THE STATE OF NEW HAMPSHIRE

SUPREME COURT

David F. Dietz and Katherine W. Dietz

v.

Town of Tuftonboro

Case Number: 2017-0536

OPENING BRIEF OF DAVID F. DIETZ AND KATHERINE W. DIETZ

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Oral Argument Requested to be
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TEXT OF APPLICABLE STATUTES AND REGULATIONS

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.

I-a. Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

III. The concurring vote of 3 members of the board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass.

IV. A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance. Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.

V. Notwithstanding subparagraph I(b), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

674:33-a Equitable Waiver of Dimensional Requirement. –

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

(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;

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

II. 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 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.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver 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. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

QUESTIONS PRESENTED

1. Whether the Superior Court erred in affirming an equitable waiver without making specific factual findings for each statutory element even though RSA 674:33-a specifically provides that an equitable waiver may be granted "if and only if the board makes all of the following findings." (Trial Brief, p. 1 at Appx. 70; Transcript 17, 61)

2. Whether the statutory language in RSA 674:33-a(I)(d) that the construction "must be done in ignorance of the facts" was a required element or whether it was a legislative drafting mistake that could be ignored. (Trial Brief, p. 13-15 at Appx. 82-85; Transcript 30-31)

3. Whether it was error to grant an equitable waiver for the 1999 construction where the applicant specifically conceded in its Answer, ¶ 100, that it was aware that the construction was within the 50 foot setback and therefore was not made in ignorance of the facts. (Trial Brief, p. 15 at Appx. 85; Transcript 30-31)

4. Whether it was error to grant an equitable waiver for the 1999 construction "in the absence of evidence" that the applicant believed what the applicant asserted in its 1999 building permit and to place the burden of proof on the abutter to prove the applicant believed what the applicant asserted. (Trial Brief, p. 2 at Appx. 71; Reconsideration, p. 2, at Appx. 110)

5. Whether it was error to apply RSA 674:33-a(I)(d)'s cost of correction balancing to include only tearing down the unlawful construction instead of the less expensive option of simply applying for a variance. (Trial Brief, p. 9-11, 15-16 at Appx. 78-80, 84-85; Transcript 22-25, 31-32, 35)

6. Whether it was error to determine RSA 674:33-a(I)(d)'s public benefit to be gained by looking only at the effect on immediate neighbors as opposed to the cumulative public benefit as the Court recognized in *Bacon v. Town of Enfield*, 150 N.H. 468 (2004). (Trial Brief, p. 9-11, 15-16 at Appx. 78-80, 84-85; Transcript 22-25, 31-32, 35)

7. Whether it was error to grant an equitable waiver where the addition violated other parts of the zoning ordinance, such as the lot coverage provisions, and the applicant did not apply for relief from these other provisions. (Trial Brief, p. 16-17 at Appx. 85-86; Transcript 32-35)

STATEMENT OF FACTS AND OF THE CASE

This case involves statutory construction of the equitable waiver statute, RSA 674:33-a. Issues of statutory construction are reviewed by this Court *de novo*. *Formula Dev. Corp. v. Town of Chester*, 156 N.H. 177, 178 (2007). In this case, the Carroll County Superior Court misconstrued the requirements of RSA 674:33-a and erroneously affirmed the Tuftonboro ZBA's granting of two equitable waivers for construction performed within 50 feet of Lake Winnipesaukee in 1999 and 2009. This Court should reverse.

Sawyer Point Realty, LLC, the applicants in this case, own a property on Lake Winnipesaukee at 39 Sawyer Point Road in Tuftonboro, New Hampshire. Sawyer Point's neighbors, David Dietz and Katherine Dietz, are the owners of a property at 41 Sawyer Point Road. The Sawyer Point property abuts the Dietz family property on two sides -- an east-west boundary of approximately 117 feet and a north-south boundary of approximately 85 feet. See Verified Complaint, Appx. 1, at ¶¶ 1-4. See also plans at Appx. 117 & 118.

The Sawyer Point property is located in the Lakefront Zoning District. Section 4.2 of the Tuftonboro Zoning Ordinance provides that there shall be a minimum 50 foot front setback in the Lakefront Zoning District. A 50 foot front setback has been required by the Tuftonboro Zoning Ordinance since at least 1995. Id. at ¶¶ 5-9. Section 4.2 sets a maximum coverage per lot of 20% for the Lakefront District. C.R. 82-83; Complaint/Answer, ¶ 115 at Appx. 13/50.

In 1998 or 1999, Sawyer Point's principal, Laurel Luby, asked her builder, David Braun, to add a second story to the Sawyer Point cottage and provided Mr. Braun with floor plans indicating that the front of the cottage was only 24 feet from the lake. As of 1999, both Sawyer Point and its agent knew that the proposed construction was within the 50 foot setback. On February 8, 1999, Mr. Braun, on behalf of Sawyer Point, submitted a building permit application

indicating that the cottage was 20 feet from the lake on one side to 35 feet from the lake on the other side. As of February 8, 1999, Mr. Braun and Sawyer Point knew that the proposed construction would be within the 50 foot setback but misunderstood whether they were legally required to apply for a variance. Appx. 2-3 at ¶¶ 9-13.

The Town granted the building permit on or about February 8, 1999. Sawyer Point added a second story in 1999 without obtaining a variance. Id. at ¶¶ 14-15.

In 2008, Sawyer Point asked Mr. Braun to convert its porch into living space and add an addition behind the porch. Both the porch and the addition were within the 50 foot front setback. The 2008 building plans showed the front porch room to have a depth of 11 feet, 4 inches, and the addition behind the front porch to have a depth of 13 feet, 6 inches. C.R. 37. Sawyer Point submitted a variance application for the porch but not for the addition. In their variance application, Sawyer Point explicitly stated that there would be no additional footprint. Id. at ¶¶ 16-20; C.R. 158.

Sawyer Point's 2009 construction was within 25 feet of the Dietz property line. The 1999 and 2009 construction approximately doubled the size of the Sawyer Point residence. Id. at ¶¶ 22-23; See also Appx. 117-118.

In July 2013, Kevin Ashe, a surveyor with White Mountain Survey, surveyed the Sawyer Point property. The White Mountain survey showed that 50 foot setback line was approximately 10 feet farther back into the property than had been indicated on Sayer Point's 2008 variance application. The White Mountain survey showed the front of the cottage approximately 20 to 35 feet from the lake, almost exactly where it was depicted on Sawyer Point's 1999 building permit application and 1998/1999 building plans. Id. at ¶¶ 27-30.

Sawyer Point did not inform the town in 2013 that it had misrepresented the location of the 50 foot setback line in its 2008 variance application. On December 11, 2014, Dietz filed in Carroll County Superior Court a private zoning enforcement action pursuant to RSA 676:15 alleging that Sawyer Point violated the Tuftonboro Zoning Ordinance by enclosing a porch and constructing an addition within the 50 foot lake setback in 2009. On December 21, 2015, Mr. Parsons, Code Enforcement Officer for the Town of Tuftonboro, submitted an affidavit that Sawyer Point had "in 2008 represented that the addition was not in the 50 foot setback but [the town] now know[s] that the addition is in the 50 foot setback. Sawyer Point is required to apply for a waiver of dimensional requirements for what was actually constructed in the front setback and not applied for in the variance application. As of today's date, Sawyer Point has yet to apply for the required waiver of dimensional requirements." Id. at ¶¶ 30-38.

Still, several months went by and Sawyer Point did not file for a variance or an equitable waiver. On May 3, 2016, Mr. Parsons again notified Sawyer Point that their addition was in violation of the Tuftonboro Zoning Ordinance. Finally, on September 23, 2016, Sawyer Point filed an application with the Tuftonboro ZBA requesting equitable waivers from the 50 foot setback for both its 2009 construction and its 1999 construction. Id. at ¶¶ 39-41; See also application at C.R. 2-11. Sawyer Point did not request relief from its violation of the lot coverage provision even though it is undisputed that the construction in 2009 expanded the footprint and lot coverage to 29.5% or 9.5% greater than allowed under the Tuftonboro Zoning Ordinance. See CR 31; See also Answer of Sawyer Point at ¶ 116 admitted calculations on plan of 29.5%; Blowup of CR 31 at Appx. 117.

The Tuftonboro ZBA held a public hearing on November 29, 2016, and, after receiving testimony and a written objection from the Dietz family, granted equitable waivers from the 50

foot setback for both the 2009 and 1999 construction. See Minutes at C.R. 19-21 and Notice of Decision at C.R.16. On December 21, 2016, the Dietz family filed a Motion for Reconsideration with the ZBA. C.R. 120-151. On January 11, 2017, the ZBA denied Dietz's request for reconsideration. C.R. 155.

An appeal was timely filed with the Superior Court on January 23, 2017. See Appx. 1 to 16. The Town and Sawyer Point filed Answers on March 3, 2017 and March 28, 2017 admitting many facts. See Appx. 17-52. The Superior Court held a hearing on June 1, 2017, and, after hearing from the parties, issued its decision on July 20, 2017. See Order at Addendum 1 to 30. Dietz filed a Motion to Reconsider on July 24, 2017, Appx. 108-111, which was denied on August 29, 2017. See Add. 31. The Notice of Appeal was filed with the Supreme Court on September 13, 2017.

SUMMARY OF THE ARGUMENT

The Superior Court erred in its refusal to apply the plain and unambiguous statutory language of RSA 674:33-a. In particular, the Superior Court erroneously ignored the statutory language in RSA 674:33-a (I) explicitly requiring findings of fact. Instead, the Court erroneously relied on cases applying a different statute, RSA 674:33, to hold the ZBA was not required to make specific findings. In addition, the Superior Court erred in holding the clear and unambiguous phrase "in ignorance of the facts constituting the violation" in RSA 674:33-a(I)(d) should be ignored as its inclusion in the statute must have been a legislative drafting mistake based on language in RSA 674:33-a(II).

