Town of Henniker

Zoning Board of Adjustment

Case 2016:04

MOTION FOR REHEARING

On June 15, 2016, the Zoning Board of Adjustment (ZBA) overruled the Planning Board's April 27, 2016 issuance of a Conditional Use Permit (CUP) to Stephen E. Forster of Forster's Christmas Tree Farm, Gardens, and Gift Shoppe. The ZBA's decision arose from an Appeal From An Administrative Decision filed by several applicants (the "Bennett Applicants"). By and through his attorneys, BCM Environmental and Land Law, PLLC, Mr. Forster moves for rehearing pursuant to Section 133-67 of the Henniker Zoning Ordinance and RSA 677:2.

There is "good reason" for the ZBA to reconsider its June 15, 2016 decision because the decision was "unlawful" and "unreasonable" for the reasons set forth in detail below. See RSA 677:2; RSA 677:3; and Zoning Ordinance § 133-67. In summary, the doctrine of finality does not apply because there has been a material change of circumstances; the definition of "agritourism" sponsored by the Planning Board categorically deems certain uses to be ancillary and accessory, and is not necessarily the controlling definition; and the Planning Board did not make an administrative decision appealable to the ZBA for purposes of RSA 676:5.

I. The Doctrine of Finality Does Not Apply Because There Has Been a Material Change of Circumstances

The ZBA erred by determining that the finality doctrine discussed in Fisher v. Dover, 120 N.H. 187 (1980) should have precluded the Planning Board from considering Mr. Forster's application. The ZBA's decision is unlawful because it is contrary to the controlling law of Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 560 (2011) and Shepherd v. Westmoreland, 130 N.H. 542, 545 (1988).

Following the New Hampshire Supreme Court's decision in Forster v. Henniker in 2015, lawmakers have substantially changed local and state laws applying to agriculture and agritourism. See Zoning Ordinance §§ 133-3 and 133-20A; Henniker Site Plan Review Regulations § 203-31A; and RSA 21:34-a, II(b)(5) (including agritourism in the definition of "agriculture" and "farming" as follows: "which means attracting visitors to a farm to attend events and activities that are accessory uses to the primary farm operation, including, but not limited to, eating a meal, making overnight stays, enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm"). These changes constitute "a material change of circumstances affecting the merits of the application" that is an exception to the finality doctrine. Fisher v. Dover, 120 N.H. at 190.

The finality doctrine applies in two circumstances: "when a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor." Id. Here, the ZBA determined that there was no material change in circumstances despite the amendments to the Zoning Ordinance, Site Plan Review Regulations, and RSA 21:34-a that have occurred since the Forster v. Henniker decision.

The ZBA's determination is contrary to a case directly on point. The New Hampshire Supreme Court has stated that "a change in the zoning laws" does not bar a subsequent application and does not trigger the finality doctrine. Shepherd v. Westmoreland, 130 N.H. at 545 ("Should the plaintiff approach the board with different proposals for the use of her land or should there be a material change in circumstances affecting her application or a change in the zoning laws, the denial of her previous requests would not bar her subsequent application, and it would merit consideration by the board") (citing Fisher v. City of Dover, 120 N.H. 187) (emphasis added).

The ZBA's determination is also contrary to the Supreme Court's decision in Brandt, 162 N.H. 553. In Brandt, the Court considered whether the finality doctrine of Fisher v. Dover prohibited a zoning board from considering an applicant's second variance application for the same use. Id. at 556. As opposed to the ZBA's recent decision in Mr. Forster's case, the Court in Brandt held that the second variance application was allowed—even though it was for essentially the same use—because in the intervening years the law had changed. See id. at 559 (describing that although the variance statute itself had not changed, the Court's interpretation of the statute had).

Shepherd and Brandt squarely apply here. When there is a change in law—including zoning law—the finality doctrine does not apply. The changes to the Zoning Ordinance, Site Plan Review regulations, and RSA 21:34-a constitute a material change in circumstances. Accordingly, it was unlawful and unreasonable for the ZBA to apply the finality doctrine to overrule the Planning Board's grant of the conditional use permit.

A. Since *Forster v. Henniker*, the Changes to the Laws Have Been Material

Before Forster v. Henniker, the Zoning Ordinance did not define or, arguably, allow agritourism, and the definition of agriculture in RSA 21:34-a did not include agritourism.

Now, the Zoning Ordinance have two definitions of agritourism, one that expressly includes "on-farm weddings and similar events" and another that includes "[g]atherings, functions, celebrations, and meetings."

Now, Section 133-20A of the Zoning Ordinance authorizes the Planning Board to issue a CUP for agritourism uses if certain criteria are met, and Section 203-31A of the Site Plan Review Regulations authorize the Planning Board to impose limitations on CUPs.

Now, the definition of agriculture in RSA 21:34-a, which is cited by both of the Zoning Ordinance's definitions of "agriculture," includes agritourism uses.

The Bennett Applicants acknowledged many of these changes, but argued—and the ZBA agreed—that because the Zoning Ordinance and RSA 21:34-a have retained the word "accessory," the changes to the laws do not constitute a material change in circumstances. For the reasons discussed below, this result is unlawful and unreasonable because it overlooks the plain language of the definition of "agritourism" (sponsored by the Planning Board) that categorically deems the listed agritourism uses to be ancillary and accessory to the principal agriculture operation.

II. The Definition of Agritourism Sponsored by the Planning Board Categorically Deems Certain Uses to be Ancillary and Accessory

Contrary to the Bennett Applicants' argument, the word "accessory" has not skated through the legal amendments unchanged. Applying the Zoning Ordinance as it existed at the time, the Forster v. Henniker Court ruled that Mr. Forster failed to prove that on-farm weddings and similar events are an accessory use under the Ordinance. However, the Ordinance's definition of "agritourism" (sponsored by the Planning Board) uses the term "accessory" differently than the Ordinance used to.

The definition of "agritourism" defines "agritourism" as "[a]ttracting visitors to a working farm" and then provides a list of agritourism purposes "that are ancillary and Accessory to the principle [sic] Agriculture operation." That list includes "[g]atherings, functions, celebrations, and meetings greater than 25 participants." This definition's list of permitted agritourism purposes is a closed list that does not allow an applicant to propose an additional, unlisted type of agritourism purpose (unless seeking to do so through applying for a variance).

This definition does not invite or require applicants to prove that one or more of the listed purposes is a type of use that is ancillary and accessory, whereas prior to the adoption of this definition, an applicant had to prove that the type of proposed use was accessory. The determination in the new Ordinance that the enumerated agritourism purposes are categorically ancillary and accessory if attached to a principal agriculture operation was enacted by the voters who approved this definition. That determination is embedded in the definition.

Under the Planning Board's definition, "[g]atherings, functions, celebrations, and meetings greater than 25 participants" are categorically deemed to be "ancillary and Accessory" to principal agriculture operations. It would not make sense for an applicant proposing one of the enumerated uses to be required to prove that the enumerated use is accessory, i.e., "customarily incidental to the main building or use." See Zoning Ordinance § 133-3 (definition of "accessory building or use"). The enumerated uses are deemed by the definition to be customarily incidental to principal agriculture operations.

