floor, and because the Town issued the building permit, Sawyer Point believed in good faith that no zoning relief was required. See C.R. 10.

Sawyer Point constructed the 1999 addition in accordance with the building permit, and no one, including Dietz, objected for sixteen years, when Dietz initiated the present dispute. Id.

B. 2008/2009 Addition

In 2008, Sawyer Point sought to make another addition to the home, this time adding a second floor over the remainder of the first floor (i.e. above the enclosed porch on the western

side of the home) as well as an addition off the south end of the porch (away from the lake). See C.R. 7.

Sawyer Point's builder, David Braun, used a surveyor's tape to measure the 50-foot setback from the lake. See C.R. 9. The measurement was complicated by the fact that the home and the enclosed porch were already in place, so that he was required to determine the setback by measuring up a steep slope from the lake, through the structure, to a distance of 50 feet. Id.

Based on his measurements, Mr. Braun determined that approximately 150 square feet of the proposed addition would be within the 50' setback from the lake. See C.R. 158. When presented with a building permit application, the Code Enforcement Officer advised Sawyer Point that before a building permit could issue, Sawyer Point needed a variance, because the addition encroached into the setback. See id. Mr. Braun thereafter submitted a variance application and a sketch showing his measurements. Id. at 165.

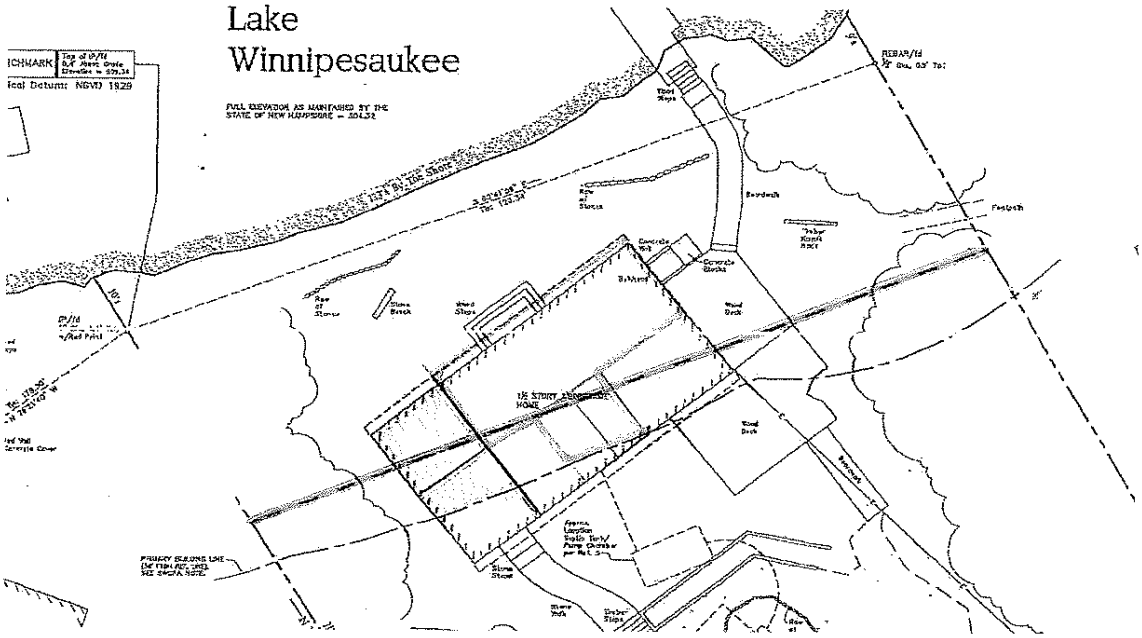
At the June 2008 ZBA hearing on the variance application, Mr. Braun noted that the floor area of the addition inside the setback was actually slightly higher than originally calculated – closer to 196 square feet. See C.R. 162.