The Superior Court also erred in applying the wrong balancing test under RSA 674:33-a(I)(d). The statute requires the ZBA to balance any public benefit to be gained by enforcing the ordinance against the cost of correction. The ZBA should have compared the cumulative public benefit of applying the ordinance against all properties and compared it to the rather minimal cost of applying for a variance. In addition, the Superior Court erred in holding facts regarding Sawyer Point's knowledge in 1999 were disputed when in fact Sawyer Point admitted in its Answer that it knew its 1999 construction was within the 50 foot shorefront setback. See Answer, ¶ 100, at Appx. 48.

Finally, the Superior Court erred in affirming an equitable waiver for construction which violated the lot coverage requirements of Sections 4.1 and 4.2 of the Tuftonboro Zoning Ordinance even though Sawyer Point did not even apply for relief from that section of the ordinance.

ARGUMENT

A Zoning Board of Adjustment does not have general equitable power but can only grant relief when an applicant has requested the relief and has complied with the statutory requirements. "[A] zoning board has the authority to grant equitable relief from a zoning ordinance *only* when the statutory prerequisites for an equitable waiver, a variance, or a special exception are satisfied." *Dembiec v. Town of Holderness*, 167 N.H. 130, 135 (2014). In affirming the ZBA's decision to grant two equitable waivers, the Carroll County Superior Court misapplied the statutory requirements under RSA 674:33-a.

I. The Statute Authorizes Equitable Waivers Only When Each Statutory Element Is Specifically Found

RSA 674:33-a authorizes equitable waivers "if and only if the board makes all of the following findings . . ." and then describes the four elements that must be met. The plain language of the statute provides that equitable waivers can be granted "if and only if" the board actually makes all of the required findings. Nevertheless, the Tuftonboro ZBA granted equitable waivers without making all of the statutorily required findings. See C.R. 16, C.R. 21.

That the ZBA failed to make factual findings is undisputed. Transcript 54:1-54:2. Nevertheless, the Superior Court affirmed the ZBA's decision finding the decision to grant the equitable waiver "'amounted to an implicit finding' by the ZBA that all of the statutory requirements for an equitable waiver had been met." Order, p. 13, at Add. 14, quoting *Thomas v. Town of Hooksett,* 153 N.H. 717, 724 (2006) and *Pappas v. City of Manchester Zoning Bd.*, 117 N.H. 622, 625 (1997); *See also Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 310 (2007); See also Order, p. 23 & 26 at Add. at 24 & 27. The Superior Court erred in not applying the clear statutory language requiring findings on each element.

1. The Plain Language of the Statute Requires Specific Findings

First, the statutory language authorizes the granting of an equitable "if and only if the board makes all of the [required] findings." RSA 674:33-a(I). "If the language used is clear and unambiguous, [this Court] will not look beyond the language of the statute to discern legislative intent." *Taylor v. Town of Wakefield*, 158 N.H. 35, 39 (2008). The clear and unambiguous meaning of RSA 674:33-a is a board may grant an equitable waiver "if and only if the board makes all of the [required] findings."

2. The Language of RSA 674:33-a Differs From RSA 674:33

Second, the statute differs from RSA 674:33, which authorizes the granting of variances when certain conditions are met but does not require the board to make specific findings. "[T]he legislature does not enact unnecessary and duplicative provisions." *State v. Gifford,* 148 N.H. 215, 217 (2002). "The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009). While specific findings may not be necessary for variances, specific findings are statutorily required for equitable waivers under RSA 674:33-a. The legislature, in adding the phrase ""if and only if the board makes all of the [required] findings" in RSA 674:33-a but not in RSA 674:33 must have intended RSA 674:33-a to be applied differently than RSA 674:33.

3. The Cases Cited in the Superior Court's Order All Involve Application of RSA 674:33 and Not RSA 674:33-a

Finally, none of the cases cited by the Superior Court involve equitable waivers under RSA 674:33-a but only variances under RSA 674:33. See *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 310 (2007); *Thomas v. Town of Hooksett,* 153 N.H. 717, 724 (2006) and *Pappas v. City of Manchester Zoning Bd.*, 117 N.H. 622, 625 (1997). Where the

statutory language in RSA 674:33-a differs from RSA 674:33, cases applying RSA 674:33 are not applicable. The Superior Court erred, as a matter of law, in affirming the ZBA's granting of an equitable waiver where the ZBA failed to make the statutorily required findings under RSA 674:33-a.

II. The Statute Requires the Construction "Must be Done In Ignorance of the Facts" Regardless of When the Construction was Completed[1]

RSA 674:33-a sets forth the four criteria which must be met prior to the granting of an equitable waiver. For construction in the past ten years, all four criteria must be met. For construction which "has existed for 10 years or more," the applicant only needs to prove subsections (c) & (d). See RSA 674:33-a(II). In this case, the ZBA could not grant an equitable waiver for Sawyer Point's 1999 or 2009 construction without finding it met the criteria set forth in subsection (d). In particular, Sawyer Point did not and cannot show that that its construction was done in ignorance of the fact the construction was within the 50 foot setback from the lake.

a. The Applicant Conceded In Its Answer that the 1999 Construction Was Not Done in Ignorance of the Facts

Sawyer Point admitted in its Answer that "Sawyer Point was aware that the 1999 construction was within the 50-foot setback." See Answer, ¶ 100, at Appx. 48. Given this admission, the Superior Court should have vacated the granting of the equitable waiver as Sawyer Point was unable to meet the statutory requirements.

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[1] The statute requires the applicant to have been ignorant of the facts either at the time of the construction or at the time the investment was made. RSA 674:33-a(I)(d). Therefore, if the applicant is a subsequent purchaser who does not have knowledge of the facts at the time of construction, the statutory requirements can be met if the subsequent purchaser can show that he was not aware of the facts constituting the violation at the time of his purchase. Where Sawyer Point has owned the property in question since before 1999, this alternative avenue of meeting RSA 674:33-a(I)(d) is not applicable.

Even without the admission in the Answer, the record clearly indicated that the 1999 construction was known to be within the 50 foot setback. The 1999 building permit stated on the face of the permit that the construction was to take place between 20 and 35 feet from the lake. See C.R. 35. Sawyer Point had plans in 1999 that had clearly marked that it was only "24 feet from water to face of the cottage" and provided copies of these plans to its builder. See C.R. 33, C.R. 42 at 13:12 to 13:18. Again, Sawyer Point cannot argue ignorance of fact where the owner had provided plans to the builder showing that the construction was to take place 24 feet from the lake. Finally, in a letter to the ZBA, Sawyer Point stated that it "has never denied that it knew the cottage was within the 50 foot setback." See C.R. 144. Given these undisputed facts and admissions, the ZBA did not and could not have found that Sawyer Point met the requirements of RSA 674:33-a, I (d).

b. The Statutory Language Cannot Be Ignored Based on Presumed Intent

Faced with clear statutory language and an admission that Sawyer Point does not meet the requirements of the statute, the Superior Court held the requirement of subsection (d) to be inapplicable. Order at p. 16-18 at Add. 17-18. In particular, the Superior Court felt that where both subsections (a) and (b) as well as subsection (d) all required the applicant to show that the construction was made in ignorance of facts and where RSA 674:33-a(II) waives subsections (a) and (b) for projects over 10 years old, the legislature could not have intended to require a showing of the ignorance of facts to meet subsection (d). Order 16-18 at Add. 17-19. In the Superior Court's view, this would render the waiver of RSA 674:33-a(II) a "virtual nullity" and that instead the requirements of RSA 674:33-a(I)(d) should be ignored. Order at p. 18 at Add. 19. This was error.

1. Clear and Unambiguous Language Needs to Be Applied as Written

First, where the clear statutory language requires an applicant to show it was "in ignorance of the facts constituting the violation" the Superior Court could not ignore this clear statutory language. "The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009). Where "the language used is clear and unambiguous, [a court should] not look beyond the language of the statute to discern legislative intent." *Formula Dev. Corp. v. Town of Chester*, 156 N.H. 177, 179, 934 A.2d 504, 505 (2007). In this case, there was no need to look beyond the clear and unambiguous phrase "in ignorance of the facts constituting the violation" in RSA 674:33-a(I)(d). The Superior Court should have applied the statute as written.

2. Each of the Four Subsections Have Different Requirements

Second, the Superior Court's reasoning that the waiver of RSA 674:33-a(II) for projects older than 10 years would be a virtual nullity is based on its erroneous determination that (I)(a), (I)(b) and (I)(d) all require proving that the owner did not discover the violation until after the construction. Order at 17 at Add. 18. This is not supported by the statutory text. Although, an owners' knowledge of the facts constituting the violation could be the basis for violating all three subparts, both (I)(a) and (I)(b) have alternate ways of meeting the elements. For example, subpart (I)(a) can be met if the violation was not discovered until after the "land in violation had been subdivided by conveyance to a bona fide purchaser for value." Likewise, subpart I(b) can be met if the violation was the result of "an error in ordinance interpretation or applicability made by a municipal official." Therefore, even if a hypothetical project has been (a) subdivided and transferred to a bona fide purchaser after (b) a municipal official mistakenly granted a building permit for the project, the current owner may be required to show under part (d) that his

"investment [was] made in ignorance of the facts constituting the violation." RSA 674:33-a(I)(d). Furthermore, while parts (a) and (b) are focused on the facts at the time of construction, part (d) is focused on either at the time of construction or at the time of the investment such as the purchase of the property. Contrary to the Superior Court's determination, parts (a), (b) and (d) are not identical and there are logical reasons why the legislature may have waived parts (a) and (b) more than 10 years after the construction while not waiving parts (c) and (d).

