THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD

Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at https://hab.nh.gov

Case Name: Chelmsford Hooksett Properties, LLC v. Town of Hooksett
Case Number: ZBA-2022-10

ORDER

This matter concerns the appeal filed by Chelmsford Hooksett Properties, LLC ("Applicant") of a decision by the Town of Hooksett ("Town") Zoning Board of Adjustment ("ZBA") denying a request for a variance to permit an 81-unit apartment building on certain land located along U.S. Route 3 (aka Hooksett Road) and College Park Drive ("Property") in Town.

FACTS

The Property is located at 2 College Park Drive and referred to in Town assessing records as Lot 9-34-1. CR 1. It is a 36.92-acre parcel of land located in the Town's Mixed Use District (MUD1).[1] The Property is currently improved with a 100,000 square foot structure that was most recently used for office space. Assessing records indicate that the structure was constructed in 1986. CR 27. The Applicant now seeks to renovate and convert the existing building from office space to market-rate residential apartments. As residential use is not permitted in the MUD1 zoning district, CR 6; App. C at 64, the Applicant requires a variance to facilitate its proposed redevelopment of the site.

On May 19, 2021, the Applicant submitted an application for a variance from Section 12(A) of the Town's Zoning Ordinance ("Ordinance"). CR 1. The ZBA held public hearings on the request on June 8, 2021; October 12, 2021; November 9, 2021. See CR 50, 89, 102. At the conclusion of the November 9, 2021 meeting, the ZBA voted to deny the variance and issued a written notice of decision. CR 110, 31. The Applicant filed a request for rehearing, which the ZBA granted on January 4, 2022. CR 123, 33. A new public hearing was held on March 6, 2022, CR 145, and the ZBA deliberated on the matter at its April 12, 2022 meeting. CR 158. Following

[1] The Property technically consists of two separate lots: Lot 9-34-1, which is at issue in this case, and Lot 9-34. CR 6. Lot 9-34 is located across College Park Drive to the north and consists of approximately sixty, undeveloped acres. While Lot 9-34 is referenced at times in the record, it is not part of the variance request that is on appeal.

deliberations, the ZBA voted unanimously to deny the Applicant's variance request ("ZBA Decision"). CR 162. A written decision dated April 14, 2022 followed. CR 34.

In its written decision, the ZBA found that:

- The variance would be contrary to the public interest and spirit of the ordinance because, if approved, the proposed use will be inconsistent with the character of the surrounding neighborhood.
- Substantial justice will not be achieved as the potential loss to the applicant is outweighed by the potential harm to the public if the variance is granted.
- No unnecessary hardship exists as the property does not contain any special conditions that differentiate it from other properties in the area; there is a fair and substantial relationship between the Zoning Ordinance and its prohibition of the proposed use in the zoning district, and the variance would frustrate that relationship; and the proposed use is deemed not reasonable under the circumstances. Finally, although not dispositive, the Board finds that any claimed hardship was self-created since the applicant applied for the variance almost immediately following its purchase of the property, knowing the zoning restriction on the proposed use and the feasibility of the property for other uses allowed in the district.

CR 34.

On May 12, 2022, the Applicant filed the above-captioned appeal with the New Hampshire Housing Appeals Board ("Board"). Alongside its appeal, and with the assent of the Town, the matter was stayed pending the decision of the ZBA on the Applicant's subsequent request for rehearing. On July 7, 2022, the Applicant filed its Assented To Motion to Lift Stay, which was granted by the Board. A prehearing conference was held on August 30, 2022, and a hearing on merits was held on September 15, 2022. This decision follows.

LEGAL STANDARDS

The Housing Appeals Board's 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.

DISCUSSION

I. Alleged Conflict of Interest

Although not briefed, in its Complaint and during oral argument on the merits hearing, the Applicant argues that the ZBA Decision should be reversed because of alleged ZBA member bias. See Complaint, ¶¶ 47-53. The basis for such allegation is that such member has an "obvious bias against apartments" and fails to meet the so-called "juror standard." Id. at ¶¶ 48, 50. However, the support for such allegation is not articulated by the Applicant. The burden on appeal rests with the Applicant. Here, the Applicant does not identify the alleged basis for the claimed conflict of interest. Rather, the Applicant generally relies upon the record as a whole. It is unreasonable to require the Board to guess at facts that the Applicant refers to in support of its argument. Moreover, as a matter of substance, a review of the minutes from the various ZBA proceedings does not convince the Board of any violations of RSA 673:14, nor is the Board convinced that reversal for this reason is appropriate. In light of the above, the Board concludes that the Applicant has not satisfied its burden to show that the ZBA Decision was unreasonable or unlawful based on an alleged board member conflict of interest.