The ZBA unanimously approved the variance, the Town issued a building permit, and Sawyer Point constructed the addition in 2009. See C.R. 7.

Dietz, as abutters, received hearing notices for Sawyer Point's variance application, had the opportunity to review the application and related materials, and to attend and speak at the public hearing. See C.R. 161. They also had a thirty (30) day period to appeal the variance after it was issued. See RSA 677:2. They did not appear at the hearing, or raise any objection until initiating the present dispute in 2015.

C. 2014 Survey

In February 2014, Sawyer Point commissioned a survey of its land in connection with a boundary dispute with Dietz. See C.R. 7. Although unrelated to the boundary dispute, the survey revealed the 50' lake setback line was approximately 10' further from the lake than Mr. Braun's measurements in 2008. The sole import of this discrepancy is that the 2008 variance application underestimated the square footage of the addition that would be within the setback. For explanation and ease of reference, a snapshot and markup of a portion of the 2014 survey is reproduced below, and a complete copy is supplied in the Joint Appendix at p. 118:



The above snapshot depicts the Sawyer Point home. The straight pink/purple line traversing the property is where Mr. Braun determined the 50' setback to be in 2008. The blue curved line below and roughly parallel to the pink/purple line is the actual 50' setback as

determined by the 2014 survey. The area shaded pink represents the second floor area which was included in the 2008/2009 variance application (i.e. the square footage within 50' setback as calculated by Mr. Braun). The area shaded yellow represents the portion of the 2008/2009 addition which was also within the 50' setback, but not discovered to be within the setback until Dietz brought their claims.

D. The Application for Equitable Waiver

Upon discovering the discrepancy in the setback line shown on the survey, Dietz brought a zoning enforcement action against Sawyer Point, arguing that the addition should be torn down. See generally RSA 676:15 (authorizing private zoning enforcement actions). Sawyer Point then applied to the Town for an equitable waiver in September 2016. The application sought the equitable waiver for the area shaded yellow on the snapshot above (2008 addition), and for the second floor area outlined in green, which represents the second floor added in 1999. See C.R. 2-11.

After a duly noticed public hearing, the ZBA granted the equitable waiver. See C.R. 16. Following the ZBA's denial of their rehearing request, Dietz appealed the decision to Superior Court. The Superior Court upheld the ZBA decision, and this appeal followed.

III. SUMMARY OF THE ARGUMENT

The Superior Court properly concluded that RSA 674:33-a, I does not require express findings of fact to be set forth in the ZBA's decision. Nothing in the statute imposes that requirement, and this Court has repeatedly rejected the argument that a ZBA must expressly set forth its factual findings. Regardless, the ZBA did make findings during deliberations, reflected in the meeting minutes, which exceeded its obligations under RSA 674:33-a, I.

The Superior Court properly applied RSA 674:33-a, I(d). Dietz's interpretation of that provision fails because it renders paragraph II of the statute meaningless. Further, there was ample evidence to support the ZBA's finding that the cost of correction would substantially outweigh the public benefit, such that it would be inequitable to require Sawyer Point to remove the additions.

The Superior Court did not apply an incorrect burden of proof regarding Sawyer Point's knowledge of the violations. Although Dietz argued that Sawyer Point *should have known* the true location of the setback line for the 2008/2009 addition, RSA 647:33-a requires actual knowledge. Sawyer Point reasonably relied on actual measurements taken by its builder at the time of the addition. The ZBA properly weighed any conflicting evidence, and the Superior Court correctly deferred to the ZBA's resolution.

Dietz's claim that the additions violate the lot coverage requirements under the Tuftonboro Zoning Ordinance fails because even if the additions violated the lot coverage requirements (which Sawyer Point disputes), there is no legal authority to support their claim that a ZBA cannot grant an equitable waiver to correct some, but not all existing zoning violations.

