

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2022-0236

Jeffrey E. Raymond, Trustee of the J&R Realty Trust, Appellant

v.

Town of Plaistow Zoning Board of Adjustment, Appellee

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APPELLEE'S BRIEF – TOWN OF PLAISTOW

MANDATORY APPEAL PURSUANT TO  
SUPREME COURT RULE 7

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## TEXT OF RELEVANT STATUTES

### **674:33 Powers of Zoning Board of Adjustment. –**

I. (a) The zoning board of adjustment shall have the power to:

(1) 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

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

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

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

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

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

(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) 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

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) 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.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) 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.

(c) The board shall use one voting method consistently for all applications

until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.

I-a. (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.

(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

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 any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

IV. (a) 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.

(b) 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.

(c) The zoning ordinance may be amended to provide for the termination of all special exceptions that were authorized under this paragraph before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

V. Notwithstanding subparagraph I(a)(2), 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.

**677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body. –**

I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

II. Upon the filing of a motion for a rehearing, the board of adjustment, a board of appeals, or the local legislative body shall within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration. Any order of suspension may be upon such terms and conditions as the board of adjustment, a board of appeals, or the local legislative body may prescribe. If the motion for rehearing is against a decision of the local legislative body and if the selectmen, as provided in RSA 677:2, shall have called a special town meeting within 25 days from the receipt of an application for a rehearing, the town shall grant or deny the same or suspend the order or decision complained of pending further consideration; and any order of suspension may be upon such terms and conditions as the town may prescribe.

**677:6 Burden of Proof. –** In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

## STATEMENT OF THE FACTS AND THE CASE

Plaintiff is the owner of 190 Plaistow Road, Plaistow, New Hampshire (the “Property”) which at the time of Plaintiff’s land use applications, was situated in the Commercial 1 Zoning District. Apx. 041.<sup>1</sup> Plaintiff proposes using the Property for its business, J&R Gutters, which sells, services and installs windows, siding, roofing, decks, and gutters. *Id.* As the initial step in the land use application, the building inspector issued a zoning determination letter that the proposed use was equivalent to a Contractor’s Storage Yard which is not permitted in the Commercial 1 Zoning District. *Id.* The Plaintiff appealed the zoning determination to the Plaistow Zoning Board of Adjustment (“ZBA”). Apx. 037-40. At the same time, the Plaintiff filed a variance application to permit a Contractor’s Storage Yard on the Property. Apx. 020-26. The ZBA held public hearings to consider the appeal of the zoning determination and the variance application submitted by the Plaintiff. The ZBA members were aware that other real property controlled by Plaintiff was not in compliance with Plaistow’s Zoning Ordinance. The ZBA found that the Building Inspector’s

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<sup>1</sup> The abbreviation “Apx.” refers to the Appendix filed by the Plaintiff-Appellant.

zoning determination was reasonable and that the Plaintiff had not met the statutory requirements for the granting of a variance. Apx. 153-54.

The Plaintiff filed a timely request for a rehearing to the ZBA pursuant to RSA 677:3, which was denied. Apx. 190-95, 204-205. An appeal of the ZBA's decision to the Rockingham Superior Court followed. Apx. 206-20. Based upon consideration of the Certified Record of the proceedings before the ZBA, the pre-hearing memoranda of law submitted by the parties, and the presentation of the parties' arguments at the hearing, the Superior Court issued a written decision denying the Plaintiff's appeal. Apx. 252-59.

## SUMMARY ARGUMENT

The Plaintiff sought to have its own interpretation of the Plaistow Zoning Ordinance prevail over the interpretation of the Plaistow Building Inspector. The Plaintiff also sought a variance in case its interpretation of the Plaistow Zoning Ordinance was incorrect. As not every proposed land use in a municipality can fit within the definition section of a Zoning Ordinance, the Building Inspector must have the ability to interpret the Zoning Ordinance table of definitions against any proposed land uses. The Building Inspector reasonably determined that a business engaged in windows, siding, roofing, gutters, sales, service, signage and installation fit within the definition of “Contractor’s Storage Yard” rather than a “Trade Business” since construction contractors are expressly excluded from qualifying as a Trade Business. The ZBA, being the Town’s final arbiter of the Zoning Ordinance, agreed with the Building Inspector’s determination, and such decision is entitled to a presumption of reasonableness.