The ZBA's interpretation that an applicant must nevertheless prove that a listed agritourism purpose is accessory would make more sense if the definition was open-ended such that it permitted an applicant to propose an agritourism use other than those listed. However, with the closed universe of approved agritourism purposes, the ZBA's interpretation creates a redundancy that would require an applicant to prove that an already approved use is ancillary and

accessory (i.e., customarily incidental) to a principal agricultural operation when the definition already makes that determination.

The definition of "agritourism" marks a material change in the Zoning Ordinance's use of the term "accessory." With regard to the six categories of approved agritourism purposes now in the definition of "agritourism," the burden of proof at issue in Forster v. Henniker for an applicant to prove that a use is "accessory" is no longer applicable. Thus, the Bennett Applicants' assertion that Mr. Forster seeks to relitigate a "requirement that was fully and completely litigated in 2013-15" is wrong.

A. The ZBA Unlawfully and Unreasonably Inserted Language Into the Ordinance

The Bennett Applicants argue that "[t]he Planning Board's definition of 'agritourism' provides that agritourism uses must be 'ancillary and accessory to the principal agriculture operation.'" (Emphasis added.) This is a misreading of the statute.

The definition actually lists six categories of agritourism "purposes that are ancillary and Accessory to the principle [sic] Agriculture operation." (Emphasis added.) This reading of the definition gives effect to the plain language of the definition, whereas the ZBA—in agreeing with the Bennett Applicants—inserted language into the Ordinance that does not exist and that creates a redundant requirement that an applicant prove something that the definition already has determined. This is unlawful and unreasonable because it does not follow the plain language of the definition and inserts a requirement that the legislative body did not see fit to include. See Lambert v. Belknap Cty. Convention, 157 N.H. 375, 378 (2008) ("When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.") (citations omitted).

B. The Henniker Laws Ensure that the Agriculture Use is Principal

While the Planning Board's definition of "agritourism" definition deems certain types of uses to be ancillary and accessory in nature, those uses must still be subordinate to the principal agriculture operation. Generally, the new Zoning Ordinance and Site Plan Review Regulations vest the Planning Board with the sole authority to regulate agritourism to ensure that it remains subordinate to the principal agriculture operation. In particular, two sections confer this authority.

First, Section 133-20A.A.2.b authorizes the Planning Board to impose conditions of approval for a CUP "to meet the spirit and intent of this Ordinance." Second, Section 203-31A of the Site Plan Review Regulations specifically authorizes the Planning Board "to establish reasonable limits to the Agritourism operation as it relates to the specific use[']s size, scale, number of potential participants, frequency of activity and hours of operation." It should be noted, also, that the Planning Board is authorized to deny a permit. It need not approve every request.

The evidence before the Planning Board showed that Mr. Forster's Christmas tree operation would remain the principal agriculture use. At the Planning Board's April 27, 2016

hearing, the Town Planner instructed the Board to compare the number of days involved with the principal agriculture operation with the number of days involved in the agritourism use. The Planning Board had before it evidence that the tree farm operates 365 days a year and that retail operations occur approximately 85 days a year. At the hearing, Mr. Forster explained that he has never had more than 18 in a year because "one event per weekend is a lot of work."

Thus, in determining that the Christmas tree farm is the principal agriculture operation, the Planning Board properly issued a CUP. Consequently, the ZBA unlawfully and unreasonably determined that the Planning Board could approve the CUP application only if Mr. Forster proved the use was accessory, i.e., customarily incidental.

III. The Planning Board's Definition of Agritourism is Not Necessarily the Controlling Definition

The ZBA determined that the definition of "agritourism" sponsored by the Planning Board is the controlling definition on the basis that it is more restrictive than the petitioned definition of "agritourism." As discussed above, the Planning Board's definition categorically deems the enumerated agritourism uses to be ancillary and accessory and, therefore, the ZBA's decision was unlawful and unreasonable.

However, it is not clear that the definition of "agritourism" is the controlling definition or the most restrictive for purposes of RSA 676:14. As discussed above, the definition sponsored by the Planning Board does not require an applicant to prove that one of the listed uses is ancillary and accessory.

Additionally, both definitions of "agritourism" allow weddings and similar events as agritourism. The petitioned definition uses the phrase "on-farm weddings and similar events." The Planning Board's definition is broader, as it includes "[g]atherings, functions, celebrations, and meetings greater than 25 participants."

Under either definition of "agritourism," the Planning Board's issuance of the CUP was appropriate, and, therefore, the ZBA's decision that the definition sponsored by the Planning Board is controlling because it is more restrictive was unlawful and unreasonable.

IV. The Planning Board Did Not Make an Administrative Decision Appealable to the ZBA for Purposes of RSA 676:5

The Bennett Applicants filed their Appeal pursuant to RSA 676:5, which allows an appeal to the ZBA "concerning any matter within the Board's powers as set forth in RSA 674:33." RSA 674:33 sets out the ZBA's powers, which are limited to hearing and deciding appeals of decisions based on the Zoning Ordinance, authorizing variances, and making special exceptions. In this case, to be appealable to the ZBA pursuant to RSA 675:5, the Planning Board's decision must have involved an interpretation of the Zoning Ordinance, but it did not.

The matter before the Planning Board was Mr. Forster's application for a CUP under Section 133-20A of the Zoning Ordinance. Section 133-20A vests exclusive authority to

consider CUP applications with the Planning Board; the Zoning Board has no authority with regard to CUPs for agritourism uses.

The Bennett Applicants assert that the Planning Board impliedly decided what constitutes an allowed use and impliedly decided what constitutes an accessory use, and thereby made a decision concerning a matter within the powers of the ZBA. The Planning Board made no such decision about whether the type of use proposed by Mr. Forster is "accessory" or allowed under the definitions of "agritourism." As discussed above, the Planning Board's definition of "agritourism" includes a list of agritourism uses that the definition categorically deems to be ancillary and accessory. The Planning Board neither has the authority to decide that any of the enumerated uses are or are not ancillary and accessory, nor does the Planning Board have the authority to approve a proposed agritourism use that it not listed in the definition. The definition's list is exhaustive.

The Planning Board correctly considered evidence on whether Mr. Forster's Christmas tree farm is and will remain the principal agriculture operation on the property, but the Planning Board made no administrative decision for purposes of RSA 676:5 that any agritourism use is allowed under Section 133-3 of the Zoning Ordinance. Therefore, it was unlawful and unreasonable for the ZBA to have considered the Bennett Applicants' appeal.

Of course, the Planning Board's decision is subject to challenge, but the proper course is an appeal to the superior court under RSA 677:15, which the Bennett Applicants have recently done. See Bennett v. Henniker, et al. (Merrimack Superior Court, Docket No. 217-2016-CV-00316) (filed May 26, 2016).

V. Conclusion

For each of the foregoing reasons the ZBA's decision to overrule the Planning Board's issuance of a CUP was unlawful and unreasonable. Mr. Forster, therefore, urges the ZBA to grant this request for a rehearing so that the ZBA has an opportunity to hold another hearing and correct its decision.

FINAL

Town of Henniker
Planning Board Meeting
April 27, 2016

Members Present:	Ron Taylor, Chair Richard Patenaude, Vice Chair Tia Hooper, Selectmen Rep. Dean Tirrell Scott Dias Jason Michie Jonathan Lapointe
Non-Voting Alternates:	Dan Higginson, Alt. Aaron Wechsler, Alt. Benjamin Fortner, Selectmen Rep. Alt.
Members Absent:	(none)
Also Present:	Mark Fougere, Town Planner
Recording Secretary:	Mindy Lloyd

1) Call to Order/Attendance

Chairman Taylor called the meeting to order at 7:00pm.