IV. ARGUMENT

a. Standard of Review

Court review of ZBA decisions is limited. Harrington v. Town of Warner, 152 N.H. 74, 77 (2005). The superior court does not sit as a "super zoning board," and may not substitute its judgment for that of the board. Thomas v. Town of Hooksett, 153 N.H. 717, 724 (2006). "Factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable." Taylor v. Town of Wakefield, 158 N.H. 35, 38 (2008) (citing Garrison v. Town of Henniker, 154 N.H. 26, 29 (2006) and RSA 677:6 (2008)). The standard of review is not whether the Court would have found as the ZBA did, but rather whether there was evidence on which it could have reasonably based its findings. Nestor v. Town of Meredith Zoning Bd. of Adjustment, 138 N.H. 632, 634 (1994).

This Court must uphold the superior court's decision unless the evidence does not support it or it is legally erroneous. Harrington, 152 N.H. at 77. The interpretation and application of a statute or ordinance is a question of law, and we review the superior court's ruling on such issues *de novo*. Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010). The party appealing a ZBA decision bears the burden of proof. See Schroeder v. Town of Windham, 158 N.H. 187, 189 (2008).

b. The ZBA Made All Necessary Findings

Dietz first argues that the equitable waiver must be reversed because the ZBA did not make express findings of fact in its written order. See Appellants' Br. 8. This argument fails because (1) the ZBA was not required to explicitly set forth its findings in its decision; and (2)

the ZBA did make findings under each of the statutory criteria, as reflected by the minutes from the public hearing.

1. The ZBA Was Not Required to Make Express Findings

The Superior Court properly rejected Dietz's argument that the ZBA was required to make express written findings at all.

> Although disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefor, is not in and of itself error.

Pappas v. City of Manchester Zoning Bd. of Adjustment, 117 N.H. 622, 625 (1977); see also Thomas, 153 N.H. at 724 (ZBA not required to set forth specific findings to support its decision); The LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 737 (2010) ("'Although the trial court did not expressly make this finding, we assume it made all subsidiary findings necessary to support its decision'") (quoting Smith v. Lillian V. Donahue Trust, 157 N.H. 502, 508 (2008)); Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007) (it would constitute error to reverse ZBA's decision on grounds it lacked express findings). Dietz attempts to distinguish this well-established body of law on the ground that the cases involve variances rather than equitable waivers. See Appellants' Br. 8-9. This argument might have merit if those decisions turned on specific language in the variance statute (RSA 674:33), but they do not. Thus, they are equally applicable to ZBA decisions regarding equitable waivers.

Furthermore, this Court has already rejected Dietz's argument under a nearly identical statute in the realm of Planning Board waivers. See Property Portfolio Group, LLC v. Town of Derry, 163 N.H. 754, 759 (2012). In Property Portfolio Group, the Planning Board granted a waiver from a setback requirement pursuant to RSA 674:44. Much like RSA 674:33-a, that statute provides that, "The planning board may only grant a waiver *if the board finds, by majority*

vote, that..." See RSA 674:44, III(e) (emphasis added). An abutter appealed, claiming that the Planning Board failed to make specific findings under each of the statutory criteria. Id. at 757. This Court rejected that argument because a mandate to make findings as a prerequisite for granting relief is not the same as a mandate to state those findings explicitly. Id. The Court distinguished the language in RSA 674:44 from several other statutes which do require findings to be explicit. Id. at 758 (citing RSA 458–C:4, IV (requiring judicial officer to "enter a written finding or a specific finding on the record that the application of the guidelines would be inappropriate or unjust and state the facts supporting such finding"); RSA 673:13, I (2008) (requiring "written findings of inefficiency, neglect of duty, or malfeasance in office" in order for land use board to remove an appointed member)). Here, as in Property Portfolio Group, the statute at issue (RSA 674:33-a) requires the ZBA to find the statutory criteria have been met to grant relief, but not to set forth an express finding on each criteria in its decision.