The granting of a variance is subject to five conditions which Plaintiff had the burden of satisfying. One such condition is establishing that the enforcement of the plain language of “Contractor’s Storage Yard” and “Trade Business” creates an unnecessary hardship for the Plaintiff, owing to special conditions of the subject property. The certified record is devoid of any evidence that the Plaintiff satisfied this condition and therefore the ZBA’s decision denying the variance application was required by law, and was reasonable.

## ARGUMENT

**I. The Superior Court appropriately determined that the Plaistow Zoning Board of Adjustment acted reasonably in affirming the Plaistow Building Inspector’s zoning determination that Plaintiff’s proposed use resembled a “Contractor’s Storage Yard” as defined in the Zoning Ordinance**

The ZBA’s review of an interpretation made by the Town’s zoning administrator is “a quasi-judicial proceeding where the applicant bears the burden of proving the interpretation is in error.” *N.H. Alpha of SAE Tr. v. Town of Hanover*, 174 N.H. 269, 261 A.3d 936, 944 (2021) (citing *CBDA Dev., LLC v. Town of Thornton*, 168 N.H. 715, 721 (2016) (“zoning boards act in a quasi-judicial capacity when interpreting a zoning ordinance”)). “Review of the board’s decision on appeal is deferential — findings of fact by the ZBA are deemed prima facie lawful and reasonable, and the ZBA’s legal determinations will be upheld unless unlawful or unreasonable.” *N.H. Alpha of SAE Tr.*, 261 A.3d at 944 (citing RSA 677:6).

The Plaintiff’s assertion that the ZBA’s decision to uphold the Building Inspector’s determination of use was unreasonable and unlawful is unsubstantiated because the Plaintiff’s intended use of the Property fits the definition of a Contractor’s Storage Yard in the Zoning Ordinance. A Trade Business as defined in Zoning Ordinance §220-2 expressly excludes “businesses such as landscaping or construction contractors that typically call for outdoor storage of materials.” Apx. 031. In contrast, a Contractor’s Storage Yard includes “heavy vehicles and equipment . . . and materials, supplies and forms, used by professional contractors in construction.” §220-2. Apx. 031. It is the nature of the underlying use/business that is

important to the Building Inspector's determination, not the identity of the business owner or the future specifics on how it is operated.

The Certified Record supports the ZBA's decision to uphold the Building Inspector's Zoning Determination that the Plaintiff's intended business was a Contractor's Storage Yard. In his request to open a business, the Plaintiff told the Building Inspector it would focus on windows, siding, roofing, and gutters. *See* Apx. 041. ZBA Member Lloyd noted that the Plaintiff's website refers to themselves as "contractors." Apx. 162. While the Plaintiff represented to the ZBA there would be no outdoor storage or heavy equipment vehicles present, ZBA members were hesitant to accept these assertions. Zoning board of adjustment members can rely "upon 'their own knowledge, experience and observations'" in making zoning decisions. *Dietz v. Tuftonboro*, 171 N.H. 614, 625 (2019). Zoning board of adjustment members are to "resolve conflicts in evidence and assess the credibility of the offers of proof." *Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 519 (2011).

Members of the ZBA observed that the Property under Plaintiff's ownership had a lot of outside storage in use, and a bulldozer had been seen at the Property, which is a zoning violation. Apx. 163. ZBA Member Lloyd suggested that "it would be a slippery slope to not call them a contractor's yard just because they voluntarily gave up some contractor yard activities." *Id.* Accordingly, the ZBA appropriately affirmed the Zoning Determination that Plaintiff's proposed use was a Contractor's Storage Yard as a reasonable decision.

The Certified Record reflects the reasonableness of the ZBA's decision to uphold the Officer's use determination after reviewing the evidence presented by the Plaintiff in conjunction with reliance on its own experiences, observations, and knowledge. *See Dietz*, 171 N.H. at 625; *see also Harborside Assocs., L.P.*, 162 N.H. at 519. The Plaintiff's failure to persuade the Superior Court otherwise is not grounds for reversal and the Superior Court's decision confirming the ZBA's decision to uphold the use determination should be affirmed. *See RSA 677:6.*

**II. The Superior Court appropriately determined that the Plaistow Zoning Board of Adjustment acted reasonably in denying the Plaintiff's variance request**

The Plaintiff raised two (2) main objections to the ZBA's decision denying the variance: (i) lack of evidence in the record to justify denial of the variance application, and (ii) the consideration of the condition of Plaintiff's other properties used for similar business purposes.