2) Approval of Minutes – April 13, 2016

Ms. Hooper said on page 9, "NEC" should be removed.

Mr. Taylor said on the bottom of page 9, the motion to elect Richard Patenaude as Vice Chairman was seconded by Ms. Hooper, not Mr. Tirrell.

Bruce Trivellini, resident, said there are several items that were omitted in the minutes regarding the design review discussion of 347 Mt Hunger Road. There were comments made that Mr. Forster's operation was exempt from the noise ordinance because it is a commercial entity; in addition, he went above and beyond the requirements for parking and providing bathroom facilities.

Motion by Ms. Hooper to approve the minutes of April 13, 2016, as amended. **Seconded** by Mr. Dias. **Motion passed unanimously.**

Mr. Fougere informed the audience that the Dollar General case would not be heard this evening. It was determined that a Special Exception would not be required in regards to setback requirements from Cogswell properties.

3) Public Hearings: Case PB2016:06 Minor site plan application for a proposed Agritourism use for weddings and events on existing Christmas tree farm, 347 Mount Hunger Road, Map 1, lot 727, Zoned RR Rural Residential District, Applicant/Owner Stephen Forster.

Mr. Higginson asked if there are a maximum number of people, including employees, per event, and if Mr. Forster provided evidence that there is enough parking to accommodate.

Mr. Forster said there is enough parking on his property for 300-400 vehicles. He has valet services on site to ensure organization.

Ms. Hooper said Captain Costello will work with Mr. Forster to ensure safety compliance.

Motion by Mr. Patenaude to approve the waiver requests of Article IV Site Plan Application Requirements 203-12: E.1, E.2, E.14 and E.20. **Seconded** by Ms. Hooper. **Motion passed 7-0.**

Motion by Mr. Michie to accept the application for Case 2016:06 Minor Site Plan. **Seconded** by Ms. Hooper. **Motion passed 7-0.**

Mr. Taylor opened the public hearing.

Ralph Joyce, abutter, Mt Hunger Rd, made a presentation in opposition of the case. He handed out paperwork and reviewed several points regarding all of the legal proceedings with respect to Mount Hunger Rd since July 2012. He argued that Mr. Forster's application is incomplete. He also argued that the events Mr. Forster holds on his property are not ancillary to the primary farm use. He voiced concerns with noise, road safety, adequate parking and sanitary facilities.

Kathleen LaBonte, 722 Gulf Rd, read into the record the State's definition of agritourism for clarification.

Mr. Fougere clarified that the State's definition is not relevant in this case as the Town voted on their own definition of agritourism.

Steve Bennett, abutter, Mt Hunger Rd, voiced similar concerns to Mr. Joyce. He asked the Board to deny Mr. Forster's request because it does not satisfy the regulatory definition of agritourism, it is disruptive to the neighborhood and there are concerns with public safety. He provided a handout to Board members.

Bruce Trivellini, resident, said the Board does not have jurisdiction to regulate income in determining whether or not a use is ancillary. Farming occurs 365 days out of the year and the events on Mr. Forster's lot are ancillary to this use. Mr. Forster's existing commercial entity existed prior to the residential subdivision on Mt Hunger Rd. This is a mixed zone.

Michelle McGirr, 486 Mt Hunger Rd, said she has lived on her property for over 20 years. Noise from the weddings held at Mr. Forster's property is obnoxious and impede on her and her family's ability to enjoy their property. She feels that Mr. Forster's proposal, to hold events between May and October each year, is unacceptable.

Ms. LaBonte spoke in favor of the proposal. She argued that residents are allowed to hold private events on their properties; this is no different.

Mr. Forster made a statement in rebuttal. He said he is compliant with the Town's noise ordinance, as well as the Town's regulations for public safety.

Mr. Trivellini said Mr. Forster pays commercial taxes on his property. With agriculture comes business.

Ms. LaBonte provided the Board with a copy of the property tax assessment for Mr. Forster's lot.

Mr. Fougere said the Planning Board will meet on May 11, 2016 at the Community Center. At this meeting, a work session will be held for the Dollar General case.

Motion by Mr. Dias to adjourn. **Seconded** by Ms. Hooper. **Motion passed unanimously.**

Meeting adjourned at 9:30pm.

Caution
As of: July 15, 2016 10:07 AM EDT

Fisher v. Dover

Supreme Court of New Hampshire

March 13, 1980

No. 79-056

Reporter

120 N.H. 187; 412 A.2d 1024; 1980 N.H. LEXIS 246

Clara R. Fisher v. City of Dover & a.

Prior History: [***1] Appeal from Strafford County.

Disposition: *Exceptions sustained.*

Core Terms

variance, superior court, Zoning, adjustment board, circumstances, second application, burden of proof, material change, proceedings, materially, differed

Case Summary

Procedural Posture

Plaintiff neighbor sought review of a decree of the Strafford County Superior Court (New Hampshire), which upheld a zoning board decision to grant a variance to defendant realty company to convert a large house into an apartment complex.

Overview

The zoning board had twice granted the variance, but on each previous occasion, the superior court had reversed the zoning board decision. Finally the zoning board denied the application. The realty company did not appeal. It filed a second application, substantially the same as the first. Its application was approved. When the neighbor appealed again, the superior court held that the neighbor had failed to overcome the statutory presumption, pursuant to N. H. Rev. Stat. Ann. § 31:78, that findings of a zoning board were prima facie lawful and reasonable. The court agreed with the neighbor that the second application was improperly granted. The denial of the first application precluded the board from granting a second one without first finding that a material change of circumstances affecting the merits of the application had occurred or that the second application for a variance was for a use that materially differed in nature and degree from the use previously denied.

Outcome

The court sustained the neighbor's exceptions to the decree.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

Governments > Local Governments > Administrative Boards

Real Property Law > Zoning > Judicial Review

HN1 N. H. Rev. Stat. Ann. § 31:78 provides that upon the hearing in an appeal of a zoning board of adjustment decision, the burden of proof shall be upon the party seeking to set aside any order or decision of the board of

adjustment or legislative body to show that the same is unreasonable or unlawful, and all findings of the board of adjustment or legislative body of such municipality upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and 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 unjust or unreasonable.

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN2 When a material change of circumstances affecting the merits of an application for a zoning variance has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of a second petition after the first one has been denied. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Real Property Law > Zoning > Judicial Review

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN3 The burden of proving a material change of circumstances before the board of adjustment lies on the party seeking the variance. On this issue, as on the other issues wherein the exercise of the board's discretion is sought, the burden of proof is on the applicant. The applicant will have easier access to evidence of changed circumstances, and to place the burden on opponents to the application would leave them open to harassment. The determination of whether changed circumstances exist is a question of fact which necessitates a consideration of the circumstances which existed at the time of the prior denial. Resolution of this issue must be made, in the first instance, by the board of adjustment. On appeal all findings of the board of adjustment are prima facie lawful and reasonable. N. H. Rev. Stat. Ann. § 31:78.

Real Property Law > Zoning > Judicial Review

HN4 In the absence of a record before the board of adjustment, the Supreme Court of New Hampshire must rely upon the record before the superior court to determine the validity of the actions taken by both the superior court and the board.