II. Public Interest and Spirit of the Ordinance

"The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance." Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 105 (2007) (quotations omitted). As such, these two factors will be discussed together. "The first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the applicable zoning ordinance." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005).

> As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. Accordingly, to 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. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. Mere conflict with the terms of the ordinance is insufficient.

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.

In denying the requested variance on public interest and spirit of the ordinance grounds, the ZBA concluded that the request would be inconsistent with the character of the surrounding neighborhood. CR 34. In its brief, the Town cites to the follow testimony in support of such conclusion:

- The Property was well-suited for commercial or mixed-use and was part of the Town's long-range planning for development in the area.
- The Applicant's traffic report is limited in scope in that it does not address traffic going west on College Park Drive.
- Noise concerns.[2]

The Applicant contends that the reuse of the existing structure will not result in a substantial change to the essential character of the neighborhood. Specifically, the Applicant points to the fact that the existing building's exterior appearance and footprint will not change; the landscaping will not change; and its use will remain consistent with the mixed-use nature of the surrounding neighborhood.

In light of the above-referenced legal framework, the first step in this inquiry is to analyze the ordinance. Then, as neither party argues that the proposed development will threaten the public health, safety, or welfare, the question becomes whether the proposed residential use on the Property will alter the essential character of the neighborhood.

With respect to the first question, interestingly, and for reasons that are not evident in the record, the Ordinance includes "statements of intent" (*i.e.*, the purpose) for certain MUD zones but not for others. Compare App. C at pp. 64, 77, 79 (consisting of MUD districts without statements of intent) with App. C at pp. 66, 81 (consisting of MUD districts with statements of

[2] Testimony in the record concerning noise from the apartments was minimal. See CR 94-95. Simply raising the issue in a speculative fashion is an inadequate basis for denial. See Derry Sr. Dev., LLC v. Town of Derry, 157 N.H. 441, 451 (2008). This is particularly true given the Property's large size and the fact that the building is positioned on the lot away from the single-family homes. See CR 25.

intent). Thus, the purpose of Article 12 of the Ordinance is not directly evident in its plain language. That said, the allowed uses of the Ordinance, along with testimony in the record, shed some light on the issue. The permitted uses itemized in Article 12 include a varied mix of commercial and retail uses, including, but not limited to: retail stores, business offices, hotels, restaurants, movie theaters, and banks. Residential use is not allowed as a matter of right or by special exception. ZBA member testimony in the record indicates that the purpose for the various MUD zones is to blend commercial and residential uses and that MUD1 was intended to exclude residential uses while morphing together different types of commercial uses. CR 106.

In light of this purpose, it is clear that the proposed residential use will conflict with the purpose of the Ordinance to a degree. However, that is the case in any variance. Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011). The question is whether the ZBA acted unreasonably in finding the requested variance will alter the neighborhood's existing essential character. The record indicates that the Property is abutted to the south and west by, primarily, single-family residential use and to the north and east by commercial and mixed-use development. CR 25. The proposed use would involve renovating the existing building, meaning that the structure itself is already part of the neighborhood's character. Thus, and as stated in the Town's Hearing Memorandum, at page 9, the crux of this issue comes down to the traffic impacts of the proposed residential use – specifically, the traffic impacts on the residents who live south and west of the Property.

Typically, traffic concerns are addressed by the planning board; however, traffic issues are sometimes relevant when considering whether a proposed variance will satisfy the five variance criteria set forth in RSA 674:33. In this case, traffic concerns were identified by the ZBA early in the public hearing process. CR 54. In an effort to respond to such concerns, the Applicant produced a traffic report. CR 185. More specifically, the Applicant's traffic expert conducted a comparative trip generation analysis for the former use of the Property (as office space used by Cigna Healthcare) and the proposed use (81 residential apartments). CR 185. The report refers to data from 2017 on the two-way traffic volume on College Park Drive, which totaled 726 (AM) and 825 (PM) during peak hour periods. CR 185. The conclusion of such analysis indicated that the proposed residential use would generate considerably fewer vehicle trips on a daily and peak hour basis than the previous office use. CR 188. The report also found that on-site parking demand for the proposed use will also be considerably less with the proposed residential use.