3. Even if the Subsections Were Identical, the Court Should Apply the Language as Written and Not What Might Have Been Written

Finally, even if parts (a), (b) and (d) were identical, the Superior Court still erred in finding that the waiver provision of RSA 674:33-a(II) trumps the clear statutory requirements of RSA 674:33-a(I)(d). Sawyer Point argues the express requirements of RSA 674:33-a(I)(d) conflicts with the intent of RSA 674:33-a(II) and therefore the express language RSA 674:33-a(I)(d) must be seen as a "drafting oversight." C.R. 147. For the reasons stated above, this is not the case. Nevertheless, even if both provisions could not be applied as written, there is no basis for concluding the language in in RSA 674:33-a(I)(d) was the "drafting oversight" as opposed to the waiver language in RSA 674:33-a(II) being the "drafting oversight."

The legislature could have written section (II) to provide for a waiver of the ignorance of facts in section (I)(d). It did not. Section II only provides for a waiver of "subparagraphs I(a) and (b)." In interpreting a statute, a court should "not consider what the legislature might have said or add language that the legislature did not see fit to include." *Taylor v. Town of Wakefield*, 158 N.H. 35, 41 (2008). The legislature could have reasonably determined that even for construction more than 10 years old, an equitable waiver should not be granted to an owner or purchaser who knew the facts constituting the violation but built or purchased anyway.

In this case, the Superior Court ignored part of section (I)(d) in order to effect what the Superior Court saw was the purpose of section (II). The purpose of section (II) was clearly expressed in the words the legislature chose – to only waive the requirements in "subparagraphs I(a) and (b)" and not to waive the requirements of I(d).

III. The Superior Court Applied the Wrong Standard in Comparing the Cost of Correction to the Public Benefit Under RSA 674:33-a(I)(d)

RSA 674:33-a(I)(d) also requires the zoning board to weigh the cost of correction to the public benefit to be gained and only authorizes equitable waivers when "the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected." The ZBA erred both in failing to look at the cumulative public benefit of enforcement as well as failing to find the cost of correction was minimal.

1. Public Benefit Analysis is Determined by Looking at the Cumulative Effect of Non-Enforcement to the Public

This Court has not yet had an opportunity to apply RSA 674:33-a(I)(d). Nevertheless, in the context of variances, this Court has held that public benefit analysis should be the cumulative effect of not enforcing the ordinance. *Bacon v. Town of Enfield*, 150 N.H. 468, 473 (2004)(affirming ZBA's denial of relief from a 50 foot shoreline setback stating "While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant.") Just as in *Bacon* where the ZBA should looked at the cumulative effect of multiple violations of the 50 foot shoreline setback, in this case the Tuftonboro ZBA should have looked at the cumulative effect of violations of the 50 foot shorefront setback.

The Superior Court erred in finding the cumulative public benefit analysis in *Bacon* inapplicable as *Bacon* involved a variance. See Order, p. 19 at Add. 20. While not directly

controlling, the principle in *Bacon* is equally applicable to the specific statutory language in RSA 674:33-a(I)(d). The Supreme Court regularly cites variance cases in discussing the equitable waiver standard and has suggested that the statutory standard for equitable waivers may be more "narrow" than for variances. *Taylor v. Town of Wakefield,* 158 N.H. 35, 42 (2008)(applicant did not meet "narrow" standard for an equitable waiver but could still apply for a variance). While the statutory language for variances and equitable waivers may differ and therefore compel a different result in some circumstances, the balancing of cost to correct as compared to "***any*** public benefit to be gained" is explicit in the equitable waiver statute. See RSA 674:33-a(I)(d)(emphasis added). See *Landry v. Landry*, 154 N.H. 785, 788 (2007)(use of the word "any" compels a broad construction).

2. Cost of Correction is Minimal and Can Be the Cost of Applying for a Variance

Sawyer Point provided no evidence of the cost of correction to allow the ZBA to weigh against the public benefit to be gained by enforcing the 50 foot setback. See Answer of Sawyer Point, ¶ 107, at Appx. 49 (admitting that it provided no information regarding the cost of correction.) Where the statute requires the ZBA to weigh the cost of correction against the public benefit and the applicant admits that it provided no evidence regarding the cost of correction, this Court must find that ZBA could not have granted an equitable waiver.

Nevertheless, even if the applicant had provided evidence regarding the cost of correction, the ZBA should have found that the cost of requiring the applicant to apply for a variance is rather small when compared to the cumulative public benefit. The ZBA erred in finding that the cost of correction is the cost to "take it down" where Sawyer Point has not even applied for a variance. As this Court has previously recognized, an applicant's failure to meet the statutory requirements for an equitable waiver under RSA 674:33-a would not necessarily preclude it

from applying for other zoning relief such as a variance or special exception under RSA 674:33. *Taylor v. Town of Wakefield*, 158 N.H. 35, 42 (2008)(applicant did not meet "narrow" standard for an equitable waiver but could still apply for a variance); *RDM Trust v. Town of Milford*, No. 2015-0495, 2016 WL 3476331, at *1 (N.H. Mar. 31, 2016)(applicant did not meet standard for an equitable waiver but could still apply for a special exception).

IV. The Superior Erred in Ignoring Sawyer Point's Admission in Its Answer

The Superior Court's clearest error may have been in ignoring Sawyer Point's factual admission in its Answer. Sawyer Point admitted in its Answer that "Sawyer Point was aware that the 1999 construction was within the 50-foot setback." See Answer, ¶ 100, at Appx. 48. This admission should have been binding. Instead, the Superior Court erred in holding there was a factual dispute and that "[i]n light of the conflicting evidence in the record, the Court finds it was reasonable for the ZBA to find that Sawyer Point did not know the true location of the survey until the White Mountain Survey in 2014."[2] Order at 22 at Add. 23. Sawyer Point's clear admission in its Answer should have precluded any contrary factual finding.

[2] The Carroll County Superior Court's finding that the violation could not be known until a survey was completed is similar to the finding made by the Milford ZBA in the case of RDM Trust v. Town of Milford. After the Milford ZBA's decision was affirmed by the Superior Court, this Court reversed in an unpublished decision. See RDM Trust v. Town of Milford, No. 2015-0495, 2016 WL 3476331, at *1 (N.H. Mar. 31, 2016)(holding no good faith mistake where "the owner stated that he estimated that the distance from the deck to the side boundary line was ten to twelve feet, and that after the survey was completed, he realized his mistake"). Even if Sawyer Point did not admit in its Answer that it knew the construction was within the 50 foot setback as early as 1999, the argument that one does not know the precise location of a setback until a survey is completed should be rejected for the same reasons this Court rejected the arguments in RDM.

V. The Superior Court Erred in Placing the Burden on Dietz to Show Sawyer Point Believed the Evidence Sawyer Point Provided to the Town

Even without the admission in its Answer, the evidence was undisputed that Sawyer Point knew its construction was in the 50 foot setback. The 1999 building permit stated on the face of the permit that the construction was to take place between 20 and 35 feet from the lake. See C.R. 35. Sawyer Point had plans in 1999 that had clearly marked that it was only "24 feet from water to face of the cottage" and provided copies of these plans to its builder. See C.R. 33, C.R. 42 at 13:12 to 13:18. The 1999 measurements were accurate. Sawyer Point admitted that the building permit measurements were accurate. Transcript at 50. In fact, the 1999 measurements match the measurements on the 2014 survey. See CR 31, CR 149. Finally, in a letter to the ZBA, Sawyer Point stated that it "has never denied that it knew the cottage was within the 50 foot setback." See C.R. 144.

Nevertheless, the Superior Court disregarded these undisputed facts holding there was no evidence that "Sawyer Point or Braun believed the interior floor plan and the 1999 sketch were accurate or, more importantly, that they accurately depicted the front setback." Order, p. 22, at Add. 23. RSA 674:33-a clearly puts the burden of proof on Sawyer Point. See RSA 674:33-a (I) ("the burden of proof [is] on the property owner.") The Superior Court erred in placing the burden of proof on Dietz to show that Sawyer Point actually believed its own representations. Where Sawyer Point never denied that it was aware the construction was within the 50 foot setback, and even admitted in its Answer, "Sawyer Point was aware that the 1999 construction was within the 50-foot setback." See Answer, ¶ 100, at Appx. 48, the Superior Court could not disregard these representations and require Dietz prove that Sawyer Point believed its own representations.

VI. Sawyer Point's 2009 Addition Also Violates Sections 4.1.1 and 4.2 of the Tuftonboro Zoning Ordinance

A 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. RSA 674:33-a(IV) specifically provides that an equitable waiver "shall not exempt . . . additions on the property from full compliance with the ordinance." In this case, Sawyer Point applied for relief only from the front setback provision of the ordinance but did not apply for relief from other sections providing for maximum lot coverage such as with Sections 4.1.1 and 4.2.

Section 4.1.1 requires provides that no building shall be enlarged without complying with the Table of Dimensional requirements in Section 4.2 See C.R. 82-83. Section 4.2 sets a maximum coverage per lot of 20% for the lakefront district. Id. Nevertheless, in a January 12, 2016 plan submitted to DES, Sawyer Point acknowledged that with the 2009 expanded footprint, lot coverage had increased lot coverage to 29.5% or 9.5% greater than allowed under the Tuftonboro Zoning Ordinance. See C.R. 31; See also blowup of C.R. 31 at Appx. 117. This fact was not disputed. The ZBA should not have even considered granting an equitable waiver of the front setback where the construction was in violation of section 4.2's coverage limitations and Sawyer Point did not apply for relief from this section. It was error for the Superior Court to affirm the granting of an equitable waiver where the construction violates other parts of the ordinance. See Order, p. 29 at Add. 30.

VII. Conclusion

The Superior Court erred in affirming the equitable waivers granted by the Tuftonboro ZBA. The ZBA should not have granted equitable waivers from the front setback requirements where the construction violated the lot coverage requirements and no application was filed for relief from this section. The Superior Court erred in ignoring the factual admission in Sawyer

Point's Answer that it was aware that its construction was in the fifty foot setback when it performed its construction in 1999. The Superior Court misconstrued the explicit requirement of RSA 674:33-a(I)(d) which required Sawyer Point to prove it was in "ignorance of the facts constituting the violation" and misconstrued the balancing test of RSA 674:33-a(I)(d) which requires a ZBA to compare any public benefit of enforcing an ordinance against the cost of compliance which can be as minimal as the cost of applying for a variance. Finally, the Superior Court erred in not requiring the ZBA to make specific factual findings where the statute authorizes equitable waivers "if and only if the board makes all of the following findings." RSA 674:33-a(I). This Court should reverse and instruct the Superior Court to apply the statute as written.