Headnotes/Syllabus

Headnotes

1. Zoning--Variances--Application

When a material change of circumstances affecting the merits of a zoning variance application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition.

2. Zoning--Variances--Burden of Proof

The burden of proving a material change of circumstances before the board of adjustment lies on the party seeking the variance; the applicant has easier access to evidence of change of circumstances and to place the burden on opponents to the application would leave them open to harassment.

3. Zoning--Variances--Powers of Boards

The determination of whether changed circumstances exist, which affect the merits of a zoning variance application, is a question of fact which must be made, in the first instance, by the board of adjustment.

4. Zoning--Appeals From Board of Adjustment--Supreme Court Review

In the absence of a record before the board of adjustment, the supreme court must rely upon the record before the superior court, on appeal of the board's decision, to determine the validity of the actions taken by both the superior court and the board.

5. Zoning--Appeals From Board of Adjustment

Zoning board of adjustment committed an error of law when it approved applicant's second application for a variance without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board.

6. Zoning--Variances--Requisites

While evidence relating to the question of whether the granting of a variance would result in any diminution in the value of surrounding properties is clearly relevant to the consideration of a variance request by a zoning board of adjustment, it is not relevant to its required threshold determination that a material change of circumstances has occurred and it should not be considered until the threshold determination has been made.

Counsel: *Fisher, Parsons, Moran & Temple*, of Dover, by brief for the plaintiff.

Scott E. Woodman, city attorney, by brief for the defendant city of Dover.

William E. Galanes, of Dover, by brief for defendant McQuade Realty, Inc.

Judges: Brock, J. Grimes, C.J., did not participate; the others concurred.

Opinion by: BROCK

Opinion

[*188] [1025]** This is an appeal under RSA 31:77 by the plaintiff Clara Fisher from a decree of the Strafford County Superior Court (*Goode*, J.) upholding a decision of the Zoning Board of Adjustment of the city of Dover, dated August 19, 1976, granting a variance to the defendant, McQuade Realty, Inc.

McQuade Realty first applied to the board for a variance to convert its thirty-two room house into a multi-family apartment complex in 1973. On October 19, 1973, the board granted the variance, but **[**1026]** upon appeal to the superior court, the order granting the variance was vacated and the case was remanded to the board. After holding another hearing on the application, the board again granted the variance on December 5, 1974. Another appeal to the superior court resulted **[***2]** in an order, dated September 18, 1975, remanding the case to the board for further proceedings not inconsistent with the court's finding and ruling that a majority of the members of the board considering the application for the variance were not "indifferent" (RSA 31:73) and that the board's finding that the variance did not adversely affect adjacent property was "unreasonable and unjust". On May 13, 1976, the board, citing the decision of the superior court, denied the variance without taking further evidence. McQuade Realty did not petition for a rehearing under RSA 31:74 (Supp. 1977).

Thereafter, on July 30, 1976, McQuade Realty filed a second application for a variance which it is conceded was substantially the same as the variance previously requested and ultimately denied by the board. The board granted

the variance on August 19, 1976, and affirmed its decision after rehearing on September 30, 1976, and plaintiff once again appealed to the superior court pursuant to RSA 31:77.

An evidentiary hearing, at which only the chairman of the zoning board testified, was held before the superior court on January 11, 1977. On April 11, 1978, a decree of the superior court issued which, **[***3]** while referring to the long and tortured history of the case and the woeful lack of record of the various proceedings **[*189]** which had taken place before the board, concluded that plaintiff had not sustained her burden under RSA 31:78 of overcoming the statutory presumption that findings of a zoning board of adjustment are prima facie lawful and reasonable.

At all times relevant to this case, RSA 31:78 ***HN1*** provided:

> Burden of Proof. Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the board of adjustment or legislative body to show that the same is unreasonable or unlawful, and all findings of the board of adjustment or legislative body of such municipality upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and 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 unjust or unreasonable.

Plaintiff contends that the denial of the first application in May 1973, precluded the board from granting the one **[***4]** filed in July 1976. She argues here that she sustained her burden before the superior court by proving that the board committed an error of law when it last granted the variance to the defendant without first finding that a material change of circumstances affecting the merits of the application had occurred or that the second application for a variance was for a use that materially differed in nature and degree from the use previously applied for and denied by the board. *Fiorilla v. Zoning Board of Appeals, 144 Conn. 275, 278-79, 129 A.2d 619, 621 (1957)*; *Bois v. Manchester, 113 N.H. 339, 341, 306 A.2d 778, 780 (1973)*.

It is apparent from the transcript of the January 11, 1977 proceedings before the superior court that the zoning board of adjustment misunderstood the legal requirements attending its reconsideration of a previously denied variance request, the denial of which was not appealed. The chairman of the board, Mr. Gentautus, testified, with respect to the second application, as follows:

> Q: Now did you compare that application with the original application which was filed by Mr. McQuade in 1973?
>
> A: No. No. I did not.
>
> **[*190]** . . . .
>
> Q: Did you **[***5]** or your board ever make a determination as to whether the application which was filed on July 30th, 1976 materially differed from the application which was previously filed?
>
> **[**1027]** A: No. No comparison was made.
>
> Q: Do I take it from you that it is your opinion that it doesn't matter whether the application materially differs or not?
>
> A: I don't believe it does.
>
> . . . .
>
> Q: And is it your understanding, sir, that the circumstances in August 1976 are essentially the same as they were prior to May of 1976?
>
> A: Yes, I think they'd be the same.
>
> Q: And -- did you or your board -- did you ever discuss this in front of your board? This question of change of circumstances?

A: I don't think we made [sic] any discussion of it, no.

HN2 When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would **[***6]** be placed on property owners seeking to uphold the zoning plan.

HN3 The burden of proving a material change of circumstances before the board of adjustment lies on the party seeking the variance. *Marks v. Zoning Board of Review, 98 R.I. 405, 203 A.2d 761 (1964)*; *Easley v. Metropolitan Board of Zoning, 161 Ind. App. 501, 317 N.E.2d 185 (1974)*. "On [this] issue, . . . as on the other issues wherein the exercise of the board's discretion is sought, the burden of proof is on the applicant." *Marks v. Zoning Board of Review, supra at 407, 203 A.2d at 763*. The applicant will have easier access to evidence of changed circumstances, and to place the burden on opponents to the application would leave them open to harassment. The determination of whether changed circumstances exist is a question of fact which necessitates "a consideration of the circumstances which existed at the time of the **[*191]** prior denial." *Easley v. Metropolitan Board of Zoning, supra at 514, 317 N.E.2d at 193*. Resolution of this issue must be made, in the first instance, by the board of adjustment. On appeal all findings of the board of adjustment are prima facie lawful and reasonable. RSA 31:78.

[*7]** With these considerations in mind, we must decide whether the plaintiff met her burden of proof under RSA 31:78, in the superior court, and established that the board's approval of the variance was unlawful. ***HN4*** In the absence of a record before the board of adjustment, this court must rely upon the record before the superior court to determine the validity of the actions taken by both the superior court and the board. *Collins v. Derry, 109 N.H. 145, 147, 244 A.2d 185, 186 (1968)*.

We conclude that the trial court's reliance upon that portion of RSA 31:78 which relates to the weight to be given findings of fact made by the board was misplaced and hold that the board committed an error of law when it approved defendant's second application for a variance without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board.