CR 188. Notwithstanding the above, the ZBA Decision found that the proposed use would be "inconsistent with the character of the surrounding neighborhood." CR 34. Again, with respect to traffic, the basis for denial was concerns about the impact on residents to the south and west of the Property. Upon review, the Board cannot conclude that the record supports this finding by the ZBA.

The traffic testimony in the record given by neighborhood residents reflect a general concern about existing traffic conditions. See, e.g., CR 54, 93-96, 105-106, 147-148. In other words, the character of this neighborhood already includes certain traffic characteristics that some residents find objectionable, including westbound traffic conditions on College Park Drive. At the same time, the record contains a report stamped by a professional engineer concluding that the proposed residential use would generate considerably fewer vehicle trips than the former office use. CR 188. Such report was unopposed. In light of the foregoing, the Board finds the ZBA's reliance on a particular off-site traffic pattern as the basis for denial is unreasonable.

Though board members may rely upon their own judgment and experience, general lay opinions are insufficient to counter the testimony of the Applicant's traffic expert. See Cont'l Paving, Inc. v. Town of Litchfield, 158 N.H. 570, 574, 969 A.2d 467, 471 (2009). Here, without a traffic report, the ZBA effectively concluded that the proposed residential use would generate different off-site traffic patterns than was results from office use. In light of the above, the Board concludes that the record does not support a finding that traffic associated with the proposed residential use of the Property would alter the essential character of the neighborhood. Thus, the ZBA Decision was unreasonable on this point.

III. Substantial Justice

"Perhaps the only guiding rule [on whether substantial justice is done] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice . . . . [W]e also [have] looked at whether the proposed development was consistent with the area's present use." Malachy Glen, 155 N.H. at 109 (internal citations and quotations omitted).

The ZBA Decision denied the Applicant's variance request on the basis that substantial justice would not be achieved as the potential loss to the applicant is outweighed by the potential harm to the public if the variance is granted. CR 34. In deliberating on the matter, the ZBA found

that the record did not establish what harm to the Applicant would result from denying the requested variance. CR 159.

Contrary to this finding, the record reflects that the Applicant introduced various evidence to support that granting the variance would result in substantial justice. In its application, the Applicant noted that the structure on the Property has remained dormant despite size and proximity to major roads. CR 8. See CR 103 (referring to vacant building for several years). The Applicant also raised the issue of the carrying costs associated with maintaining the Property and the vacant building. CR 38. Thus, it was unreasonable for the ZBA to conclude that the Applicant did not address the issue. Finally, the Applicant introduced testimony into the record concerning the general need for additional housing in the state, which is relevant when considering public lose or gain. See, e.g., CR 207, 209.

With respect to any public gain that might result from denying the variance, during deliberation, one ZBA member acknowledged the considerable traffic testimony in the record, but then also recognized that traffic would be an issue regardless of the ultimate use. CR 159. Another member felt that the number of homes in the area should be weighed. Id. However, the ZBA did not articulate a finding on what exactly the public would gain if the Property was not converted to residential use. To the extent the ZBA based its substantial justice finding on the neighborhood's traffic conditions, as discussed above, the unchallenged traffic report of the Applicant concludes that the proposed residential use will generate considerably fewer vehicle trips on a daily and peak-hour basis.

In light of the above, the record does not support the ZBA Decision's finding that substantial justice will not be achieved if the variance is granted, as the potential loss to the applicant will not be outweighed by the potential harm to the public.

IV. Unnecessary Hardship

The final basis for the ZBA's denial of the variance request concerns the fifth, and final, prong of RSA 674:33 – unnecessary hardship. The ZBA found that no unnecessary hardship exists because: (A) the Property did not contain any special conditions; (B) there was a fair and substantial relationship between the Ordinance and its prohibition of residential use in the MUD1

zone; and (C) that the proposed use was not reasonable under the circumstances of this case. CR 34.[3] Each point is addressed in turn.