CERTIFYING STATEMENT

I hereby certify that every issue raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important questions regarding statutory construction and the application of RSA 674:33-a. Oral argument before the full Court would be helpful to resolving these issues. If oral argument is granted, the Appellant requests 15 minutes to be presented by Attorney Michael J. Tierney.

Respectfully submitted,
DAVID F.DIETZ AND KATHERINE W. DIETZ
By their attorneys,
WADLEIGH, STARR & PETERS, PLLC

By: _____

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Date: January 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that two copies of Opening Brief of David F. Dietz and Katherine W. Dietz has this day been mailed to Richard D. Sager, Esq., Sager & Smith, PLLC, 5 Courthouse Square, PO Box 385, Ossipee, NH 03864-0385 and to Daniel M. Deschenes, Esq., John L. Arnold, Esq. and Jamie S. Myers, Esq., Hinckley Allen, 650 Elm Street, Manchester, NH 03101.

_____
Michael J. Tierney, Esq., NH Bar 17173

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **David F. & Katherine W. Dietz v Town of Tuftonboro**
Case Number: **212-2017-CV-00007**

Enclosed please find a copy of the court's order of July 14, 2017 relative to:

Final Order

July 20, 2017

Abigail Albee
Clerk of Court

(406)

C: Michael J. Tierney, ESQ; Richard Dean Sager, ESQ; Daniel M. Deschenes, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CARROLL, SS. 212-2017-CV-00007

DAVID F. DIETZ AND KATHERINE W. DIETZ

v.

TOWN OF TUFTONBORO

ORDER

The plaintiffs, David F. Dietz and Katherine W. Dietz ("Dietzes"), appeal a decision by the Town of Tuftonboro ("Town") Zoning Board of Adjustment ("ZBA") granting equitable waivers to Sawyer Point Realty, LLC ("Sawyer Point") under RSA 674:33-a (2016) for two additions to Sawyer Point's house, one made in 1999 and the other in 2008/2009. (Court index #1.) Sawyer Point has intervened in this action and, along with the Town, asks this court to uphold the ZBA's decision. (Court index #4.) The court held a hearing on this matter on June 1, 2017. After considering the certified record, the parties' arguments, the pleadings, and the applicable law, the court AFFIRMS the ZBA's decision.

I. Factual Background

The certified record supports the following relevant facts.[1] Sawyer Point owns a 0.4 acre property along the shore of Lake Winnipesaukee located at 39 Sawyer Point Road in Tuftonboro, New Hampshire ("Sawyer Point Property"). (See C.R. at 3.) The Dietzes own abutting lakefront property at 41 Sawyer Point Road ("Dietz Property").

[1] At the June 1, 2017 hearing the court granted the Town's motion to amend the certified record to include "Part 'B'" of a two-part appraisal provided to the ZBA by Sawyer Point during the November 29, 2016 ZBA hearing. (See court index #31.) Although Part B was provided to the ZBA, it was mistakenly omitted from the certified record.

(See C.R. at 17, 78.) Both properties are located within the Lakefront Residential Zoning District ("Lakefront District"). (C.R. at 54.) Section 4.2 of the Town of Tuftonboro Zoning Ordinance ("Zoning Ordinance") provides that there shall be a minimum fifty-foot front setback in the Lakefront District.[2] (C.R. at 83.)

In 1999, Sawyer Point[3] sought to add a second floor addition over the eastern portion of the first floor of its home (hereinafter "1999 addition"). (See C.R. at 7, 35.) At the time, Sawyer Point was aware that its home was located within fifty feet of the lake, and that the planned addition would therefore create a second floor within the fifty-foot setback. (See C.R. at 144; see also Sawyer Point's Answer ¶ 11; Sawyer Point's Trial Mem. ¶ 10.) Before beginning construction, Sawyer Point's principal, Laurel Luby ("Luby"), provided her builder, David Braun ("Braun"), with an interior floor plan of the house, which indicates that one corner of the house is "24" from water." (See C.R. at 33, 42.) Prior to undertaking the work, Braun submitted a building permit application to the Town. (See C.R. at 35; Pls.' Ex. D.) The building permit application contains a rough sketch of the existing house, which indicates the house's eastern corner is twenty feet from the lake and its western corner is thirty-five feet from the lake. (See C.R. at 35; Pls.' Ex. D.) On February 8, 1999, the Town's building inspector granted the building permit, noting the addition would cause "no change in footprint." (See C.R. at 35; Pls. Ex. D; see also C.R. at 19.) Thereafter, Sawyer Point added the second floor addition over the eastern portion of the existing house. (See C.R. at 7.)

In 2008, Sawyer Point sought to add a second addition to its home, which would add a second floor over the existing enclosed porch, as well as an addition off the south

[2] Within the Lakefront District, the front setback applies to the lakefront side of the property.
[3] At that time, the Sawyer Point Property was owned by Sawyer Point Realty Trust, which is now Sawyer Point Realty, LLC. (C.R. at 7.) For ease of reference, this order refers collectively to "Sawyer Point."

end of the cottage (hereinafter "2008/2009 addition"). (See C.R. at 7.) The addition was to be approximately 350 to 400 square feet. (See C.R. at 7.) Prior to obtaining a building permit for the addition, Braun attempted to determine the location of the fifty-foot front setback. (See C.R. at 7, 144.) Using a surveyor's tape, Braun measured the fifty-foot setback from the lake. (See C.R. at 7, 19, 144.) The measurement was complicated, however, by the fact that the home and enclosed porch were already in place, and so Braun was required to determine the fifty-foot setback by measuring horizontally from the shoreline of the lake through the existing structure to a distance of fifty feet. (See C.R. at 7, 19, 144.) Braun marked the location of the fifty-foot setback on a septic design plan. (See C.R. at 19, 160.)

Based on Braun's measurements and drawing, it appeared that approximately 150 square feet of the proposed addition would be within the fifty-foot front setback. (See C.R. at 7, 144, 160.) Accordingly, in June 2008, Braun submitted an area variance application, with this drawing, to the ZBA on behalf of Sawyer Point. (See C.R. at 158–60; see also C.R. at 7.) The ZBA held a hearing on Sawyer Point's variance application on June 25, 2008. (See C.R. at 161.) In the minutes of the June 2008 ZBA hearing, Braun noted that the floor area of the addition inside the fifty-foot front setback was actually closer to 196 square feet. (See C.R. at 162; see also C.R. at 7.) Thereafter, the ZBA unanimously approved the variance, and the addition was constructed pursuant to a building permit issued by the Town. (See C.R. at 7, 162–63.)

In February 2014, Sawyer Point commissioned White Mountain Survey to survey the Sawyer Point Property. (See C.R. at 7, 19, 149.) The survey was recorded at Book 232, Page 96 in the Carroll County Registry of Deeds ("White Mountain Survey"). (See

C.R. at 31; see also C.R. at 7; Pls.' Ex. B.) The White Mountain Survey revealed that the fifty-foot front setback is approximately ten feet closer to the lake than Braun had determined in 2008. (See C.R. at 31; see also Pls.' Ex. B.) According to the White Mountain Survey, the portion of Sawyer Point's 2008/2009 addition that is within the fifty-foot front setback is approximately 200 to 245 square feet, rather than the 196 square feet represented by Braun at the 2008 ZBA hearing on Sawyer Point's variance application. (See C.R. at 31, 149, 162; see also C.R. at 7–8; Pls.' Exs. A, B.)

In December 2014, upon discovering this discrepancy, the Dietzes brought a zoning enforcement action against Sawyer Point in Carroll County Superior Court, claiming that Sawyer Point was in violation of the Zoning Ordinance because of the setback violation. (See C.R. at 8, 53, 58–59.) In response to the Dietzes' claim, on September 23, 2016, Sawyer Point submitted to the ZBA an application for an equitable waiver of dimensional requirements, seeking an equitable waiver for the portion of the 2008/2009 addition within the fifty-foot setback and not covered by the 2008 variance, and for the portion of the 1999 addition within the fifty-foot setback. (See C.R. at 5–11.)

In its application, Sawyer Point asserted that it met all of the statutory requirements for an equitable waiver for both the 1999 and 2008/2009 additions under RSA 674:33-a (2016). (See C.R. at 8–11.) Specifically, Sawyer Point maintained that Braun made a good faith error in measurement when measuring the fifty-foot setback in 2008 and that Sawyer Point did not become "fully aware that the area of the [2008/2009] addition inside the 50-foot setback was greater than" Braun had originally determined until the White Mountain Survey was performed. (See C.R. at 9–10.) Sawyer Point also argued that the additions had not adversely affected property values

in the area, nor did they constitute public or private nuisances. (See C.R. at 10–11.) Finally, Sawyer Point asserted that the cost of removing the violation "far outweighs any public benefit to be gained." (C.R. at 10.)

On November 24, 2016, Sawyer Point's neighbors, Lawrence and Geraldine DeGeorge ("DeGeorges"), wrote to the ZBA to express their support for the ZBA granting Sawyer Point's equitable waiver application, noting, "[i]n no way does this situation negatively impact us or our neighborhood and we see no reason not to grant the waiver." (See C.R. at 14.) The DeGeorges also stated that "[t]he lack of impact of the setback error on the neighborhood is clear; the house adjacent to 39 Sawyer Point Road to the east, 37 Sawyer Point Road, was sold on October 21st. It was listed in MLS and sold in 39 days at 92% of the asking price, and above the assessed value!" (C.R. at 14.)