Finally, we consider the effect on these proceedings of certain evidence offered by the defendant at the board hearing on the second variance application. This **[***8]** evidence related to the question of whether the granting of the variance would result in any diminution in the value of surrounding properties.

While such evidence is clearly relevant to the board's consideration of a variance request, *Town of Rye v. McMahon, 117 N.H. 857, 860, 379 A.2d 807, 809 (1977)*, it is not relevant to its required threshold determination that a material change of circumstances has occurred and should not be considered **[**1028]** by the board until that determination has been made.

Exceptions sustained.

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Caution
As of: July 15, 2016 10:08 AM EDT

Shepherd v. Westmoreland

Supreme Court of New Hampshire

June 8, 1988

No. 87-192

Reporter
130 N.H. 542; 543 A.2d 922; 1988 N.H. LEXIS 25

Sara Shepherd v. Town of Westmoreland

Prior History: [*1]** Appeal from Cheshire County.

Disposition: *Affirmed.*

Core Terms

variance, doctrine of res judicata, cause of action, superior court, circumstances, zoning, inverse condemnation claim, declaratory judgment, subsequent action, res judicata, presenting a petition, theory of recovery, particular facts, zoning ordinance, material change, trial court, constitutes, proposals, appeals, argues

Headnotes/Syllabus

Headnotes

1. Res Judicata--Generally

Inquiry in determining whether res judicata bars a subsequent action is whether the second action constitutes a different cause of action from the first.

2. Res Judicata--Actions Barred

The term "cause of action" means the right to recover, regardless of the theory of recovery; a theory of recovery must be pleaded, or be subject to bar by res judicata.

3. Res Judicata--Actions Barred

The bar of res judicata is effective despite a plaintiff's intent in a subsequent action to argue alternative theories or to seek a remedy not previously requested.

4. Res Judicata--Actions Barred

Superior court properly barred plaintiff's declaratory judgment action against a town, alleging that a zoning ordinance was unconstitutional and that the denial of a variance amounted to an inverse condemnation, where the claims raised by the plaintiff arose out of the same factual transaction as did a previous claim for a variance, where the zoning board had dismissed the application and the superior court had upheld the board.

5. Res Judicata--Actions Barred

The fact that a plaintiff attaches a new label to her cause of action is insufficient to remove the res judicata bar of an earlier adjudication against her.

6. Res Judicata--Actions Barred

Res judicata bar of earlier denial of a variance would not bar subsequent application, should there be a different proposal for the use of the land or a material change in circumstances affecting the application, or a change in the zoning laws.

Counsel: *Buckley and Zopf*, of Claremont (*Michael A. Fuerst* on the brief and orally), for the plaintiff.

Bradley, Burnett & Kinyon P.A., of Keene (*Homer S. Bradley, Jr.*, on the brief and orally), for the defendant.

Judges: Brock, C.J. All concurred.

Opinion by: BROCK

Opinion

[*543] **[**922]** The plaintiff, Sara Shepherd, appeals from the dismissal of her petition for declaratory judgment, claiming that the Trial Court (*Hollman*, J.) erred in applying the doctrine of res judicata to bar her petition. We affirm.

In July 1984, the plaintiff applied for a variance to build a home on a sub-standard lot she owns in the town of Westmoreland. Her 1.32-acre lot is located in an area zoned residential and does not meet either **[**923]** the lot size or frontage requirements of the town's zoning ordinance.

The Westmoreland Zoning Board of Adjustment (the board), concluding that the plaintiff's request for a variance was identical to one that she had sought unsuccessfully in 1981, declined to schedule a hearing and dismissed the application. The plaintiff subsequently appealed to the superior court, which upheld the board. The plaintiff did not appeal the ruling **[***2]** of the superior court.

In May 1985, the plaintiff filed a petition for declaratory judgment against the town, alleging that the zoning ordinance is unconstitutional as applied to her and that the denial of a variance amounted to an inverse condemnation of her land. The defendant responded by filing a motion for summary judgment and arguing that the doctrine of res judicata barred the plaintiff's action. In October 1985, the Superior Court (*Hollman*, J.) ruled that res judicata did not bar the action and scheduled the matter for trial.

During the trial, the court learned of our recent decision in Eastern Marine Construction Corporation v. First Southern Leasing, Ltd., 129 N.H. 270, 525 A.2d 709 (1987), which analyzes this State's application of the doctrine of res judicata to particular facts and circumstances. Based on the holding in *Eastern Marine*, the trial court reconsidered and reversed its prior order, ruling that **[*544]** the doctrine of res judicata did act to bar the plaintiff's current action. The plaintiff appeals that ruling to this court.

At issue on appeal is whether our holding in *Eastern Marine* bars the plaintiff's declaratory **[***3]** judgment action under the doctrine of res judicata. We hold that it does.

The parties do not dispute either the underlying facts or that this case turns on our application of *Eastern Marine* to their particular facts and circumstances. The plaintiff argues that her present petition for declaratory judgment recites a cause of action separate and distinct from that involved in the appeal of her 1984 variance request. The defendant argues that because the plaintiff had the opportunity, but failed, to litigate her constitutional and inverse condemnation claims on appeal of the board's 1984 denial of her variance request, she is precluded from raising these issues in her present petition.

Our inquiry, when determining whether res judicata bars a subsequent action, is whether the second action constitutes a different cause of action from the first. Eastern Marine Const. Corp., 129 N.H. at 274, 525 A.2d at 712. As we explicitly held in *Eastern Marine*, the term "'cause of action' means the right to recover, regardless of the

theory of recovery. A theory of recovery must be pleaded, or be subject to bar." *Id.*; *see also* Restatement (Second) **[***4]** of Judgments ch. 3 §§ 24, 25 (1980) (expounding upon the modern approach to res judicata). This bar is effective despite a plaintiff's intent in a subsequent action to argue alternative theories or to seek a remedy not previously requested. *Eastern Marine Const. Corp., 129 N.H. at 275, 525 A.2d at 712*; Restatement (Second) of Judgments ch. 3 § 25, at 209.

In the present case, the constitutional and inverse condemnation claims raised by the plaintiff arise out of the same factual transaction as did her previous claim for a variance. Indeed, the only fact to be added here is that, having been denied a variance, the plaintiff now contends that that denial constitutes a taking of her property. We have consistently barred such claims when, as here, the subsequent action is so closely related to the earlier action. *Colebrook Water Co. v. Commissioner of Dep't. of Pub. Works, 114 N.H. 392, 394, 324 A.2d 713, 715 (1974)*. The fact that the plaintiff attaches a new label to her cause of action is insufficient to remove the bar of the earlier adjudication against her. *Eastern Marine Const. Corp., 129 N.H. at 275, 525 A.2d at 713*; **[***5]** *Lougee v. Beres, 113 N.H. 712, 714, 313 A.2d 422, 423 (1973)*.

[*545] We do not mean to suggest, however, that the plaintiff is without recourse concerning proposals for the use of her land. It is the fact that she should have raised her constitutional and inverse condemnation **[**924]** claims in her 1984 appeal to the superior court that bars the present action. Should the plaintiff approach the board with different proposals for the use of her land or should there be a material change in circumstances affecting her application or a change in the zoning laws, the denial of her previous requests would not bar her subsequent application, and it would merit consideration by the board. *Fisher v. City of Dover, 120 N.H. 187, 412 A.2d 1024 (1980)* (zoning board may not lawfully consider subsequent variance petition absent material change in circumstances or material difference in requested use).