A. Whether Special Conditions Exist

The first question in determining whether unnecessary hardship exists, in context of RSA 674:33, I(a)(1)(E), is to determine if the property at issue possesses special conditions that distinguish it from other properties in the area. The ZBA determined that the Property did not contain any special conditions that differentiate it from other properties in the area. During deliberations, members commented on how the land was flat and had no wetlands or other features that would prohibit development; that there were other uses for which the building could be used; and that the lot was highly visible and good for commercial use. CR 160-161. However, the Applicant did not exclusively allege that the Property's land was unique; rather, that the existing building was obsolete for its intended purpose and, thus, the variance request was reasonable.

The record indicates that the Property is an oversized lot, located on the southerly boundary of the MUD1 zoning district, such that it abuts (or is across the street from) three separate zoning districts (MDR, URD, MUD2). CR 25. The Property abuts residential uses to the south and west. CR 25. Notably, unlike the land located across College Park Drive to the north, the Property is already improved with an existing (vacant) structure that the Applicant testified is obsolete for the purposes for which it was originally intended. CR 50. Given these facts, the Board concludes that because of the structure, the Property is uniquely burdened by the Ordinance. The Board further concludes that the ZBA unreasonably focused on the Property's land, at the expense of its building. In light of the foregoing, the Board concludes that the ZBA erred in finding that the Property lacks any special conditions that distinguished it from other properties in the area.

B. Relationship Between Ordinance and Its Application to the Property

If special conditions are present, the next step in this inquiry requires considering whether, because of such conditions, there is no fair and substantial relationship between the general public purpose of the ordinance provision at issue and the specific application of that provision

[3] The ZBA also found that the hardship alleged by the Applicant was self-created. CR 34, 161. As acknowledged by the Town, such finding is non-dispositive and, thus, the Board's decision in this case is not driven by such finding. Whether the Applicant knew of local zoning when it purchased the Property does not dictate whether the variance request complies with RSA 674:33, I(a)(2).

to the Property. See 674:33, I(b)(1)(A). As noted above, the apparent purpose of the MUD1 district is to allow various commercial and retail uses, and the Town cites to its long-range planning goals with respect to the Property. However, the question is not how the Town or the ZBA would like the Property developed; rather, at issue here is whether the Property's special conditions excuse compliance with the Ordinance (i.e., whether the special conditions result in no fair or substantial relationship between the ordinance and its application to the Property). To that end, the Applicant testified that the Property's building was obsolete for office space. CR 50. It further testified that it would rent to commercial tenants but that there is no market for such use on the Property. CR 56, 146. Finally, the Applicant specifically testified that the uses allowed in the MUD1 district are not viable now. CR 89. Such testimony supports a finding that the Property's special conditions effectively sever the relationship between the ordinance's purpose and its application to the Property. Thus, the Board finds that the ZBA unreasonably held otherwise.

C. Whether the Proposed Use is Reasonable

The final inquiry in this hardship analysis asks whether the proposed use is reasonable. See RSA 674:33, I(b)(1)(B). The ZBA found that the proposed residential use was not reasonable because of the many other uses allowed on the Property that do not require a variance. CR 162. In its brief, the Town also refers to the nature of the use and its impact on the surrounding neighborhood. The Applicant contends that the proposed use is reasonable since it seeks to repurpose an existing, vacant building in a way that will reduce traffic impact while fitting in with the existing neighborhood uses.

While the Ordinance does permit various non-residential uses on the Property, the record contains testimony that none of those uses are viable as applied to the Property's existing, vacant structure. With respect to impact on the neighborhood, as discussed previously, the Applicant's traffic report demonstrates that the proposed use will considerably reduce trip generation from the Property. The proposed use seeks to renovate a vacant building on a large lot without expanding its footprint. It proposes a use that will serve as a transition between the existing single-family homes to the south and west and the mixed uses to the north and east. In light of the above, the Board finds that the ZBA acted unreasonably in concluding that the proposed use was not reasonable.

In summary, the Board concludes that literal enforcement of the Ordinance would result in unnecessary hardship and the ZBA acted unreasonably and unlawfully in finding otherwise.

