

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



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Case Name: 46 Martin Road, LLC v. Town of Epping
Case Number: ZBA-2022-16

ORDER

This matter concerns the appeal by 46 Martin Road, LLC (“Applicant”) of a decision by the Town of Epping (“Town”) Zoning Board of Adjustment (“ZBA”) denying a variance application to allow three habitable stories where only two are allowed. The variance request was filed in support of the Applicant’s proposed residential project of 315 rental apartments incorporating sixty-four workforce housing units (“Project”).

FACTS

The property at issue in this appeal is known as Map 36 Lot 23, located at 46 Martin Road in Epping, New Hampshire (“Property”). The Property is located in the Industrial/Commercial Zone and Aquifer Protection District Overlay. The record in this matter indicates that the Applicant’s efforts on the Project date back to at least August of 2021. Certified Record¹ (“CR”) at p. 1. Since that time, the Applicant has applied for, and the ZBA has granted, the following forms of relief:

1. A variance from the Town Zoning Ordinance’s (“Ordinance”) requirement for municipal water for the Project. CR 545.
2. A variance from the Ordinance’s maximum allowed density (requesting a density of 9.3 units per 40,000 square feet where a maximum of one unit per 40,000 square feet is allowed). CR 546.
3. A variance from the Ordinance’s maximum lot coverage limit (requesting 25% lot coverage where 10% is permitted). CR 437.

¹ In its Legal Memorandum, the Applicant includes references and hyperlinks to certain Town materials that are outside of the Certified Record. See, e.g., Petitioner’s Legal Memorandum at pp. 20-21. For the purposes of clarity, the Board notes that it does not rely on such materials in any way in rendering this decision.

4. A variance from the Ordinance's maximum building height limit (to permit a building height of 53 feet). CR 438.
5. A special exception to permit a multi-family development within the Aquifer Protection District. CR 436.

None of the above forms of relief are the subject of this appeal. Rather, the single decision on appeal concerns the ZBA's denial of the Applicant's request to allow three habitable stories where the Ordinance permits two ("Three-Story Variance").² See Ordinance, § 6.10(2)(d).

At its April 19, 2022 meeting, the ZBA denied the variance request for three habitable stories. CR 435.³ Thereafter, the Applicant filed a request for a rehearing concerning such denial, CR 469, and a rehearing was held on June 15, 2022. CR 577. At the conclusion of the ZBA's rehearing, by a 3-1 margin, the ZBA again voted to deny the Three-Story Variance. CR 580. A written notice of decision dated June 16, 2022 was subsequently issued by the ZBA. CR 581. The ZBA's written notice of decision informed the Applicant that its request was denied and refers to the public meeting minutes for specific details. Id.

On July 6, 2022, the Applicant filed its appeal with the Housing Appeals Board ("Board"). A prehearing conference was held on September 15, 2022, and a hearing on the merits was held on October 4, 2022. This decision follows.

LEGAL STANDARDS

The Housing Appeals Board review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. See, RSA 679:9. See also, Lone Pine Hunters Club v. Town of Hollis, 149 N.H. 668 (2003) and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

² The Applicant originally proposed four habitable stories where two are allowed but subsequently requested, instead, three habitable stories. CR 387.

³ The Board observes that the minutes contained within the certified record for the March 30, 2022 meeting appear to be substantively identical to the April 19, 2022 minutes. Compare CR 360-68 with CR 422-30. As neither party identifies this as an issue relevant to the appeal, the Board simply notes this for the record.

As required under RSA 674:33, I(a)(2)(A)-(E), a zoning board of adjustment is authorized to grant a variance if the variance will not be contrary to the public interest; the spirit of the ordinance is observed; substantial justice is done; the values of surrounding properties are not diminished; and literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. “The variance applicant bears the burden of demonstrating that all five criteria are met.” Perreault v. Town of New Hampton, 171 N.H. 183, 186 (2018).