Affirmed.

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Caution
As of: July 15, 2016 10:06 AM EDT

Brandt Dev. Co. v. City of Somersworth

Supreme Court of New Hampshire

June 9, 2011, Argued; October 12, 2011, Opinion Issued

No. 2010-641

Reporter
162 N.H. 553; 34 A.3d 593; 2011 N.H. LEXIS 140

BRANDT DEVELOPMENT COMPANY OF NEW HAMPSHIRE, LLC v. CITY OF SOMERSWORTH

Subsequent History: Released for Publication

Prior History: [***1] Strafford.
Brandt Dev. Co., LLC v. City of Somersworth, 2010 N.H. Super. LEXIS 175 (2010)

Disposition: Reversed and remanded.

Core Terms

variance, circumstances, unnecessary hardship, zoning, material change, ordinance, zoning ordinance, area variance, applications, variance application, merits

Case Summary

Procedural Posture

Petitioner applicant sought a variance under former *RSA 674:33, I(b)* from respondent city's zoning board of adjustment. The Strafford Superior Court (New Hampshire) upheld the ZBA's denial of the variance. Petitioner appealed.

Overview

Petitioner sought unsuccessfully in 1994 to convert its property into four dwelling units. When petitioner again sought a variance in 2009, the ZBA declined to consider the merits on the ground that circumstances had not changed sufficiently to warrant acceptance of the application. The court held that this was error. The case law had changed significantly between 1994 and 2009. The court's two-part test for area variances in Boccia allowed petitioner to argue not that the zoning restriction effectively prevented any reasonable use of the land, but that the variance was necessary to enable the proposed use of the land and that other reasonably feasible means were unavailable. Similarly, the three-part Simplex standard for use variances was a material change of circumstances because it lowered the unnecessary hardship analysis to a standard that focused on the reasonable use of the property, the relationship between the general purposes of the ordinance and the application of the ordinance to the property, and the effect of the variance on both public and private rights of others. These changes created a reasonable possibility of a different outcome from that obtained in 1994.

Outcome

The court reversed the trial court's decision. It remanded the case.

LexisNexis® Headnotes

Real Property Law > Zoning > Judicial Review

HN1 Judicial review in zoning cases is limited. Factual findings of the zoning board of adjustment (ZBA) are deemed prima facie lawful and reasonable, and the ZBA's decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the ZBA decision is unlawful or unreasonable. *RSA 677:6* (2008). An appellate court will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2 The interpretation and application of a statute or ordinance is a question of law, and an appellate court reviews the trial court's ruling on such issues de novo.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN3 A zoning board, having rejected one variance application, may not review subsequent applications absent a material change of circumstances affecting the merits of the application. This rule is consistent with the majority rule that a new application for administrative relief or development permission may be considered by a board if there is a substantial change in the circumstances or the conditions relevant to the application. That rule reflects the practical reality that zoning boards should not be required to reconsider an application based on the occurrence of an inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN4 In New Hampshire, successive variance proposals must demonstrate either (1) material changes in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application.

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN5 In subsequent variance applications, the applicant bears the burden to demonstrate a material change in circumstances. Once the applicant has presented evidence of a change in circumstances, the zoning board of adjustment must determine as a threshold matter whether a material change of circumstances has occurred and whether full consideration is therefore required. Although a reviewing court defers to the board's factual findings, the trial court's decision to uphold the board's actions may be set aside if it is legally erroneous.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN6 In both 1994 and 2009, the variance statute, *RSA 674:33*, required a petitioner to satisfy a five-part test: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) the variance must not diminish the value of the surrounding properties.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN7 Under Simplex, an applicant can show unnecessary hardship by demonstrating that: (1) a zoning restriction as applied to its property interferes with its 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.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN8 The three-part Simplex test applies only to "use" variances — those that seek a use that is prohibited by the zoning ordinance — and the New Hampshire Supreme Court has established a different two-part analysis for "area" variances — those that authorize deviations from restrictions which relate to a permitted use, rather than limitations on the use itself. An applicant seeking an area variance satisfies the unnecessary hardship prong by demonstrating that: (1) an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) the benefit sought by the applicant could not be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. In sharp contrast to the Governor's Island standard, which favored the integrity of the ordinance and said the regulation stands unless it fails to provide any permitted use to the property owner, the New Hampshire Supreme Court in Simplex and Boccia loosened the reins of the unnecessary hardship test and instructed zoning boards to apply an approach more respectful of the constitutional rights of property owners to use and enjoy their property. Boccia, in particular, relaxed the unnecessary hardship standard for area variances, thereby creating a higher likelihood that an applicant will prevail under the new test.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN9 The requirement under Simplex that granting a variance will not injure the private or public rights of others is coextensive with the first and third variance criteria under former *RSA 674:33, I(b)*. A variance is injurious to the public rights of others — or "contrary to the public interest" — if it unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN10 The New Hampshire Supreme Court refined the "substantial justice" criterion for a variance in 2007, observing that the two critical inquiries are: (1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN11 Although it is but one factor in the variance statute, unnecessary hardship is central to the very concept of a variance. 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. Moreover, the post-Simplex line of cases demonstrates that the five criteria of former *RSA 674:33, I(b)*, at least before they were modified by the legislature in response to Boccia, are not discrete and unrelated criteria, but interrelated concepts that aim to ensure a proper balance between the legitimate aims of municipal planning and the hardship that may sometimes result from a literal enforcement of zoning ordinances.

Headnotes/Syllabus

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1. 1.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

A zoning board, having rejected one variance application, may not review subsequent applications absent a material change of circumstances affecting the merits of the application. This rule is consistent with the majority rule that a new application for administrative relief or development permission may be considered by a board if there is a substantial change in the circumstances or the conditions relevant to the application. That rule reflects the practical reality that zoning boards should not be required to reconsider an application based on the occurrence of an

inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial.

NH2. 2.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

In New Hampshire, successive variance proposals must demonstrate either (1) material changes in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application.

NH3. 3.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

In subsequent variance applications, the applicant bears the burden to demonstrate a material change in circumstances. Once the applicant has presented evidence of a change in circumstances, the zoning board of adjustment must determine as a threshold matter whether a material change of circumstances has occurred and whether full consideration is therefore required. Although a reviewing court defers to the board's factual findings, the trial court's decision to uphold the board's actions may be set aside if it is legally erroneous.

NH4. 4.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

In both 1994 and 2009, the variance statute required a petitioner to satisfy a five-part test: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) the variance must not diminish the value of the surrounding properties. RSA 674:33.

NH5. 5.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

Under *Simplex*, an applicant can show unnecessary hardship by demonstrating that: (1) a zoning restriction as applied to its property interferes with its 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. RSA 674:33.

NH6. 6.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

The three-part *Simplex* test applies only to "use? variances — those that seek a use that is prohibited by the zoning ordinance — and the supreme court has established a different two-part analysis for "area" variances — those that authorize deviations from restrictions which relate to a permitted use, rather than limitations on the use itself. An applicant seeking an area variance satisfies the unnecessary hardship prong by demonstrating that: (1) an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) the benefit sought by the applicant could not be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. In sharp contrast to the *Governor's Island* standard, which favored the integrity of the ordinance and said the regulation stands unless it fails to provide any permitted use to the property owner, the court in *Simplex* and *Boccia* loosened the reins of the unnecessary hardship test and instructed zoning boards to apply an approach more respectful of the constitutional rights of property owners to use and enjoy their property. *Boccia*, in particular, relaxed the unnecessary hardship standard

for area variances, thereby creating a higher likelihood that an applicant will prevail under the new test. RSA 674:33.