2. The ZBA Made Findings on Each of the Statutory Criteria

Even if the ZBA were required to make express findings, it complied with that obligation. During deliberations, the ZBA addressed the four criteria under RSA 674:33-a, and found that each had been met, see C.R. 21 (addressing each of the statutory criteria). Although the ZBA did not include detailed findings in its written decision, see C.R. 16, that was not necessary. C.f. Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95, 103 (2010) (meeting minutes are to be considered in conjunction with written decision to determine whether Planning Board met statutory obligation to set forth basis for denial). Thus, the ZBA exceeded any obligation it had to make express findings.

c. The Superior Court Properly Applied RSA 674:33-a, I(d)

Dietz next argues that the Superior Court misapplied RSA 674:33-a, I(d) by not requiring Sawyer Point to prove its construction was done "in ignorance of the facts."[3] Dietz's argument fails because (1) Dietz's reading of RSA 674:33-a, I(d) would render paragraph II of that statute meaningless; (2) there was ample basis for the ZBA to conclude that the cost of correction would be substantial; and (3) there was ample basis for the ZBA to conclude that there would be no public benefit gained by correction.

1. The Superior Court Properly Ruled that Dietz's Reading of RSA 674:33-a, I(d) Would Render Paragraph II Meaningless

This Court must "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Wolfgram v. New Hampshire Dep't of Safety, 169 N.H. 32, 36 (2016) (internal quotations omitted). "When construing the meaning of a statute, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to words used." Id. (internal quotations omitted). "We will not construe a statute in a way that would render it 'a virtual nullity.'" Id. (quoting Appeal of Wilson, 161 N.H. 659, 664 (2011)). "We construe statutes so as to effectuate their evident purpose and to avoid an interpretation that would lead to an absurd or unjust result." Id.

Here, the Superior Court correctly ruled that Sawyer Point need not prove that the 1999 addition was made in ignorance of the facts constituting the violation. Holding otherwise would render RSA 674:33-a, II meaningless. RSA 674:33-a, II provides:

> In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation

[3] Although Dietz references the 2008/2009 addition in passing on page 9 of their Brief, Dietz's arguments with respect to RSA 674:33-a, I(d) relate solely to the 1999 addition.

> has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

RSA 674:33-a, I(a) provides:

> (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

Starting with subsection (a), an applicant seeking an equitable waiver must prove that the violation was unknown prior to substantial completion of construction. See RSA 674:33-a, I(a). However, paragraph II dispenses with requirement where the violation is at least 10 years old. See RSA 674:33-a, II. Dietz's interpretation of subsection (d) nullifies paragraph II by mandating an applicant still prove the construction was done in ignorance of the violation, even when the violation is more than 10 years old. This reading is contrary to the plain language of the statute, and the intent to exempt longstanding violations (i.e. 10+ years) from the requirements of subsections (a) and (b).

Furthermore, while there is no dispute that Sawyer Point knew the location of the 1999 addition[4], it did not know of any violation. See RSA 674:33-a, I(d) ("ignorance of the facts *constituting the violation*") (emphasis added); C.f. RSA 674:33-a, I(b) (while ignorance of the law is no excuse, "an error in ordinance interpretation or applicability made by a municipal official" is). Sawyer Point followed the proper procedures to obtain a building permit prior to construction, and disclosed the exact location of the addition in its application. See C.R. 35. The Code Enforcement Officer charged with determining compliance with the ordinance determined that no variance was required, and issued the building permit. See id.; Tuftonboro Zoning

[4] The 2008/2009 addition is discussed in Section (d) of the argument.

Ordinance §§16.1.1, 16.2.1. Nobody, including Dietz, appealed the Code Enforcement Officer's determination, see RSA 676:5, or objected to the construction until Dietz's present claims, made 16 years after the fact. Thus, there was a reasonable basis for the ZBA to conclude that the 1999 addition was done in ignorance of the facts constituting the violation.