DISCUSSION

I. Basis for Denial

The Applicant contends that the ZBA’s decision was unlawful in that it failed to provide written reasons for disapproval. As noted above, the ZBA’s written notice of decision does not identify why the variance request was denied. Thus, for this task, reference to the ZBA’s June 15, 2022 meeting minutes is necessary. See CR 577-80. The June 15th minutes indicate that, during deliberations, ZBA board members did substantively discuss the Three-Story Variance in light of the public interest prong. CR 579-80. Such discussion includes a conclusion that the three-story building was not in the public’s interest due to safety concerns. CR 580. The relevant minutes further indicate that the ZBA members provided no comment with respect to the spirit of the ordinance and hardship prongs. CR 580. With respect to the substantial justice prong, the only comment was from one member, who stated that they thought “they have done substantial justice,” to which another member agreed. CR 580. With respect to the values of surrounding properties, ZBA member deliberation was mixed, with one member stating that they thought the Three-Story Variance would decrease surrounding property values; another member did not see impact to the houses in the area; one member had no comment; and one member stated they thought that it “will add to the area surrounding and the residences that are concerned.” CR 580.

Thus, although the June 15, 2022 minutes are not a model of clarity with respect to a basis for denial, from those minutes, one can reasonably discern that the variance at issue was denied on the basis of public interest related to safety concerns.⁴ As such, the Board does

⁴ This is consistent with the Town’s legal memorandum, its Requests for Findings of Facts and Rulings of Law, and Town Counsel’s argument during the October 4th merits hearing.

not find that the ZBA's decision was unlawful or unreasonable based on a failure to provide written reasons for disapproval.

II. Whether the Three-Story Variance is in the Public Interest

"[T]o adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, we must determine whether to grant the variance would unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011) (internal quotations and citations omitted). The two established pathways to determine whether a variance will violate a zoning ordinance's basic zoning objectives are to examine: (1) whether the variance would alter the essential character of the neighborhood; and (2) whether the variance would threaten the public health, safety, or welfare. Id.

The Applicant argues that the ZBA erred when it relied on subjects outside of its jurisdiction, including fire and life safety considerations, which, the Applicant maintains, fall within the domain of the Town's Planning Board. While some of these issues may typically fall outside of the scope of the ZBA's general review, public health and safety is a component of the public interest that is proper for the ZBA to consider. See Harborside, 162 N.H. at 514. That being said, the question remains whether the record contains adequate evidence on which to deny the Three-Story Variance on safety concerns.

The record includes two relevant instances of testimony from the Town's fire department on this issue. In the first, at the ZBA's March 30, 2022 hearing, Deputy Fire Chief Lombardo stated:

[t]here are safety concerns related to the ability of the department to handle this development based on the resources they currently have available. The code requirements will be reviewed by Lt. St. Cyr once the project reaches the Planning Board. It is not something the department reviews at the zoning board stage. . . . No construction drawings or plans have been reviewed at this time. The project is conceptual at this time, until they go before the planning board. The fire departments responsibility is to ensure life safety which will be done once plans are being reviewed.

CR 363. Second, a formal letter from the fire department, dated May 6, 2022, was submitted and was available to the ZBA at its June 15, 2022 rehearing. This letter stated, in part, that the

“ideal access scenario incorporated into the original four-story configuration is reduced by three-story construction. In light of this, we feel the initial four-story design provides a better scenario from a public safety standpoint.” CR 511. Finally, when deliberating on whether the Three-Story Variance would be contrary to the public interest, in relevant part, one member stated that the request was not in the public interest because of the size. CR 580. Another member said the request was not in the public interest because of “safety reasons” and that the Town did “not have the personnel to cover this project.” CR 580.