On November 29, 2016, the ZBA held a public hearing on Sawyer Point's equitable waiver application. (See C.R. at 19.) The ZBA first heard from Sawyer Point's attorney, Attorney Richard Uchida. (See C.R. at 19.) Attorney Uchida stated, as recorded in the minutes, that he believed Sawyer Point qualified for the equitable waiver because the error in measuring the fifty-foot front setback "was not discovered until the [2014] survey was done[,]" the error "was not done in bad faith and [was] not a misrepresentation of the law[,]" and "there was no attempt to hide anything[;] they just got it wrong." (C.R. at 19; see also C.R. at 20.) Attorney Uchida further stated that "[t]here is no [diminution] in property value of any surrounding properties"; [t]here had been no complaints until the [Dietzes'] lawsuit"; "[t]he addition brings the house into

conformity with others in the neighborhood"; and "the cost would be prohibitive to remove the back of the house." (C.R. at 19.)

The ZBA also heard testimony from Braun, who testified that he measured the fifty-foot setback in 2008 "the best he could" and using "the standards of the day." (C.R. at 19; see also C.R. at 21.) Braun asserted that he "never tried to deceive anyone" and it "would not have been good for him to lie" given his "reputation as a local builder." (C.R. at 21.)

Kristin Eldridge ("Eldridge"), a licensed New Hampshire real estate appraiser, also testified before the ZBA. (See C.R. at 19.) Eldridge had conducted an appraisal of the Dietz Property, evaluating the market value of the property before and after the 2008/2009 addition. (See C.R. at 98–119, 167–91.) With respect to Eldridge's testimony, the minutes state the following: "[Eldridge] felt there was no diminution in value to [the Dietzes'] property or anyone else's in the neighborhood. You cannot see applicants house unless you are in their driveway, Dietz house is barely visible. Their house does not obstruct any view of the lake for anyone." (C.R. at 19.)

Eldridge also provided a copy of her appraisal report to the ZBA. (See C.R. at 19, 98–119, 167–91.) Her report states, in relevant part,

> Although [the 2008/2009 addition] is reasonably well screened from the Dietz home by a natural buffer of trees, the addition could be viewed from the Dietz home.
> In considering diminution of value, it is noted that this condition is not normally considered in adjusting for value. The presence of a neighboring home, or a neighboring addition, creates nothing measurable in terms of value to the subject. The home is close to the subject, and can be seen, but that has always been true. This is a neighborhood with little "elbow room" . . . ; the people in Sawyer Point see their neighbors, and those neighbors are in fairly close proximity. The presence of this addition would not, under any circumstances, be considered in valuing the closest neighbor's property, which is the Dietz property. There is no obstruction of

> view, as the area in question is roughly between the Dietz's driveway and the Luby's driveway. It is not an area of interest, such as a focal point of view on the waterfront side of the neighborhood. Therefore, this appraiser concludes that there is no diminution of value to the Dietz property at 41 Sawyer Point Road as a result of the addition constructed on to the property at 39 Sawyer Point Road.

(C.R. at 178.) In her report, Eldridge also concludes that "no other property on Sawyer Point Road could possibly be impacted by any diminution of value. The neighborhood is somewhat cramped between houses, driveways and natural foliage; the other property owners could hardly be aware of the addition unless they drove down the Luby's driveway." (C.R. at 178.)

The ZBA also heard testimony from the Dietzes' attorney, Attorney Michael Tierney, and from Mr. Dietz in opposition to the equitable waivers. (See C.R. at 20.) In addition, the Dietzes submitted a written objection, wherein they argued that Sawyer Point had not met any of the requirements for an equitable waiver under RSA 674:33-a for either the 1999 or 2008/2009 additions. (See C.R. at 22–28.)

Much of Attorney Tierney's testimony before the ZBA was on the issue of whether Sawyer Point knew of the violation prior to construction. (See C.R. at 20.) Specifically, Attorney Tierney noted that in 1999, Sawyer Point and Braun had the interior floor plan, which indicated that one corner of the house was "24' feet from water," and that Braun's sketch on the 1999 building permit application indicated the house was thirty-five feet from the lake. (See C.R. at 20.)

Attorney Tierney also asserted that the additions diminished the value of the Dietz Property "because [the additions] now allow[] more use of the property with more people." (C.R. at 20.) Mr. Dietz similarly testified that "he felt there is an increase in use . . . and because of that it does impact their value, more noise, they like peace and

quiet, more use of septic that could impact his well etc." (C.R. at 20) In response, ZBA member Mark Howard ("Howard") asked Mr. Dietz why he had waited seven years "before bringing this forward." (C.R. at 20.) Dietz explained that "he was not aware of what was going on at the time." (C.R. at 20.)

The ZBA heard contrary testimony regarding potential increased use from Sawyer Point's other neighbor, Mr. DeGeorge, who spoke in favor of granting the equitable waiver. (See C.R. at 20.) Mr. DeGeorge stated, as represented in the minutes, that "[t]he Luby's are only here about 4 months of the year and maybe grandchildren are here for a week, it's just the 2 of them most of the time." (See C.R. at 20.) Attorney Uchida echoed this sentiment, stating that "[t]he use is the same year after year, consistent number of people." (C.R. at 20.)

To support their allegation that the additions decreased their property value, the Dietzes submitted a letter from a licensed New Hampshire real estate appraiser, Barry Shea ("Shea"), opining as to the potential effect of the Sawyer Point additions on the Dietz Property's value. (C.R. at 20, 85–87.) Shea writes, in relevant part:

> Because of its proximity to the most desirable section of the [Dietz Property's] waterfront, the side of the [Dietz Property] that abuts the [Sawyer Point Property] would naturally be the most used portion of the [Dietz Property]. Because of its proximity to the [Sawyer Point Property], it is also the most likely to be adversely impacted by [Sawyer Point's] building encroachment into the setback area. Although I have not researched paired sales or performed any statistical analysis, the factors identified above are of a nature that would have an adverse effect on the value and marketability of the subject property. That is, encroachment such as that which exists on the [Sawyer Point Property] would typically have a negative impact on the value of an abutting property with the [Dietz Property's] characteristics.

(C.R. at 86–87.) Significantly, however, Shea did not "perform[] an appraisal of the Dietz [P]roperty, or of any other property related to this matter." (C.R. at 85.)

After comments closed, the ZBA "proceeded with the four findings" required for an equitable waiver. (See C.R. at 21.) The minutes state the following:

> [The ZBA] will address both years 1999 and 2008.
> A: Violation was not noticed for 10 years or more. 1999 ok. 2008: No other survey until 2014. [ZBA member] Jim [Cubeddu] remembers sitting on the 2008 variance and the issue was what was given for the setback. All agreed there is no violation.
> B: Violation was not an outcome of ignorance of the law. Board felt it was a good faith error, no certified plan available and that Braun's testimony was important. All agreed it was a good faith error.
> C: The physical or dimensional violation does not constitute a public or private nuisance. All agreed it does not.
> D: The cost of correction far outweighs any public benefit. [Howard] noted that it was not a nuisance until 2014, and no benefit to owner or town to take it down. All agreed there is no obstruction.
> The board concluded that the applicant met the 4 issues for both years . . . .

(C.R. at 21.) Accordingly, the ZBA granted Sawyer Point equitable waivers from section 4.2 of the Zoning Ordinance for both the 1999 and 2008/2009 additions. (See C.R. at 16, 21).

By letter dated December 21, 2016, the Dietzes filed a motion for rehearing with the ZBA. (See C.R. at 120–40.) Sawyer Point filed an objection to the Dietzes' motion for rehearing on January 6, 2017, (see C.R. at 142–49), to which the Dietzes responded on January 11, 2017 (see C.R. at 150–51). On January 11, 2017, the ZBA voted unanimously to deny the Dietzes' request for a rehearing. (See C.R. at 153, 154.) The minutes of the January 11, 2017 ZBA hearing state, in relevant part:

> There was not a survey done until 2014 to show the actual difference. The board all agreed that the extra few feet did not make a difference in the decision. The applicant clearly stated they were not trying to get away with anything, a good faith error.

(C.R. at 154.)

On January 25, 2017, the Dietzes filed a complaint in this court, appealing the ZBA's decision pursuant to RSA 677:4.[4] (Court index #1.)

II. Standard of Review

Any person aggrieved by a ZBA decision may appeal to the superior court. RSA 677:4. "Judicial review in zoning cases is limited," however. Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment, 164 N.H. 757, 760 (2013). The appealing party bears the burden of proving that the ZBA's decision was "unlawful or unreasonable." RSA 677:6; 47 Residents of Deering v. Town of Deering, 151 N.H. 795, 797 (2005). It is the province of the zoning board of adjustment, not the trial court, to resolve conflicting evidence and determine issues of fact. Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 671 (2003). Accordingly, all findings of fact made by the ZBA are considered prima facie lawful and reasonable. RSA 677:6; Simplex Techs. v. Town of Newington, 145 N.H. 727, 729 (2001); Korpi v. Town of Peterborough, 135 N.H. 37, 39 (1991). The trial court will affirm the zoning board's decision unless the board made an error of law or the court finds, based upon a balance of probabilities, that the decision was unreasonable. RSA 677:6; Greene v. Town of Deering, 151 N.H. 795, 797 (2005).

"The review by the superior court is not to determine whether it agrees with the zoning board of adjustment's [factual] findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 670 (2003) (quotation omitted). The fact that "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA . . . does not mean that either finding or decision is wrong per

[4] On March 13, 2017, the court (Ignatius, J.) granted Sawyer Point's motion to intervene. (Court index #4.)

se." Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994). The burden here, therefore, is on the Dietzes to demonstrate "by the balance of probabilities" that the ZBA's decision to grant Sawyer Point equitable waivers for the 1999 addition and the 2008/2009 addition was unlawful or unreasonable. See RSA 677:6.

Under RSA 674:33-a, a ZBA is empowered to authorize an equitable waiver from a physical layout or dimensional requirement in a zoning ordinance,

> if and only if the board makes all of the following findings:
> (a) That the violation as 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;
> (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
> (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
> (d) That due to the degree of past construction or investment made in ignorance of the fact constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

In lieu of the ZBA finding the requirements of subparagraphs I(a) and (b) met, "the owner may demonstrate to the satisfaction of the board that the violation 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, II. The property owner seeking the equitable

waiver bears the burden of proving to the ZBA that each of RSA 674:33-a's requirements are met. RSA 674:33-a, I.