2. The Cost of Correction Would be Substantial

The purpose of RSA 674:33-a, I(d) is to weigh the costs and benefits of correcting the violation to arrive at an equitable result. See RSA 674:33-a, I(d) (balancing test to determine whether it would be "inequitable to require the violation to be corrected"). There was ample evidence to support the ZBA's conclusion that the cost of correction would substantially outweigh any public benefit, such that requiring removal of the addition would be inequitable. And, those findings are entitled to great deference. Taylor, 158 N.H. at 38 (factual findings made by the ZBA are deemed prima facie lawful and reasonable).

Dietz argues that the ZBA erred because there was no direct evidence regarding the actual cost of correction. See Appellants' Br. 14. However, no such evidence was necessary for the ZBA to reach its conclusion. "In arriving at a decision, the members of the ZBA can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved." Nestor, 138 N.H. at 636 (internal brackets and quotations omitted). The ZBA members were entitled to use their own knowledge to reasonably conclude that the cost to remove a second floor from a home would be substantial.

Perhaps recognizing this, Dietz claims that the ZBA should not have based its decision on the estimated cost of removing the additions, but rather on the cost of applying for a variance for the violations. See Appellants' Br. 14. This argument is disingenuous because a variance application would "correct" the violations only if granted by the ZBA and upheld on appeal.

Dietz has made clear that they would challenge the issuance of a variance for the additions, ultimately seeking to have them removed. Moreover, under Dietz's argument, the cost of correction in any equitable waiver appeal would be the cost of applying for a variance. The amount would essentially be fixed in every case, rendering the balancing test meaningless. Thus, the ZBA properly evaluated this criteria using the removal of the additions as the true cost of correction.

3. Removing the Additions Would Not Result in Any Public Benefit

Dietz argues that the ZBA and Superior Court failed to take account for the public benefit to be gained by correction. See Appellants' Br. 13. At the outset, this argument highlights the inconsistencies in Dietz's positions regarding the method of correction. When arguing for the public benefit, Dietz again contemplates removal of the additions, and not simply applying for a variance (which would yield no discernable public benefit over an equitable waiver). Regardless, there is no public benefit to be gained by removing the 1999 addition.[5] It has been in place for 16 years without issue. Based on testimony from a licensed real estate appraiser, see C.R. 19, 98-119, 167-91, and a letter from an abutter, see C.R. 14, as well as their own experience, see Nestor, 138 N.H. at 636, the ZBA determined that the additions caused no public or private nuisance, did not diminish surrounding property values, and would not benefit the Town if removed. See C.R. 21. These findings provide ample support for the conclusion that no public benefit is to be gained by correction.

Dietz's reliance on a single case, Bacon v. Town of Enfield, 150 N.H. 468 (2004) is misplaced. In Bacon, the ZBA denied a variance for a shed constructed within the setback from

[5] With respect to the 2008/2009 addition, only the yellow shaded area on the diagram depicted on page 5 hereof (and in the Joint Appendix at p. 118) would have to be removed to correct the violation, as the ZBA approved the portion of the addition shaded pink by granting the 2008 variance. There is no public benefit to be gained by removing the yellow-shaded portion of the addition, given that the pink-shaded portion is entitled to remain.

the lake. Id. at 470. The Court upheld the ZBA on the grounds that the variance was not within the spirit of the ordinance. Id. at 473. Bacon is inapplicable for a host of reasons. First, it involved different statutory criteria, and turned on the "spirit of the ordinance," which is not a criteria under the equitable waiver statute. Compare RSA 674:33, I(b)(2) with RSA 674:33-a. Second, it involved the construction of a new shed within the setback, which expanded the building footprint. Id. at 470. Third, the property owner did the construction without consulting with, or seeking any permits or approvals from the Town. Id. at 469. Fourth, the construction could have feasibly been done without any encroachment into the setback. Id. at 470. Finally, and most critically, the Court acknowledged that reasonable minds could differ on whether the shed caused any public detriment, but given the deferential standard of review given to ZBA decision, upheld the denial. Id. at 473. Thus, Bacon is unavailing, and with respect to the final point giving deference to a zoning board's factual findings, actually supports Sawyer Point's position.