While the testimony of Deputy Chief Lombardo raised the issue of public safety, it did so in a preliminary manner based on the Town’s current resources. Such testimony specifically acknowledged that “[t]here has been discussion with the applicant about acquiring a fire truck.” CR 363. This testimony also indicates that the fire department considered the project conceptual until the planning board stage, and, further, that the fire department’s responsibility to ensure life safety “will be done once plans are being reviewed.” CR 363. At that same meeting, the Town’s planner “reiterated the process for receiving municipal department input, related to the construction of the development, is done during the planning board process. A condition of each of these variances is to receive planning board approval which encompasses the requirement of receiving municipal department comments related to the project.” CR 427. Such testimony reveals that while the fire department opined on the general safety issues that it saw at that time, a detailed review would not occur until the planning board stage, including a review for life safety issues.

Moreover, while the fire department’s May 6, 2022 letter expressed a preference for the four-story building design, it did so on the basis of perimeter access. CR 511. Notably, such letter does not state that the proposed three-story building would be unsafe. Id. Consistent with its prior testimony, the May 6th letter notes that the Applicant has agreed to provide a contribution towards the purchase of an aerial vehicle (also known as a ladder truck) for the Town, which the department suggests should be considered as part of the Project’s overall impact fee determination. Id.

The Board concludes that such testimony within the record does not reasonably support the ZBA’s finding that the Three-Story Variance would be contrary to the public interest due to public health and safety concerns. Rather, the record in this case demonstrates that granting

the Three-Story Variance is in the public interest. This is reinforced by the fact that the Project contains sixty-four workforce housing units. See RSA 672:1, III-e.

III. Remedy and Request for Damages

Having found that the record does not support the ZBA's denial of the Three-Story Variance, the Board must next craft an appropriate remedy. To that end, the Applicant seeks a builder's remedy in this case. At oral argument during the Board's October 4th hearing on the merits, the Applicant clarified that the scope of such request was limited to proceedings before the ZBA. During such hearing, counsel for both parties agreed that, in the event the Board reversed the ZBA's decision, the appropriate outcome would be for the Three-Story Variance to be granted, with the Project then able to move on to the Town's Planning Board for its review, as appropriate, without need for a remand to the ZBA.

The Applicant also seeks an award of damages, arguing that the ZBA's conduct warrants such relief. As an initial matter, whether the Applicant adequately raised the issue of damages in its appeal is questionable. Pursuant to the Board's administrative rules, an applicant is limited to those grounds stated in its appeal document (along with the limitations contained in RSA 677:4). See Hab 202.02(d). In relevant part, the appeal document in this case alleges that (1) the ZBA's conduct "caused significant damages" to the Applicant due to worsening economic conditions and additional permitting costs, see Appeal at ¶ 61, and (2) the Applicant has been subjected to conduct that has wrongfully delayed the approval of the variance. Id. at ¶ 79. Neither of those allegations are clear in requesting an award of damages from the Town. Regardless, for the purposes of economy and finality, the Board assumes, without finding, that the issue was properly raised.

"Costs shall not be allowed against the municipality unless it shall appear to the court that the zoning board of adjustment acted in bad faith or with malice or gross negligence in making the decision appealed from." RSA 677:14. Likewise, an award of attorney's fees may be warranted if a zoning board is found to be acting in bad faith. See Harkeem v. Adams, 117 N.H. 687 (1977). Upon review of the record, including but not limited to the fact that the Town granted four variances and a special exception for the Project, and denied the Three-Story Variance on a single criterion, the Board finds no evidence of conduct that would warrant an award of damages in this case. As such, the Applicant's request for damages is denied.

CONCLUSION

Based on the foregoing, upon a balancing of the probabilities, the Housing Appeals Board ORDERS as follows:

1. The decision of the Town of Epping Zoning Board of Adjustment denying the Applicant's variance to permit three habitable stories is REVERSED and such variance is GRANTED, consistent with this decision;
2. The Applicant's request for damages is DENIED; and
3. The Town's requests for findings of fact and rulings of law which are consistent with this Order are APPROVED; the balance are DENIED.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth Menard, Clerk

Date: December 5, 2022