III. Analysis

On appeal, the Dietzes contend that the ZBA erred in granting Sawyer Point equitable waivers from the fifty-foot front setback requirement because Sawyer Point failed to meet the statutory requirements under RSA 674:33-a for the 1999 addition and for the 2008/2009 addition. Additionally, the Dietzes assert that the ZBA erred in granting the equitable waiver for the 2008/2009 addition because the addition also violates the lot coverage limitations in sections 4.1.1 and 4.2 of the Zoning Ordinance. The court addresses each of the Dietzes' arguments in turn.

A. 1999 Addition

The court first addresses the 1999 addition. It is undisputed that the 1999 addition has existed for more than ten years without any enforcement action by the Town or any other person. Accordingly, both parties agree that pursuant to RSA 674:33-a, II, Sawyer Point was only required to prove subparagraphs (I)(c) and (d). The Dietzes contend that Sawyer Point did not meet either of these requirements, and thus the ZBA erred in granting Sawyer Point the equitable waiver for the 1999 addition. The court addresses each statutory requirement in turn.

1. RSA 674:33-a, I(c)

Pursuant to RSA 674:33-a, I(c), the property owner seeking an equitable waiver must prove "[t]hat the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property." The

Dietzes argue that the ZBA erred with respect to this factor because (1) it failed to make any findings as to whether there was a diminishment in value of other properties in the area, and (2) there was no evidence to support a finding that the 1999 addition did not diminish the value of the Dietz Property.

With respect to the Dietzes' first argument, the ZBA's decision to grant Sawyer Point's equitable waiver application for the 1999 addition "amounted to an implicit finding" by the ZBA that all of the statutory requirements for an equitable waiver had been met. Thomas v. Town of Hooksett, 153 N.H. 717, 724 (2006); Pappas v. City of Manchester Zoning Bd., 117 N.H. 622, 625 (1977); cf. 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)). "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." Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007) (quoting Thomas, 153 N.H. at 724) (citing Pappas, 117 N.H. at 625). Accordingly, the court will not vacate or remand the ZBA's decision simply because the minutes do not contain an explicit finding by the ZBA that the 1999 addition did not diminish the value of the Dietz Property or other property in the area.

Moreover, the court finds that there is sufficient evidence in the record to support a finding that the setback violation caused by the1999 addition did not diminish the value of other property in the area. See Harborside Assocs. L.P. v. Parade Residence

Hotel, LLC, 162 N.H. 508, 514 (2011) (explaining trial court's review is limited to "examin[ing] whether there was evidence in the record to support [the ZBA's] factual findings"). First, Eldridge testified and presented her conclusions that the 2008/2009 addition caused no diminution in value to the Dietz Property or any other property on Sawyer Point Road. (See C.R. at 19, 178.) Although Eldridge's report considers the effect of only the 2008/2009 addition on the market value of the Dietz Property (see C.R. at 177–78), the 2008/2009 addition is closer to the Dietz Property than the 1999 addition (see C.R. at 31, 149; see also Pls.' Exs. A, B.). It is thus reasonable to conclude that if the 2008/2009 addition had no effect of the value of the Dietz Property, then neither did the 1999 addition.

Additionally, Eldridge's report describes the Sawyer Point neighborhood as "a neighborhood with little 'elbow room'" and concludes that "[t]he presence of a neighboring home, or a neighboring addition, creates nothing measurable in terms of value to the [Dietz Property]."[5] (C.R. at 178.) Eldridge also testified before the ZBA, consistent with her report, that Sawyer Point's house "does not obstruct any view of the lake for anyone." (C.R. at 19; see also C.R. at 178.) Moreover, the DeGeorges' letter to the ZBA stated that, "[t]he lack of impact of the setback error on the neighborhood is clear; the house adjacent to 39 Sawyer Point Road to the east, 37 Sawyer Point Road,

[5] The Dietzes argue that Eldridge's report cannot be relied upon. The court does not agree. First, the Dietzes contend that Eldridge's report contained a "Part A" and "Part B," but "Part B" was never provided to the ZBA. Contrary to the Dietzes' assertion, both "Part A" and "Part B" of Eldridge's report were presented to the ZBA. Next, the Dietzes assert that Eldridge's report is an opinion of value as of July 28, 2016, while the unlawful construction occurred in 1999 and 2009. The statute does not require a finding regarding valuation at the time of the construction, however. RSA 674:33-a, I(c) requires a finding that the "violation does not . . . diminish the value of other property in the area." RSA 674:33-a, I(c). Thus, the statute speaks in terms of a present valuation, not a past valuation. Finally, the Dietzes contend that Eldridge's report is based on faulty assumptions that the septic and water systems conform to state standards. However, the Dietzes presented no evidence that the septic and water systems do not conform to state standards. Accordingly, the court finds that it was reasonable for the ZBA to rely upon Eldridge's report.

was sold on October 21st. It was listed in MLS and sold in 39 days at 92% of the asking price, and above the assessed value!" (C.R. at 14.) In light of this evidence, the court finds that it was reasonable for the ZBA to conclude that the 1999 addition did not diminish the value of other property in the area.

Although the Dietzes presented Shea's letter opining as to the possible effect of the additions on the Dietz Property's value, Shea did not "perform[] an appraisal of the Dietz [P]roperty, or of any other property related to this matter." (C.R. at 85.) Thus, Shea only speculates that "encroachment such as that which exists on the [Sawyer Point Property] would typically have a negative impact on the value of an abutting property with the [Dietz Property's] characteristics." (C.R. at 85 (emphasis added).) Significantly, Shea does not actually conclude that the 1999 addition, or the 2008/2009 addition, caused the Dietz Property to diminish in value. (See C.R. at 85.) Moreover, although Mr. Dietz testified that the alleged increase in use of the Sawyer Point Property negatively impacts the value of his property, he offered no concrete evidence to support this conclusory allegation.

After considering all of the evidence before the ZBA, the court finds that the ZBA acted reasonably in finding that the 1999 addition did not diminish the value of other property in the area. Accordingly, the court finds that the ZBA did not err in finding RSA 674:33-a, I(c) met for the 1999 addition.

2. RSA 674:33-a, I(d)

The Dietzes also maintain that the ZBA erred in finding the requirements of subparagraph I(d) met. Pursuant to RSA 674:33-a, I(d), the owner must prove "[t]hat due to the degree of past construction or investment made in ignorance of the facts

constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected." The Dietzes assert that the ZBA erred in finding this statutory element met because (1) in order to meet this element, Sawyer Point needed to show that its actions were "made in ignorance of the facts," and Sawyer Point could not make this showing as it has admitted that it was aware that the 1999 construction was within the fifty-foot setback; and (2) Sawyer Point did not and cannot show that the cost of correction exceeds the benefit to the public.

The court first addresses the Dietzes' argument that subparagraph I(d) requires the owner to prove that its actions were "made in ignorance of the facts." This issue presents a question of statutory interpretation. When interpreting a statute, the court "first examine[s] the language found in the statute, and where possible, [the court] ascribe[s] the plain and ordinary meanings to words used." Wolgram v. N.H. Dep't of Safety, 169 N.H. 32, 26 (2016) (quotation omitted). However, the court "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); see also Holt v. Keer, 167 N.H. 232, 243 (2015) (rejecting interpretations of statute that would "render other portions of [the statute] a nullity"). Additionally, "[t]he legislature is not presumed to waste words or enact redundant provisions." Garand v. Town of Exeter, 159 N.H. 136, 141 (2009) (quotation omitted). Thus, "whenever possible, every word of a statute should be given effect." Id. (quotation omitted). The court "also presume[s] that the legislature does not enact unnecessary and duplicative provisions." Id. (quotation omitted). Ultimately, the court should interpret a statute "so as to effectuate [its] evident purpose and to avoid an

interpretation that would lead to an absurd or unjust result." Wolgram, 169 N.H. at 26 (quotation omitted).

The Dietzes assert that under RSA 674:33-a, I(d), Sawyer Point was required to prove that the construction was "made in ignorance of the facts." The court does not agree. Subparagraph I(d) must be read in the context of the statute as a whole. See Wolfgram, 169 N.H. at 32. RSA 674:33-a, II provides that

> [i]n 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 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.

Subparagraph I(a) requires that the owner prove that neither he, nor his agent or representative, noticed or discovered the violation until after the construction had been substantially completed. RSA 674:33-a, I(a). Thus, when, as here, the violation has existed for ten years or more and no enforcement action has been taken by the Town or any person directly affected, the owner need not prove that he did not discover the violation until after the construction.[6]

Under the Dietzes' interpretation of subparagraph I(d), however, even where a violation has existed for ten years or more and no enforcement action had been taken by the Town or any person directly affected, an owner would be required to prove that

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[6] Subparagraph I(b) requires that the owner show that the violation

> was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.

RSA 674:33-a, I(b). Thus, if the requirements of RSA 674:33-a, II are met, the owner also need not prove that the violation was caused by either an error in measurement or calculation, or an error by a municipal permitting official in interpreting or applying the ordinance.

he did not know of the facts constituting the violation at the time of the construction. Such an interpretation would render RSA 674:33-a, II a virtual nullity. The court "will not construe a statute in a way that would render it a virtual nullity." Wolfgram, 169 N.H. at 36. When the statute is viewed as a whole, it is clear that the Legislature's intent in enacting subparagraph I(d) was to require the balancing test, whereby the cost of correction is weighed against the public benefit. The court, therefore, finds that Sawyer Point was not required to prove under subparagraph I(d) that the 1999 construction was made in ignorance of the facts constituting the violation.