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 Hooksett Zoning Board of Adjustment denying the Applicant's variance to permit an 81-unit apartment building on the Property, is REVERSED, consistent with this Order; and

2. The Applicant'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

Date: November 14, 2022

Elizabeth Menard, Clerk

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Case Number: ZBA-2022-10

ORDER

This matter concerns an appeal filed by Chelmsford Hooksett Properties, LLC ("Applicant") of a decision by the Town of Hooksett ("Town") Zoning Board of Adjustment ("ZBA") denying a request for a variance to permit an 81-unit apartment building on certain land located along U.S. Route 3 (also known as Hooksett Road) and College Park Drive ("Property") in Hooksett. On November 14, 2022, the Housing Appeals Board ("Board") issued an Order reversing the ZBA decision on appeal. The Town subsequently filed its Motion for Reconsideration. A rehearing was held by the Board on February 2, 2023, limited to the Town's rehearing argument that the Board erred in finding that the Applicant provided adequate evidence to support its burden with respect to its hardship claim. See Board Order dated January 13, 2023. This Order follows.

With respect to the limited rehearing issue, the Town contends that the Board erred in finding that the evidence within the record was adequate to determine that the existing building on the Property was obsolete. The following testimony from the Applicant, relevant for the purpose of this discussion, is contained within the certified record ("CR"):

- "The office building is in decent condition and obsolete from office space." CR 50.
- "There is currently no market from what can be done with this building within the current zoning." CR 52.
- "Brady Sullivan has looked at this extensively to determine the highest and best use. The existing building is not productive." CR 52.
- "Before they made the decision to buy it [the Applicant] determined what a viable use is. If they can convert it and have tenants that is the best thing to do. It would be difficult to sub-divide this or get a single user." CR 52.
- "If you have an obsolete structure that is not marketable that is a hardship." CR 52
- "You will generate more income with the apartments than with office space." CR 55.

- “The office market is soft and shrinking. If we could rent to commercial tenants we would do that but there is no market.” CR 56.
- “We have talked about allowed uses in MUD1. They are limited and not viable at this time.” CR 89.
- In response to a question by a member of the ZBA who asked if the Applicant had tried to market this as commercial, and what could be done for everyone in the Town to appreciate, the Applicant’s agent responded that “I was asked to look at the zoning which is MUD1. There is no way you can make the market work for office space based on the rental rates for commercial. People with money want to see housing. We met with the Economic Development Committee to master plan this property for mixed use. When you look at MUD1, the uses are not going to go there. You can put housing here. That is in demand. When you look at that site there is nothing in MUD1 that you can do.” CR 92.
- “Converting this to an adaptive reuse is a reasonable use. This is a building that is not viable for commercial use and a zoning ordinance that does not provide viable options. That satisfies the hardship criteria.” CR 92.
- In response to a question by the ZBA asking “[h]ave you genuinely looked at other uses for this building?” the Applicant’s agent responded: “Not really. Brady Sullivan acquires a lot of properties. I looked at the ordinance, said nothing in MUD1 is viable, and suggested a zoning change. I also made the suggestion to take it down which would be a shame to do.” CR 97.
- Applicant has concluded that apartment conversion would be highest and best use. CR 145.
- In response to a question by a member of the ZBA whether there has been any effort to market this, the Applicant’s agent “explained the marketing efforts and concluded commercial is not viable.” CR 146.

The Town argues that such evidence consists of conclusory statements from the Applicant’s attorney, which are insufficient to satisfy the statutory criteria for hardship. In part, the Town relies upon Hanrahan v. Portsmouth, 119 N.H. 944, 947 (1979), in support of the proposition that unsubstantiated testimony by the Applicant’s attorney is insufficient to serve as evidence to support a hardship argument.

Hanrahan involved an application for a permit to demolish a building within the City of Portsmouth’s historic district. In support of such request, the applicant (a bank) provided various testimony from its attorney representative. Id. at 948 (including testimony about the bank’s need for parking; building condition/maintenance; attorney’s view of related historic value; proposed sidewalk). The record also included two memos opposing the demolition of the structure that discussed the historic nature of the building. Id. The demolition permit was granted in the first

instance by the local historic district commission and then upheld by the local zoning board on appeal. Id. at 945. After the superior court upheld the zoning board's decision, the New Hampshire Supreme Court overruled the superior court and remanded the matter back to the historic district commission for a rehearing. Id. at 949.