NH7. 7.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

It was error to decline to consider a 2009 variance application on the ground that circumstances had not changed sufficiently since an application in 1994 was denied. The supreme court's decisions in both *Simplex* and *Boccia* fundamentally altered the legal framework governing variances between the two applications. Moreover, although the other four criteria of the variance test had not changed to the same degree as the unnecessary hardship criterion, they had been refined and clarified since 1994. These doctrinal changes created a reasonable possibility — not absolute certainty — of a different outcome from that obtained in 1994 upon the zoning board of adjustment's consideration of the merits of the 2009 variance request. RSA 674:33.

NH8. 8.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

The requirement under *Simplex* that granting a variance will not injure the private or public rights of others is coextensive with the first and third variance criteria. A variance is injurious to the public rights of others — or "contrary to the public interest" — if it unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives. RSA 674:33.

NH9. 9.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

The supreme court refined the "substantial justice" criterion for a variance in 2007, observing that the two critical inquiries are: (1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use. RSA 674:33.

NH10. 10.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

Although it is but one factor in the variance statute, unnecessary hardship is central to the very concept of a variance. 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. Moreover, the post-*Simplex* line of cases demonstrates that the five criteria of the variance statute, at least before they were modified by the legislature in response to *Boccia*, are not discrete and unrelated criteria, but interrelated concepts that aim to ensure a proper balance between the legitimate aims of municipal planning and the hardship that may sometimes result from a literal enforcement of zoning ordinances. RSA 674:33.

Counsel: *Donahue Tucker & Ciandella, PLLC*, of Portsmouth (*Christopher L. Boldt* and *Keriann Roman* on the brief, and *Mr. Boldt* orally), for the petitioner.

Mitchell Municipal Group, P.A., of Laconia (*Walter L. Mitchell* and *Leigh S. Willey* on the brief, and *Mr. Mitchell* orally), for the respondent.

Judges: LYNN, J. DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

Opinion by: LYNN

Opinion

[*555] [594]** LYNN, J. The petitioner, Brandt Development Company of New Hampshire, LLC (Brandt), appeals an order of the Superior Court (*O'NEILL*, J.) upholding the decision of respondent City of Somersworth's (City) zoning board of adjustment (ZBA) to deny its application for a variance. We reverse and remand.

The following facts are drawn from the record. Brandt owns a house and attached **[**595]** barn on Myrtle Street in the residential multi-family district of the City. In November 1994, Brandt applied for a variance from size and frontage requirements to convert the property, then being used as a duplex, into four dwelling units. The ZBA denied the application after finding that the property failed to satisfy the five criteria for a variance set out in RSA 674:33, I(b) (1986). *See* Labrecque v. Town of Salem, 128 N.H. 455, 457-58, 514 A.2d 829 (1986). **[***2]** Brandt did not appeal the 1994 decision.

From 1995 to 1997, Brandt added four bedrooms to the upstairs unit after receiving permits to do so. As a result, today the property contains one seven-bedroom unit upstairs and one three-bedroom unit downstairs.

In December 2009, Brandt again sought to convert the Myrtle Street property into a four-unit dwelling, and again applied to the ZBA for a variance from the City's area, frontage, and setback requirements. Brandt proposed to renovate and reconfigure both the existing dwelling units and the attached barn, so that the property would contain four units: one with four bedrooms, one with two bedrooms, and two with three bedrooms. The ZBA declined to consider the merits of the variance application on the basis that "circumstances [had] not changed sufficiently to warrant acceptance of the application." Brandt unsuccessfully moved for rehearing and appealed the ZBA's decision to the superior court pursuant to RSA 677:4 (2008). The superior court affirmed the ZBA's decision in August 2010. This appeal followed.

HN1 Judicial review in zoning cases is limited. Harrington v. Town of Warner, 152 N.H. 74, 77, 872 A.2d 990 (2005). Factual findings of the ZBA are deemed **[***3]** *prima facie* lawful and reasonable, and the ZBA's decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the ZBA decision is unlawful or unreasonable. RSA 677:6 (2008); Harrington, 152 N.H. at 77. We will uphold the superior court's decision unless the evidence does not support it or it is legally erroneous. Harrington, 152 N.H. at 77. ***HN2*** The interpretation and application of a statute or ordinance is a question of law, and we review the superior court's ruling on such issues *de novo*. Atwater v. Town of Plainfield, 160 N.H. 503, 507, 8 A.3d 159 (2010).

[*556] Brandt argues that the ZBA was required to review its 2009 variance application on the merits even though it asked for essentially the same relief as the 1994 application. Brandt contends that, under the standard set out in Fisher v. City of Dover, 120 N.H. 187, 191, 412 A.2d 1024 (1980), material changes in circumstances occurred during the fifteen years between the 1994 ruling and the 2009 application, including changes in the case law interpreting the criteria for granting a variance, the City's zoning ordinance and policy documents, and the physical layout **[***4]** of the property. The City counters that the ZBA acted reasonably in denying the application because these intervening developments do not constitute material changes. The City argues that even a material change in circumstances under the unnecessary hardship prong of the five-part test for a variance does not require the ZBA to hear Brandt's application anew because the ZBA denied the 1994 application on four other statutory grounds, none of which have changed in the meantime. Thus, the issue on appeal is whether the facts and circumstances surrounding the 2009 application constitute material changes in circumstances, *see* Fisher, 120 N.H. at 191, **[**596]** requiring the ZBA to conduct a full review of Brandt's variance request.

NH[1,2] [1, 2] It is well settled that ***HN3*** a zoning board, having rejected one variance application, may not review subsequent applications absent a "material change of circumstances affecting the merits of the application." *Id.* The rule in *Fisher* is consistent with the majority rule that "a **[***5]** new application for administrative relief or development permission may be considered by a board if there is a substantial change in ... the circumstances or the conditions relevant to the application." 4 E. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 68:9 (2011). That rule reflects the practical reality that zoning boards should not be required "to reconsider an application

based on the occurrence of an inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial." Sterk & Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139, 1175 (2011). ***HN4*** In New Hampshire, successive variance proposals must demonstrate either (1) material changes in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application. Fisher, 120 N.H. at 191. Brandt's argument is based solely on the latter ground. We therefore consider only whether the circumstances surrounding the application have changed sufficiently in the intervening years to require full ZBA consideration.

[3] [3] ***HN5*** In subsequent variance applications, the applicant bears the burden **[***6]** to demonstrate a material change in circumstances. *Id. at 190*. Once the applicant has presented evidence of a change in circumstances, the zoning **[*557]** board of adjustment must determine as a threshold matter whether a material change of circumstances has occurred and whether full consideration is therefore required. *See* Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 536, 986 A.2d 662 (2009). Although a reviewing court defers to the board's factual findings, the trial court's decision to uphold the board's actions may be set aside if it is legally erroneous. *Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105, 920 A.2d 1192 (2007)*.