The court next addresses the Dietzes' argument that Sawyer Point did not and cannot show that the cost of correction exceeds the benefit to the public. The court finds that there is sufficient evidence in the record to support a finding by the ZBA that the cost of correcting the fifty-foot setback violation caused by the 1999 construction "so far outweighs any public benefit to be gained, that it would be inequitable to require" Sawyer Point to correct the violation. RSA 674:33-a, I(d). First, to correct the violation at issue, Sawyer Point would have to remove a significant portion of the second floor addition to its home. (See C.R. at 31, 149; Pls.' Exs. A, B.) Thus, it is reasonable to conclude that correcting the violation would be rather costly. As to the public benefit to be gained, the ZBA heard testimony and was presented with evidence that, with the exception of the Dietz Property, the setback violation at issue has not negatively impacted the Sawyer Point neighborhood, or the general public. (See C.R. at 10, 14, 19, 20.) To the extent the Dietzes are being affected by the 1999 setback violation, as the ZBA pointed out, the Dietzes did not complain about the addition until filing their 2014 lawsuit, suggesting the harm to the Dietzes is not particularly great. (See C.R. at

20, 21.) On this evidence, the court finds that it was reasonable for the ZBA to find that there would be little to no public benefit gained if Sawyer Point were required to correct the violation.

The Dietzes assert, relying on Bacon v. Town of Enfield, 150 N.H. 468 (2004), that when considering the public benefit to be gained, the ZBA should have considered the cost to the public of not enforcing the fifty-foot front setback requirement anywhere in town. Bacon, however, was a variance case—not an equitable waiver case. See 150 N.H. at 470–73. In Bacon the issue before the New Hampshire Supreme Court was whether granting the variance would violate the "spirit of the ordinance," which necessarily entails a consideration of the overall purpose of the ordinance and the cumulative effect of any violations of the ordinance restriction. See 150 N.H. at 472–73. Here, however, the issue is not whether granting the equitable waiver would violate the "spirit of the ordinance," but rather the extent of the public benefit to be gained by requiring Sawyer Point to correct the setback violation. Thus, the court does not find Bacon controlling here. Moreover, the court notes that the Dietzes appear to overlook the fact that the 1999 addition did not expand the footprint of Sawyer Point's house, and even if the 1999 addition were removed, the first floor of the existing cottage would still be in the setback. (See C.R. at 19, 31, 149; Pls.' Ex. A.) Thus, removing the portion of the 1999 addition within the fifty-foot setback, would not cure the setback violation. Accordingly, the court finds that the ZBA did not err in failing to consider the public cost of not enforcing the fifty-foot front setback requirement anywhere in town.

For the foregoing reasons, the court finds that the ZBA did not err in finding RSA 674:33-a, I(d) met for the 1999 addition. The court therefore finds that the ZBA's

decision granting Sawyer Point an equitable waiver from the fifty-foot front setback requirement for the 1999 addition was proper.

B. 2008/2009 Addition

The court next addresses whether the ZBA properly granted the equitable waiver for the portion of the 2008/2009 addition within the fifty-foot front setback and not covered by the 2008 variance. The Dietzes argue that Sawyer Point did not meet any of the four requirements under RSA 674:33-a, and that the ZBA therefore erred in granting Sawyer Point the equitable waiver for the 2008/2009 addition. The court addresses each statutory requirement in turn.

1. RSA 674:33-a, I(a)

RSA 674:33-a, I(a) provides that the "owner, former owner, owner's agent or representative, or municipal official," must not have "notice or discovered" the violation for which the owner seeks an equitable waiver "until after a structure in violation had been substantially completed." The Dietzes assert that "[t]he ZBA erred in applying the wrong standard and finding this statutory element was met because 'there was no other survey until 2014.'" (Pls.' Trial Mem. at 2 (citing C.R. at 21).) The Dietzes also contend that if the correct standard is applied, "the undisputed facts show that both the owner, Laurel Luby, and her agent, David Braun, knew that the addition was within the setback long before it was built." (Pls.' Trial Mem. at 3.) The court does not agree.

The ZBA heard conflicting evidence as to Sawyer Point's knowledge of the location of the fifty-foot setback. Sawyer Point maintained that although it knew a portion of the 1999 addition and 2008/2009 addition were within the fifty-foot setback prior to construction, it was not aware of the true location of the fifty-foot setback until

the White Mountain Survey in 2014. (See C.R. at 7–8, 9–10, 19.) Sawyer Point asserted that because it knew a portion of the 2008/2009 addition was within the fifty-foot front setback, Braun attempted to measure the true location of the setback and then, after calculating the location, Sawyer Point applied for a variance for the 2008/2009 addition. (See C.R. at 7–8, 9–10, 19.) However, according to Sawyer Point, Braun had erroneously calculated the location of the fifty-foot setback and thus the variance application mistakenly did not encompass the entire area of the addition within the fifty-foot front setback. (See C.R. at 7–8, 9–10, 19, 20, 21.) As Sawyer Point stated in its application,

> Sawyer Point and Braun were well-aware that variance relief was required for the [2008/2009 addition] because of its location in the setback, and as such filed and received that variance relief. It is simply that a larger portion of the addition—that which faces Sawyer Point Road away from the lake—was also in the 50-foot setback despite Mr. Braun's best efforts to locate the setback line. This was nothing more than a good faith error in measurement by Mr. Braun.

(C.R. at 9–10.)

The Dietzes, on the other hand, presented evidence suggesting Sawyer Point and Braun knew the location of the fifty-foot setback prior to the 1999 and 2008/2009 additions. (See C.R. at 20, 23, 33, 35, 37, 42.) Specifically, the Dietzes asserted that Luby and Braun had an interior floor plan of Sawyer Point's house prior to beginning construction in 1999 that indicated a corner of the house was "24' from water (see C.R. at 20, 23, 33), and that the sketch on Braun's 1999 building permit application indicated one corner of the house was twenty feet from the lake, while the other corner was thirty-five feet from the lake (see C.R. at 20, 23, 35; Pls.' Ex. D). The Dietzes thus contended that Sawyer Point and Braun knew that building an addition approximately 11.4 feet

behind the front of the house[7] would be within the fifty-foot front setback. (See C.R. at 20, 23.)

In light of the conflicting evidence in the record, the court finds that it was reasonable for the ZBA to find that Sawyer Point did not know the true location of the fifty-foot front setback until the White Mountain Survey in 2014. Although the Dietzes presented evidence suggesting otherwise, significantly, the ZBA heard no evidence that Sawyer Point or Braun believed the interior floor plan and 1999 sketch were accurate or, more importantly, that they accurately depicted the front setback. In fact, there was no evidence presented that anyone had actually measured the front setback until Braun attempted to do so in 2008.

Moreover, although it may have been reasonable for the ZBA to conclude, given the evidence presented by the Dietzes, that Sawyer Point or Braun knew that a greater portion of the 2008/2009 addition than they included in the variance application was within the fifty-foot front setback, the fact that "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA . . . does not mean that either finding or decision is wrong per se." Nestor, 138 N.H. at 634. Moreover, this court's task "is not is not to determine whether it agrees with the zoning board of adjustment's [factual] findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, 149 N.H. at 670; see also Thomas, 153 N.H. at 724 (stating that reviewing court "does not sit as a 'super zoning board'" and "may not substitute its judgment for that of the [ZBA]" (quoting Cook v. Town of Sanbornton, 118 N.H. 668, 671 (1978))). The court finds that

[7] The plans submitted with Braun's building permit application show the depth of the front (lakeside) room as 11 feet and four inches. (See C.R. at 37)

there is sufficient evidence in the record upon which the ZBA could reasonably conclude that Sawyer Point did not know the true location of the fifty-foot front setback until the White Mountain Survey in 2014. Accordingly, the court finds that the ZBA did not err in finding that Sawyer Point had met the requirements of RSA 674:33-a, I(a).

2. RSA 674:33-a, I(b)

The Dietzes next assert that the ZBA erred in finding subparagraph I(b) met. Under RSA 674:33-a, I(b), the owner must show that "absent certain conditions, the violation for which the [owner] seeks an equitable waiver must have been caused by one of two conditions: (1) an error in measurement or calculation by the owner or owner's agent; or (2) an error by a municipal permitting official in interpreting or applying the ordinance." Taylor v. Town of Wakefield, 158 N.H. 35, 40 (2008) (citing RSA 674:33-a, I(b)). The Dietzes assert that the ZBA erred with respect to subparagraph I(b) because (1) the ZBA "misapplied the statute in finding that Mr. Braun acted in good faith as there was 'no certified plan available'" (Pls.' Trial Mem. at 4 (quoting C.R. at 21)); (2) the ZBA "did not make a separate finding as to whether the violation was a result of the owner or the owner's agent's failure to inquire"; and (3) "even if Mr. Braun made a good faith error in measurement in 2008, the owner failed to properly inquire as to the ten foot discrepancy with her building plans and, in fact, neglected to review the application at all." (Pls. Trial Mem. at 4.) The court does not agree.

At the outset, the court notes that, for the reasons discussed above, the ZBA was not required to include its specific factual findings with respect to each element of subparagraph I(b). See Kalil, 155 N.H. at 310; Thomas, 153 N.H. at 724; Pappas, 117 N.H. at 625. Implicit in the ZBA's finding that Sawyer Point satisfied the requirements of

subparagraph I(b), was a finding that "the violation was not an outcome of . . . failure to inquire." See Thomas, 153 N.H. at 724; Pappas, 117 N.H. at 625.

Moreover, the court finds that it was not unreasonable for the ZBA to find that the violation was not the result of a failure to inquire, but was instead caused by a good faith error in measurement or calculation. As discussed above, the ZBA heard evidence that prior to beginning the 2008/2009 construction, Sawyer Point and Braun knew a portion of the addition would be in the fifty-foot front setback, but did not know the precise location of the fifty-foot front setback, and accordingly, Braun attempted to measure the location of the front setback. (See C.R. at 7–8, 9–10, 19, 20, 21.) Significantly, Braun testified that he attempted to measure the front setback as "best he could," using the "standards of the day" and that he "never tried to deceive anyone." (C.R. at 19, 21.) The ZBA also heard evidence that Braun's measurement was complicated by the fact that the home and enclosed porch were already in place, and so he was required to determine the fifty-foot setback by measuring horizontally from the shoreline of the lake through the existing structure to a distance of fifty feet. (See C.R. at 7, 19, 144.)