As the basis for its reversal and remand, the supreme court found that the record before the historic district commission amounted to little more than unsubstantiated opinions of the permit applicant. Id. at 948. Critically, the court also found that the commission did not have adequate information to address the specific criteria that were part of the local regulatory requirements. Id. at 948 (finding that the historic district commission did not have adequate evidence concerning whether the demolition would preserve the "architectural and historic setting" of the area, foster "civic beauty," or be compatible with the "special character of the area"). In other words, the testimony in the Hanrahan record failed to address the particular statutory criteria at play during a demolition permit review. As it relates to this appeal, the Board concludes that Hanrahan does not control. This is not a case in which the Applicant's testimony fails to address the statutory criteria. As detailed above, the record is clear that the Applicant's testimony speaks to the hardship standard. Thus, the Board does not find that it erred in reversing the ZBA's decision based on Hanrahan.

That said, the Board must address whether it erred in overturning the ZBA given the adequacy of the record, including that the Applicant did not introduce any specific data concerning the viability of other permitted uses of the Property. It is undisputed that the Applicant did not submit detailed studies or economic analysis in support of its case. Rather, as detailed above, it relied primarily upon statements from its attorney.[1] As an initial matter, case law is clear that, in general, evidence can originate from an applicant's attorney in context of a variance application. See Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 519 (2011). As such, the Board finds no error in relying upon evidence in the record simply because it was introduced by the Applicant's attorney.

The question remains, however, whether the Board erred in finding that the Applicant satisfied its burden to prove statutory hardship given the testimony contained within the certified

[1] While the majority of testimony concerning the Property's hardship was introduced by the Applicant's attorney, the Applicant's principal also testified that there was no market for commercial use of the Property. See CR 56.

record. On one hand, the record contains representations made by the Applicant that the existing structure on the Property was obsolete and could not be used in a viable manner for any use permitted in the MUD1 zoning district. See supra pp. 1-2 (listing various testimony found within the certified record). Furthermore, there is no affirmative evidence in the record indicating that any of the allowed uses in the MUD1 zone are, in fact, viable. Additionally, while the ZBA inquired with the Applicant whether the Property could be used for other uses, see e.g., CR 51 (nursing home), CR 52 (small hospital, assisted living facility), CR 92 (medical facility, mixed use), the ZBA did not request additional feasibility studies concerning the Property.

Conversely, when the Applicant claims that the Property's existing structure is obsolete and not viable (i.e., marketable) under current zoning in the MUD1 zone, it presents an argument rooted in a theory of financial hardship. In doing so, the Applicant effectively argues that the Property's permitted uses prohibit a reasonable return on its investment. Under established case law, the evidence required to prove such hardship is "actual proof." See Garrison v. Town of Henniker, 154 N.H. 26, 32 (2006) (citation omitted). See also Harrington v. Town of Warner, 152 N.H. 74, 80 (2005). As indicated above, the record in this case consists exclusively of testimony that is conclusory in nature. The Applicant did not introduce any studies, reports, or any so-called "dollars and cents" evidence to support its position on the viability of the Property under current zoning.[2] In fact, the record includes certain testimony that can reasonably be perceived as casting doubt on the precise actions undertaken by the Applicant in concluding that the existing structure is obsolete. See CR 97 (including an exchange between a member of the ZBA and the Applicant concerning whether other uses of the building were looked at). Furthermore, while the ZBA is empowered by statute to request certain studies and impose the reasonable costs of such studies on an applicant, see RSA 676:5, IV-V, that right does not supplant the applicable burdens of proof, which rest upon a variance applicant, Perreault v. Town of New Hampton, 171 N.H. 183, 184 (2018), and appellants before this Board. See RSA 677:6.

In conclusion, to find that an applicant for a variance can satisfy its hardship burden by relying upon conclusions that a particular property is not viable under current zoning and market conditions without actual proof of same, is inconsistent with the above-referenced legal

[2] This is not to say that such proof must come from an expert. See Garrison v. Town of Henniker, 154 N.H. 26, 32 (2006) ("Applicants may show [a lack of reasonable return on the applicant's investment or interference with reasonable use] through lay or expert testimony.").

framework. In light of the above, the Board finds that it erred in reversing the underlying decision of the ZBA on the basis of unnecessary hardship.

CONCLUSION

Based on the foregoing, the Housing Appeals Board ORDERS as follows:

1. The Housing Appeals Board hereby REVISES its Order dated November 14, 2022, consistent with the above.

2. The decision of the Town of Hooksett Zoning Board of Adjustment denying the Applicant's variance to permit an 81-unit apartment building on the Property is AFFIRMED.

