

Motion for Reconsideration

Case 2012 -06

Authority: NH RSA 677:2 specifies which parties may request a rehearing. The Zoning Board of Adjustment is not identified, per se. However, the New Hampshire Supreme Court has ruled the Board may revisit their decisions, cited as follows:

“...we believe that municipal boards, like courts, have the power to reverse themselves at any time prior to final decision if the interests of justice so require. We hold that belief because the statutory scheme established in RSA chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its own decisions so that the court may have the benefit of the board’s judgment in hearing the appeal.”

74 Cox St. LLC v. City of Nashua, 156 N.H. 228, 931 A.2d 1194 [2007]

Issues:

- 1) The Board found that the request for variance failed to meet criterion 1: Public Interest and criterion 2: the Spirit of the Ordinance, focusing on two issues: public safety due to traffic, and the fact the residential use was not specified in the ordinance.

Background: In ruling in the case of **Harborside Associates v. Parade Residence Hotel LLC, 162 N.H. [2011]**, the New Hampshire Supreme Court found:

*The requirement that the variance not be contrary to the public interest is related to the requirement that [it] be consistent with the spirit of the ordinance. **Farrar v. City of Keene, 158 N.H. 684, 691 [2009]**. The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. **Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 [2005]**. As the provisions of the ordinance represent a declaration of public interest, any variance would, in some measure, be contrary thereto. **Id.** Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. **Id.** Mere conflict with the terms of the ordinance is insufficient. **Id.** We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's basic zoning objectives. One way is to examine whether granting the variance would alter the essential character of the neighborhood. **Id.** Another approach is to examine whether granting the variance would threaten the public health, safety, or welfare. **Id.***

Regarding the use not being allowed in the ordinance, the following is excerpted from an email to the Town of Milford from Attorney William Drescher, dated September 13, 2010:

... the law is clear that there can be no impediment to the ZBA’s right to grant a variance from the terms of the ordinance. The NH Supreme Court was presented with this issue many years ago and made it clear that, in order for zoning to be constitutionally compliant, a ZBA must exist that has the power (when the five part test is proven) to grant a complete waiver from the ordinance ...

This reasoning stems from the Supreme Court ruling in **Bacon v. Town of Enfield, 150 N.H. 468, 477 [2004]** “The variance was originally conceived as a means to ensure the constitutionality of zoning ordinances by building in a mechanism that would avoid imposing hardship on individual landowners.”

Consideration:

a) The applicants addressed the traffic issue when they testified the, were the building to be completely filled with offices, the number of occupants and therefore vehicles, would significantly exceed the number of occupants and vehicles if the building were converted to residential use. There is no rational reason to disregard this testimony.

b) While not cited in the conclusions, the Board was very concerned with the number of parking places to be made available to potential residents. This issue is not actually within the purview of the Zoning Board, but is rather an issue for the Planning Board.

c) Again, not cited in the conclusions, the Board was concerned with the placement of bus stops, both for public transport and school busses. While the board can make provision for such stops a condition of granting a variance, the actual placement of such stop is an issue for the Planning Board.

d) In applying the “Spirit” test, the board failed to consider the basic purpose of the variance and, by its very existence, that it must, to some degree, violate the spirit of the ordinance. The Board need not wait for the voters to approve changes to either the allowed uses in a district or the Zoning classification applied to a specific parcel or parcels. The Board has the variance to accomplish that task. If the Board finds it is consistently granting the same types of relief within a district, it can, and should, recommend those changes, through the Planning Board, to the voters.

2) The Board also found that the request for variance failed to meet criterion 5: Hardship.

Background: Again, in ruling in the case of **Harborside Associates v. Parade Residence Hotel LLC, 162 N.H. [2011]**, the New Hampshire Supreme Court reiterated the conditions necessary to find “hardship”:

RSA 674:33, I(b)(5) contains two definitions of unnecessary hardship. Under the first definition: “[U]nnecessary 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.