The Dietzes argue, however, that the error was due to Sawyer Point's failure to inquire. The Dietzes maintain that because Sawyer Point had an interior floor plan showing one corner of the house was "24' from water," it "should have been alerted to the erroneous measurement." (Pls.' Trial Mem. at 6.) However, as mentioned above, the ZBA heard no evidence as to the accuracy of this plan or that anyone had actually measured the fifty-foot front setback prior to Braun's 2008 measurement. Moreover, this plan is an interior floor plan and is not a plan created for the purpose of depicting the location of the front setback. Finally, as Sawyer Point asserts,

> There was absolutely nothing for Sawyer Point to gain by doing any of this. Whether the floor area within the setback was 196 [square feet] or 250 [square feet], Sawyer Point would have required the same variance from the ZBA. The [Dietzes'] 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. Further, there is no reason to believe that the trial difference of 54 [square feet] would have had any bearing on the ZBA's decision to grant the variance. . . . It would be one thing if the "omitted" square footage caused the addition to be closer to the lake; but that is not the case here. Indeed, the square footage "omitted" from the 2008 variance application lies behind (i.e. further from the lake) the portion of the addition which was granted a variance in 2008.

(Sawyer Point's Trial Mem. ¶ 55.)

After considering all of the evidence before the ZBA, the court finds that there is sufficient evidence in the record to support the ZBA's finding that "the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith" on the part of Sawyer Point or Braun, "but was instead caused by a good faith error in measurement or calculation made by" Braun. RSA 674:33-a, I(b). Accordingly, the court finds on a balance of the probabilities that the ZBA did not err in finding that Sawyer Point met the requirements of subparagraph I(b).

3. RSA 674:33-a, I(c)

The Dietzes next contend that the ZBA erred in its interpretation and application of RSA 674:33-a, I(c). As discussed above, under subparagraph I(c), the property owner must prove "[t]hat the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property." The Dietzes argument here is more or less identical to the argument it made regarding subparagraph I(c) and the 1999 addition. That is, the Dietzes maintain that the ZBA erred because (1) it failed to make any findings as to whether the 2008/2009

addition diminished the value of other property in the area, and (2) Sawyer Point failed to meet its burden of proving that the 2008/2009 addition did not diminish the value of the Dietz Property.

For the reasons discussed above, the court rejects the Dietzes' argument that the ZBA erred in failing to make specific findings that the 2008/2009 addition did not diminish the value of other property in the area. See Kalil, 155 N.H. at 310; Thomas, 153 N.H. at 724; Pappas, 117 N.H. at 625. The court also finds that there is sufficient evidence in the record to support a finding that the 2008/2009 addition did not diminish the value of the Dietz Property or any other property in the area.

Eldridge's testimony and appraisal report indicated that the 2008/2009 addition caused no change to the value of the Dietz Property. (See C.R. at 19, 178.) Eldridge's appraisal report unambiguously states that "there is no diminution of value to the Dietz [P]roperty at 41 Sawyer Point Road as a result of the addition constructed on to the property at 39 Sawyer Point Road." (C.R. at 178.) Additionally, Eldridge also concluded that "no other property on Sawyer Point Road could possibly be impacted by any diminution of value." (C.R. at 178.) Moreover, Sawyer Point's neighbors, the DeGeorges testified and submitted a letter to the ZBA in support of the equitable waiver. As discussed above, the DeGeorges' letter indicated that the setback violation appeared to have no impact on the value of properties in the area. (See C.R. at 14.) Although the Dietzes rely on Shea's letter as evidence to the contrary, as the court noted in its discussion of the1999 addition, Shea did not actually conclude that the 2008/2009 addition caused the Dietz Property to diminish in value. (See C.R. at 85.) The court, therefore, finds that it was reasonable for the ZBA to find that Sawyer Point

had met its burden of proving that the 2008/2009 addition did not diminish the value of the Dietz Property or any other property in the area. Accordingly, the court finds that the ZBA did not err in finding the requirements of subparagraph I(c) met

4. RSA 674:33-a, I (d)

The Dietzes next assert that the ZBA erred in finding that Sawyer Point met the requirements of RSA 674:33-a, I(d). As previously discussed, under RSA 674:33-a, I(d), the owner must prove "[t]hat due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected." The Dietzes argue that the ZBA erred because Sawyer Point presented no evidence regarding the cost of correction and because the cost of correction "is rather small when compared to the cumulative public benefit."[8] The court does not agree.

At the outset the court notes the violation in question is only a portion of the 2008/2009 addition within the front setback. Sawyer Point obtained a variance for 196 square feet of the addition. (See C.R. 162–63; see also C.R. at 7–8, 149; Pls.' Ex. A.) Moreover, the area of the addition in violation is further away from the lake than the 196 square feet covered by the 2008 variance. (See C.R. at 7–8, 149; Pls.' Ex. A.)

[8] As with the 1999 addition, the Dietzes maintain that the ZBA erred in finding this statutory element met because in order to meet this element, Sawyer Point needed to show that its actions were "made in ignorance of the facts," and Sawyer Point could not make this showing as it knew the 2008/2009 addition would be within the setback. The court has already considered and rejected the Dietzes' interpretation of subparagraph I(d) in its discussion of the 1999 addition. Moreover, even assuming, arguendo, that the statute required Sawyer Point to prove ignorance of the facts under subparagraph (I)(d), the court has already found that it was reasonable for the ZBA to conclude that Sawyer Point did not know the true extent of the violation prior to the 2014 White Mountain Survey.
The Dietzes also argue, relying on Bacon, that the ZBA erred in failing to consider the cumulative public benefit. As with the 1999 addition, the court does not find Bacon controlling here and thus concludes that the ZBA did not err in failing to consider the cumulative public benefit of enforcing the fifty-foot setback throughout the town.

According to Sawyer Point, the area within the front setback not covered by the variance is only approximately 54 square feet. (See Sawyer Point's Trial Mem. ¶ 58.) Thus, the question under subparagraph I(d) is whether the cost of correcting the violation caused by this approximately 58 square-foot portion of the 2008/2009 addition far outweighs the public benefit to be gained.

Although Sawyer Point did not present evidence of the exact cost of correcting the violation, in its application, Sawyer Point averred,

> [a]s a practical matter, it is obvious that the cost of removal far outweighs any public benefit to be gained. . . . Sawyer Point is unaware of any detriment or adverse impact to the public by the addition, let alone a benefit or gain to the public if a portion of the addition had to be removed.

(C.R. at 10.) Similarly, at the ZBA hearing, Attorney Uchida stated that "the cost would be prohibitive to remove the back of the house." (C.R. at 1.)

With respect to the public benefit to be gained, the ZBA heard little evidence of the benefit to be gained by correcting the 2008/2009 violation. Although the Dietzes maintained that they are harmed by the addition and that the public detriment of not enforcing the fifty-foot front setback requirement is great (see C.R. at 20, 24, 25), the ZBA also heard evidence that the violation was not negatively impacting Sawyer Point's other neighbors, and that the Dietzes did not complain about the addition until 2014 (see C.R. at 14, 19, 20, 178). Additionally, the violation at issue is only a small portion of the 2008/2009 addition, and is the portion of the addition within the front setback area that is furthest from the lake. Even if Sawyer Point were to correct this violation, the approximately 196 square feet of the addition covered by the 2008 variance would remain within the fifty-foot front setback. In light of all this evidence, the court finds that it was not unreasonable for the ZBA to conclude that the cost of correction far

outweighs the public benefit to be gained. Thus, the court finds that the ZBA did not err in finding that Sawyer Point had satisfied the requirements of subparagraph I(d).

5. Lot Coverage Claim

Finally, the Dietzes argue that the ZBA erred by granting Sawyer Point the equitable waiver for the 2008/2009 addition because the addition violates other provisions of the Zoning Ordinance, specifically the lot coverage requirements under Sections 4.1.1 and 4.2. As Sawyer Point contends, however, Sawyer Point's equitable waiver application did not include a request for an equitable waiver from the Zoning Ordinance's lot coverage requirements, and thus this issue was not considered by the ZBA. Therefore, the court finds that the issue of a possible lot coverage violation caused by the 2008/2009 addition is not properly before this court.

Accordingly, the court finds that the ZBA did not err in granting Sawyer Point an equitable waiver from the fifty-foot front setback requirement for the 2008/2009 addition.

IV. Conclusion

For the reasons stated herein, the court AFFIRMS the ZBA's decision. The Dietzes have submitted a request for findings of fact and rulings of law. The court's findings and rulings are set forth in narrative form in this order. See Harrington v. Town of Warner, 152 N.H. 74, 86 (2005); Geiss v. Borassa, 140 N.H. 629, 632–33 (1996). Insofar as the Dietzes' request for findings and rulings are consistent with this order, they are granted; otherwise, they are denied or determined to be unnecessary

So ordered.

7-14-17
Date

Peter H. Fauver
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

FILE COPY

Case Name: **David F. & Katherine W. Dietz v Town of Tuftonboro**
Case Number: **212-2017-CV-00007**

Please be advised that on August 29, 2017 Judge Ignatius made the following order relative to:

Dietz Motion for Reconsideration

8/24/17 On review, the Court finds it has not misapprehended the facts or misapplied the law - The motion for reconsideration is Denied. Peter H. Fauver, Judicial Referee

Referee's finding APPROVED, so ordered. Hon. Amy L. Ignatius 8/29/2017

August 29, 2017

Abigail Albee
Clerk of Court

(406)

C: Michael J. Tierney, ESQ; Richard Dean Sager, ESQ; Daniel M. Deschenes, ESQ; John L. Arnold, ESQ