The Zoning Board of Adjustment cannot lawfully grant a variance when the following conditions have not been satisfied by the applicant: (1) the variance will not be contrary to the public interest, (2) the spirit of the zoning ordinance is observed, (3) substantial justice is done, (4) the values of surrounding properties are not diminished, and (5) literal enforcement of the ordinance would result in an unnecessary hardship. *See RSA 674:33.* To establish unnecessary hardship in requesting a variance, applicants must provide proof that:

- (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the

unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

*Simplex Techs., Inc. v. Town of Newington*, 145 N.H. 727, 732 (2001).

The “uniqueness” prong “refers to the ‘special conditions’ of the land itself, not of the proposed use.” *Bacon v. Town of Enfield*, 150 N.H. 468, 480 (2004).

The Certified Record reflects the ZBA’s review of all five elements required for a variance to be approved, and their reasons for denying Plaintiff’s variance application. The ZBA recognized that separating uses by their intensity into separate zoning districts is the essence of zoning and prevents friction between incompatible uses or businesses. The Plaintiff’s non-conforming industrial type business would be contrary to the public interest, as it is in a commercial area and could discourage conforming businesses from locating to the area. Plaintiff’s primary industrial use is contrary to intent of the ordinance, which is to separate such uses from the Commercial Zoning District. The Plaintiff suggested that surrounding property values would increase, but the ZBA rejected this assertion as without merit due to the fact that no evidence was submitted.<sup>2</sup> Additionally,

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<sup>2</sup> In considering the Plaintiff’s Motion for a Re-Hearing, the ZBA noted that the applicant had only provided “unsubstantiated opinions and no evidence that use would enhance market values of nearby properties.” Apx. 186.

while the Plaintiff mentioned that there are “certain unique aspects of the premises,” Plaintiff did not elaborate or identify such characteristics of the land itself. The non-permitted use that the Plaintiff requests is not a special characteristic that qualifies as a hardship. Thus, the ZBA’s denial of the variance request was reasonable based on the lack of evidence presented by the Plaintiff.

The Plaintiff also claims that the ZBA erred in considering the condition of Plaintiff’s other properties toward how the Property might be utilized and maintained. New Hampshire law allows ZBA members to “base their conclusions upon their own knowledge, experience and observations.” *Dietz*, 171 N.H. at 624. In making decisions, the ZBA can “rely on its own knowledge of the area resulting from its familiarity therewith in arriving at its conclusion.” *Vannah v. Bedford*, 111 N.H. 105, 112 (1971). Further, the ZBA is to “resolve conflicts in evidence and assess the credibility of the offers of proof.” *Harborside Assocs., L.P.*, 162 N.H. at 519. In this case, the certified record shows that ZBA members were familiar with the Plaistow/Old County Road area as well as the Plaintiff’s other properties.<sup>3</sup> The ZBA considered both of Plaintiff’s business properties in Plaistow while discussing his commitment to comply with voluntary conditions in exchange for the variance. The Plaintiff’s attorney offered verbal promises surrounding the storage of materials and heavy equipment. Apx. 106-08. However, ZBA members expressed doubt at both meetings regarding the Plaintiff’s trustworthiness to voluntarily

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<sup>3</sup> The Plaintiff has another property in Plaistow, NH at 213 Main Street and the current headquarters of JNR Gutters is in Haverhill, MA.

comply in the future, as the Property and Plaintiff's other business property in town had outstanding code violations.<sup>4</sup> Apx. 107-09, 158-59. Aerial pictures of the Property revealed multiple violations that had been noticed to the Plaintiff yet remained unaddressed.<sup>5</sup> As noted by ZBA Member Bealo, "it [is] difficult to rely on voluntary compliance when there are already violations." Apx. 107. Enforcing zoning violations is "an expense to the Town and [] more conditions d[oes] not ensure compliance." Apx. 109.