[4] [4] Important recent changes in the law governing the standard to be applied to variance applications convince us that the ZBA unreasonably declined to hear Brandt's 2009 application. ***HN6*** In both 1994 and 2009, the variance statute, *RSA 674:33*, required the petitioner to satisfy a five-part test: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and **[***7]** (5) the variance must not diminish the value of the surrounding properties. *Farrar v. City of Keene, 158 N.H. 684, 688, 973 A.2d 326 (2009)*; *Hussey v. Town of Barrington, 135 N.H. 227, 233, 604 A.2d 82 (1992)*. Our case law interpreting these criteria, however, has changed significantly.

[5] [5] In 1994, when Brandt first applied for a variance, the unnecessary hardship standard for obtaining a variance required applicants to show a deprivation "so great as to effectively prevent the owner from making any reasonable use of the land." *Governor's Island Club v. Gilford, 124 N.H. 126, 130, 467 A.2d 246 (1983)*. Recognizing that this restrictive approach was at odds with the constitutional rights of property owners to use and enjoy their property and made it extremely difficult to obtain a variance in New Hampshire, we overruled **[**597]** *Governor's Island* in 2001. *See* Simplex Technologies v. Town of Newington, 145 N.H. 727, 731-32, 766 A.2d 713 (2001). In its place, *Simplex* established a new standard that is markedly more favorable to property owners seeking variances than was the standard under *Governor's Island*. *See* Simplex, 145 N.H. at 731-32. ***HN7*** Under *Simplex*, an applicant could show unnecessary hardship by demonstrating that: (1) a zoning restriction as applied **[***8]** to its property interferes with its 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. *Id.*

[6] [6] Then, in 2004, in *Boccia v. City of Portsmouth, 151 N.H. 85, 92, 855 A.2d 516 (2004)*, we held that ***HN8*** the three-part *Simplex* test applied only to "use" variances — those that seek a use that is prohibited by the zoning ordinance — and we **[*558]** established a different two-part analysis for "area" variances — those that authorize "deviations from restrictions which relate to a permitted use, rather than limitations on the use itself." *Boccia, 151 N.H. at 90* (quotation omitted); *see also* Harrington, 152 N.H. at 78-79. *Boccia* provided that an applicant seeking an area variance satisfies the unnecessary hardship prong by demonstrating that: (1) an area variance is needed to *enable* the applicant's proposed use of the property given the special conditions of the property; and (2) the benefit sought by the applicant could not be achieved by some other method **[***9]** reasonably feasible for the applicant to pursue, other than an area variance. *Boccia, 151 N.H. at 92*. In sharp contrast to the *Governor's Island* standard, which "favor[ed] the integrity of the ordinance and [said] the regulation stands unless it fails to provide *any permitted use* to the property owner," *Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 247, 614 A.2d 1048 (1992)* (HORTON, J., dissenting) (emphasis added), *Simplex* and *Boccia* loosened the reins of the unnecessary hardship test and instructed zoning boards to apply an approach more respectful of the constitutional rights of property owners to use and enjoy their property. *Boccia*, in particular, relaxed the unnecessary hardship standard for area variances, thereby creating a higher likelihood that an applicant will prevail under the new test. *See* Boccia, 151

N.H. at 92; 2 P. SALKIN, AMERICAN LAW OF ZONING § 13:9 (5th ed. 2011) (noting that the standard in New Hampshire for area variances is more relaxed than for use variances after *Boccia*)[1].

[7] [7] We need not decide whether Brandt's 2009 application asks for a use variance or an area variance, as both Simplex and Boccia fundamentally altered the legal framework governing variances between Brandt's two applications. Assuming Brandt's application asks for an area variance, *Boccia's* two-part test allows Brandt to argue not that the zoning restriction effectively prevents *any* reasonable use of the land, but that the variance is necessary to enable the proposed use of the land and **[**598]** that other reasonably feasible means are unavailable. Similarly, the three-part *Simplex* standard for use variances constitutes a material change of circumstances because it lowers the unnecessary hardship analysis from the high bar of *Governor's Island* to a standard that focuses on the reasonable use of the property, the relationship between **[***11]** the general purposes of the ordinance and the **[*559]** application of the ordinance provision to the property, and the effect of the variance on both public and private rights of others. Simplex, 145 N.H. at 731-32.

NH[8,9] [8, 9] Although the other four criteria of the variance test under RSA 674:33 have not changed to the same degree as the unnecessary hardship criterion, they have been refined and clarified since 1994. We have said that ***HN9*** the requirement under *Simplex* that granting a variance will not injure the private or public rights of others is coextensive with the first and third variance criteria under RSA 674:33. *See* Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580, 883 A.2d 1034 (2005). Notably, in *Chester Rod & Gun Club*, we established that a variance is injurious to the public rights of others — or "contrary to the public interest" — if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives." Id. at 581 (quotations omitted); *see also* Gray v. Seidel, 143 N.H. 327, 328-29, 726 A.2d 1283 (1999) (clarifying that the applicant need not show a benefit to the public interest, but only that the variance would not be contrary to the public interest). **[***12]** ***HN10*** We also refined the "substantial justice" criterion in 2007, observing that the two critical inquiries are: (1) whether the gain to the general public by denying the variance request outweighs any loss to the individual; and (2) whether the proposed development is consistent with the area's present use. Malachy Glen, 155 N.H. at 109. Although these developments merely clarified the meaning of the various factors boards must consider when reviewing a variance request, and did not fundamentally change the law as did *Simplex* and *Boccia*, they do lend further weight to our conclusion that circumstances have changed sufficiently between 1994 and 2009 to require a full review of Brandt's application by the ZBA.

[10] [10] The trial court correctly noted that *Simplex* and *Boccia* uprooted only one criterion — that of unnecessary hardship — of the five-part test in RSA 674:33, and that Brandt's 1994 application failed on all five criteria. It does not follow, however, that a major shift in the doctrine of unnecessary hardship does not constitute a material change in circumstances with respect to the 2009 application. Indeed, ***HN11*** although it is but one factor in our statute, unnecessary hardship is central to **[***13]** the very concept of a variance. "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." Bacon v. Town of Enfield, 150 N.H. 468, 477, 840 A.2d 788 (2004) (quotation omitted); *see also* RATHKOPF, *supra* § 58:1 (identifying the "common purpose behind allowing variances" as a means to correct the "occasional inequities that are created by general zoning ordinances"). Moreover, our post-*Simplex* line of cases demonstrates that **[*560]** the five criteria of RSA 674:33, at least before they were modified by the legislature in response to *Boccia*, are not discrete and unrelated criteria, but interrelated concepts that aim to ensure a proper balance between the legitimate aims of municipal planning and the hardship that may sometimes result from a literal enforcement of zoning ordinances. It is sufficient for the purposes of *Fisher* that these doctrinal **[**599]** changes, taking place in the fifteen-year period between Brandt's applications, create a reasonable

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[1] The legislature in 2010 established a uniform standard for both area variances and use variances, effectively displacing *Boccia*. *See* Laws 2009, 307:6; Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 509, 514 (2011), 162 N.H. 508, 34 A.3d 584. That **[***10]** enactment, however, specified that the new standard applies only to applications submitted after January 1, 2010. Laws 2009, 307:7, :8. Because Brandt applied for the variance in 2009, *Boccia's* two-part test will still apply to the facts of this case if the board concludes that Brandt is seeking an area variance rather than a use variance.

possibility — not absolute certainty — of a different outcome from that obtained in 1994 upon the ZBA's consideration of the merits of [***14] Brandt's 2009 variance request.

Reversed and remanded.

DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

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