The statute provides that if an applicant fails to satisfy the first definition of unnecessary hardship, then it may still obtain a variance if it satisfies the second definition. See RSA 674:33, I(b)(5)(B). Under the second definition,

- (i) 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
- (ii) a variance is therefore necessary to enable a reasonable use of it

Consideration:

- a) In considering the Hardship issue, Board failed to fully explain its reasoning as to why the special conditions of this property failed to meet the requirements of RSA 674:33, I(b)(5)(A)(i) and/or how this use was not a reasonable one pursuant to RSA 674:33, I(b)(5)(A)(ii).

- b) In determining that the application did not meet the requirements of RSA 674:33, I(b)(5)(A), the Board then failed to explain its reasons why the application failed to meet the criteria in RSA 674:33, I(b)(5)(B).

Submitted by

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Chair, Zoning Board of Adjustment

Attachment 1 – Comparison of uses by Right, Special Exception, or Conditional Use Permit
Attachment 2 – Current Use Of Properties In This Specific ICI District and Other Milford
Zoning Districts Bordering This Specific ICI District

Note that some wording, issues, and timing of this motion are based on conversations with the attorneys at the Local Government Center.

**Comparison of uses by Right, Special Exception, or Conditional Use Permit
(in alphabetical order)**

Commercial (5.05)	Industrial (5.06)	Integrated Commercial Industrial (5.08)
Accessory Dwelling Units	Accessory Dwelling Units	Accessory Dwelling Units
Agriculture and farming	Agriculture and farming	Adult Entertainment Businesses Agriculture and farming
Banks and financial institutions		Banks and financial institutions
Bed & breakfast		Bed and breakfast
Churches or Houses of Worship		Churches or Houses of Worship
Day care facilities		Day care facilities
Distribution and mailing facilities	Distribution and mailing facilities	Distribution and mailing facilities
Dwelling, Mixed-use		Dwelling, Mixed-use
Family day care homes		Family day care homes
Farm roadside stands	Farm roadside stands	Farm roadside stands
Farmer's market		Farmer's market
Filling stations		Filling stations
Funeral homes		
Health services facilities	Harvesting of natural resources	Harvesting of natural resources Health services facilities
Home occupations		
Hospice house		
Hospitals		Hospitals
Hotels	Hotels	Hotels
Manufacturing	Manufacturing	Manufacturing
Motor vehicle repair facilities		Motor vehicle repair facilities
Motor vehicles sales facilities		Motor vehicle sales facilities
Multi-family dwellings		
Newspaper and job printing	Newspaper and job printing	Newspaper and job printing
Nursing home or facility		Nursing home or facility
Offices	Offices	Offices
	Processing and warehousing	Processing and warehousing
	Processing of natural resources	Processing of natural resources
Recreational facility		Recreational facility
Research and development	Research and development	Research and development
Restaurants		Restaurants
Retail businesses		Retail businesses
Schools		
Senior Housing Developments		Senior Housing Developments
Single-family dwellings		
Small Wind Energy Systems	Small Wind Energy Systems	Small Wind Energy Systems
Telecommunication facilities	Telecommunication facilities	Telecommunication facilities
Utility, public or private	Utility, public or private	Utility, public or private
Veterinary clinics		Veterinary clinics
Wholesale businesses		Wholesale businesses

Uses allowed in the Commercial District but not allowed in the ICI District (six)

Uses allowed in the Industrial District but not allowed in the ICI District (none)

Uses allowed only in the ICI District (one)

Current Use Of Properties In This Specific ICI District

6-13	The property in question
6-14	Undeveloped land with minor structures
6-15	Undeveloped land
6-16	Commercial – Bank building
11-14	Single Family Residence
11-15	Two Family Residence
11-16	Single Family Residence
11-17	Single Family Residence
11-18	Single Family Residence
11-19	Vacant lot 0.18 ac.
11-20	Single Family Residence
11-21	Single Family Residence
11-22	Single Family Residence

Other Milford Zoning Districts Bordering This Specific ICI District

North	Residential R
East	Commercial
South	Industrial – separated by NH Route 101
West	N/A – Town of Wilton