d. The Superior Court Applied the Correct Burden of Proof

In Section V of its Brief, Dietz seems to argue that the Superior Court improperly put the burden on Dietz to prove that Sawyer Point knew the true location of the setback line at the time of the 2008/2009 addition. See Appellants' Br. 16. See id. Dietz's argument misconstrues the Superior Court's order, and the applicable burdens of proof.

In applying for an equitable waiver, Sawyer Point had the burden to prove all statutory criteria were met. See RSA 674:33-a. After the ZBA granted the equitable waiver, and Dietz appealed to Superior Court, Dietz had the burden to prove that the ZBA's decision was unlawful or unreasonable. See Taylor, 158 N.H. at 38. The Superior Court was obligated to accept the ZBA's factual findings as prima facie lawful and reasonable. Id.

Here, the sole issue with respect to the 2008/2009 addition was the square footage of the addition within the setback. In 2008, Sawyer Point applied for and obtained a variance for the addition, and represented to the ZBA that approximately 196 square feet lay within the setback. See C.R. 162. When the setback line was established by the 2014 survey, it revealed that roughly 250 square feet actually lay within the setback. See C.R. 7. Thus, in reviewing RSA 674:33-a, I(a) in connection with the equitable waiver, the question was whether Sawyer Point knew at the time of the 2008/2009 addition whether the square footage was actually 250, rather than 196. See RSA 674:33-a, I(a). In granting the equitable waiver, the ZBA made a factual finding that Sawyer Point did not have that knowledge until the 2014 survey was done. See id.; C.R. 21. On appeal, the Superior Court was required to treat this finding as prima facie lawful and reasonable and Dietz had the burden to prove otherwise. See Taylor, 158 N.H. at 38.

Dietz argues that Sawyer Point did know, or should have known, based on the dimensions shown on a 1991 floor plan and the rough sketch on the 1999 building permit application. See Appellants' Br. 16. But that argument does not satisfy Dietz's burden of proof, and fails for several reasons. First, it misstates the legal standard under RSA 674:33-a, which instead requires that "the violation was not *noticed* or *discovered*" – i.e. actual knowledge, not constructive knowledge. See RSA 674:33-a, I(a) (emphasis added). In this case, the "violation" was the additional 50+/- square feet that lay within the setback. Sawyer Point did not discover that discrepancy until after the 2014 survey was done. See C.R. 21. Second, neither the 1999 building permit application, nor the 1991 floor plans even show the location of the setback line. See C.R. 33 (1991 floor plans); C.R. 35 (1999 building permit application). Third, Dietz ignores the fact that Mr. Braun physically measured the setback to the best of his ability using customary practices in connection with the 2008/2009 addition. See C.R. 19. Dietz seems to suggest that

Sawyer Point should have ignored Mr. Braun's actual measurements. Finally, and perhaps most critically, Dietz's argument is illogical if followed to its conclusion. Dietz argues that (1) Sawyer Point knew that Mr. Braun miscalculated the location of the setback line in 2008; (2) that Sawyer Point intentionally showed the setback line approximately 10' closer to the lake than it should have been in the 2008 variance application; and (3) that they did this to hide the fact that the floor area within the setback is approximately 250 s.f., rather than the 196 s.f.. There was absolutely nothing for Sawyer Point to gain by doing any of this. Whether the floor area within the setback was 196 s.f. or 250 s.f., Sawyer Point would have required the same variance from the ZBA, and there is nothing to suggest that the trivial difference of 54 s.f. would have had any bearing on the ZBA's decision. Dietz's argument would be more credible if the miscalculation obviated the need to obtain any zoning relief at all, but plainly that was not the case.