At the hearing's continuation on January 7, 2021, the Plaintiff submitted new photos of 213 Main Street, which ZBA Member Lloyd noted looked different from his own observations at the site three-weeks prior. Apx. 160. In an effort to distinguish the Property from 213 Main Street, the Plaintiff suggested that he intended to move his business currently located in Haverhill, MA to the Property. Apx. 158. Thus, there was no intent "to make 190 Plaistow Rd look like 213 Main Street." *Id.* However, ZBA Member Bealo had driven by the Haverhill location prior to the hearing, and "it presented much the same as the 213 Main Street site." *Id.*

Accordingly, the Certified Record reflects the reasonableness of the ZBA's decision to deny the Plaintiff's variance request after reviewing the limited evidence presented by the Plaintiff and balancing with the ZBA members' own experiences, observations, and knowledge. The Plaintiff's

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<sup>4</sup> There were eight (8) final notices of violation without compliance dating back as far as April 2018 for the 213 Main Street Property. Apx. 108.

<sup>5</sup> The violations included a trailer with wheels, construction vehicles, and a sign. The Plaintiff had been verbally told to remedy the violations. Apx. 041.

failure to persuade the ZBA otherwise is not grounds for reversal and the ZBA's decision to deny the variance should be affirmed.

**III. The Plaintiff waived his due process argument where he failed to raise the issue in his motion for rehearing and in his complaint to Superior Court**

It is well established that issues not raised in a motion for rehearing before a ZBA are waived. *See* RSA 677:3; *see also Atwater v. Town of Plainfield*, 160 N.H. 503, 511–12 (2010) (“if a party fails to set forth in its motion for rehearing alleged errors with respect to the ZBA's decision, the party is barred from raising those grounds in an appeal to the superior court unless the court, for good cause shown, orders otherwise.”). Likewise, if an appellant fails to raise the issue in an appeal to Superior Court, the Supreme Court can ignore the same. *See Sperl v. Sperl*, 119 N.H. 818, 821 (1979) (“It is elementary that issues not raised at trial cannot be raised on appeal to [the New Hampshire Supreme Court].”). Here, the Plaintiff failed on both accounts. He failed to raise any due process issue in his motion for rehearing before the ZBA and failed to include a claim for violation of his due process in his complaint to Superior Court. Apx. 003-15 (Complaint), 170-75 (Motion for Rehearing). Accordingly, the Plaintiff waived this argument and it should be rejected by this Court.

If, however, this Court determines that the Plaintiff properly preserved this due process issue, such should nonetheless be rejected where the Plaintiff failed to articulate, with any specificity or legal authority, what, if any, due process rights were actually violated. *See Appeal of Mullen*, 169 N.H. 392, 396–97 (2016) (rejecting a Plaintiff's substantive

due process argument where Plaintiff’s brief only referred to substantive due process violations). In *Mullen*, this Court noted that “merely referring to substantive due process is insufficient to articulate a substantive due process argument.” Accordingly, “[J]udicial review is not warranted for complaints regarding adverse rulings without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration.” *Id.* at 396. Likewise, here the Plaintiff references that he suffered a violation of due process but does not cite any legal support or authority, nor does he articulate whether these were procedural or substantive violations. Therefore, the Court can ignore this issue.

### **CONCLUSION**

For the reasons stated above, this Court should affirm the decision of the Trial Court, which found that the Appellant failed to meet his burden of establishing that the Plaistow Zoning Board of Adjustment’s decision was unreasonable or legally erroneous.

### **REQUEST FOR ORAL ARGUMENT**

The Appellee requests fifteen minutes of oral argument.

### **RULE 16(11) CERTIFICATION**

I hereby certify that this Brief is in compliance with the word limit requirement of New Hampshire Supreme Court Rule 16(11). The number of words in this Brief is 2671.

Respectfully submitted,

Town of Plaistow

By their attorneys

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Dated: September 21, 2022

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**CERTIFICATION OF SERVICE**

I hereby certify that a copy of this pleading was served via the Court's electronic notification system to all counsel of record.

Dated: September 21, 2022

By: /s/Charles F. Cleary, Esq.

Charles F. Cleary, Esq.