e. The Superior Court and ZBA Properly Rejected Dietz's Lot Coverage Claim

Dietz's final argument is that the "ZBA cannot grant partial relief from a zoning ordinance and give permission to allow a structure that it knows violates other parts of the zoning ordinance." See Appellants' Br. 17. Dietz argues that the 2008/2009 addition violated the lot coverage restrictions under the zoning ordinance, and that therefore, the ZBA could not grant an equitable waiver for the setback violations. Id. Setting aside Dietz's argument that the construction violates the ordinance's lot coverage requirements (which Sawyer Point disputes), Dietz's claim lacks any basis in law.[6]

The only legal authority Dietz cites is RSA 674:33-a, IV; however, that provision does not support Dietz's claim. The entirety of the clause cited by Dietz reads: "An equitable waiver

[6] After Dietz complained to the Town in 2015, the Code Enforcement Officer determined that the additions violated the front yard setback, and directed Sawyer Point to seek an equitable waiver from the ZBA. See Appellant's Br. 4. The Code Enforcement Officer *did not* make a determination that the additions violated the lot coverage requirements, or direct Sawyer Point to seek any zoning relief related thereto. See id.

granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance." RSA 674:33-a, IV. Dietz selective quotations entirely ignore the word "future" in the above-quoted provision. At most, paragraph IV affirms that an equitable waiver does not exempt any future construction from other zoning requirements. Nothing in the statutory language could be read to suggest that an equitable waiver cannot be granted to cure some zoning violations where other past violations still exist. Thus, even if Sawyer Point's additions did exceed permissible lot coverage (which Sawyer Point disputes), Sawyer Point could simply seek a separate equitable waiver or variance from the ZBA for lot coverage. It would not render the present equitable waivers for the 50' front setback void.

V. CONCLUSION

The additions to Sawyer Point's home have been in place for 19 years and 9 years, respectively. They were constructed after following the proper application procedures with the Town, and in good faith reliance on (a) the Code Enforcement Officer's zoning analysis, and determination that no variance was required for the 1999 addition; and (b) the actual measurements taken by Mr. Braun with respect to the 2008/2009 addition. Dietz's claims are retaliatory and untimely. RSA 674:33-a is entitled "Equitable Waiver of Dimensional Requirements". It is difficult to imagine circumstances where the equities of granting a dimensional waiver are more compelling. For the reasons set forth herein, this Court should affirm the Superior Court's decision upholding the ZBA's issuance of equitable waivers for Sawyer Point's 1999 and 2008/2009 additions.

VI. ORAL ARGUMENT

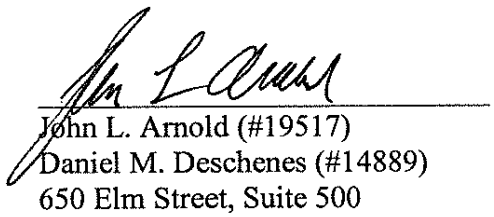
Sawyer Point does not believe oral argument is necessary to resolve this appeal. However, to the extent this Court desires oral argument, it will be presented by John L. Arnold.

Respectfully Submitted,

SAWYER POINT REALTY, LLC

By its Attorneys,

HINCKLEY, ALLEN & SNYDER, LLP

Dated: February 16, 2018 By: 

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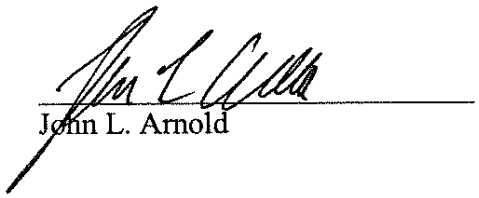
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2018, I caused a copy of the foregoing Brief to be mailed and emailed to Michael J. Tierney, Esquire, and Richard D. Sager, Esquire, counsel of record.



John L. Arnold

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