3. The Housing Appeals Board's November 14, 2022 decision on the merits (Order Number 2022-081), suspended by Interim Order dated December 22, 2022, is UNSUSPENDED and REINSTATED forthwith, consistent with the above.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: May 30, 2023

Elizabeth Menard, Clerk

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On November 14, 2022, the Housing Appeals Board ("Board") issued an Order reversing the ZBA decision on appeal. Subsequently, following a Motion for Reconsideration filed by the Town, a rehearing was held by the Board on February 2, 2023. On May 30, 2023, the Board issued an Order reversing its November 14, 2022 decision and affirming the ZBA's decision. On June 28, 2023, the Applicant filed its Motion for Reconsideration alongside a separate Motion to Expand Certified Record, to which the Town objects.

Motion for Reconsideration

The Board will only grant a rehearing motion "upon a showing that [it] overlooked or misapprehended the facts or the law and such error affected the board's decision." See Hab 201.32(e). Nothing in the Applicant's rehearing request identifies any facts (as contained within the certified record) or law the Board overlooked or misapprehended that affected the Board's May 30, 2023 Order. Moreover, and with respect to the Applicant's position that the record justifies its rehearing motion, the Board's rules related to rehearing motions specifically address the submission of evidence. Hab 201.32(g) states:

> Parties shall submit all evidence and present all arguments at the hearing. Therefore, rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been raised at the hearing. Except by leave of the board, parties shall not submit new evidence with rehearing motions. Leave shall

> only be granted when the offering party has shown the evidence was newly discovered and could not have been discovered with due diligence in time for the hearing and when the new evidence will assist the board.

The evidence that the Applicant seeks to introduce (in the form of videos of the local proceedings) is not newly discovered and was discoverable at the commencement of the appeal. In light of the foregoing, the Applicant's Motion for Reconsideration is hereby DENIED.

Motion to Expand Certified Record

While the Applicant's Motion to Expand Certified Record is related to its rehearing motion, as addressed above, it was filed as a separate document. As such, the Board addresses it separately. The Applicant seeks to enlarge the certified record in this case with the video recordings of the underlying hearings before the ZBA. As the basis for such request, the Applicant contends that the certified record, in its current form, is paraphrased and does not capture all of the evidence offered at the hearings.

Broadly stated, it is the Board's general policy to permit a party to expand the certified record with hearing videos on the condition that the recording is accompanied by the relevant portion of the transcript of the proceedings. See, e.g., James Logan v. Town of Candia, PBA-2022-28, Order Number 2023-006 (January 27, 2023); Lewis Builders Development, Inc. v. Town of Plaistow, ZBA-2022-25, Order Number 2022-085 (November 23, 2022); Mary DeSantis v. Town of Salem, ZBA-2021-28, Order Number 2022-018 (February 22, 2022). This policy is consistent with the Board's enabling statute (RSA 679:9, I), its rules (Hab 201.18(d)), as well as the civil rules of the New Hampshire superior court (Super. Ct. Civ. R. 55). That said, the ability to expand the certified record has limits, one of which is the timing of the filing of such requests.

Pursuant to Hab 201.18(d), all requests to expand the certified record shall be made in advance of any scheduled hearing. Additionally, by Notice of Prehearing Conference & Hearing issued by the Board dated July 28, 2022, "[a]ll pre-hearing motions, including motions in limine and motions to expand the Certified Record, and proposed witness lists and/or exhibit lists shall be submitted to the Board at least 10 days prior to the prehearing conference." In this case, the prehearing conference took place on August 30, 2022, and the hearing on the merits took place on September 15, 2022. Notwithstanding these filing deadlines, the Applicant did not seek to expand the record at the onset of this case, as required by the Board's rules and notice. Rather,

the Applicant files its request after the Board has already issued a decision on the merits and after the issuance of a decision on the Town's rehearing request. Furthermore, and as argued by the Town, the state of the record existed at the onset of the appeal. There is no argument before the Board that the request to expand the record is due to newly discovered evidence, for example, or other persuasive justification that post-dates the commencement of the appeal. In light of the above, there is nothing to convince the Board that a request to expand the certified record at this late stage of litigation is warranted, thus, the Applicant's Motion to Expand Certified Record is hereby DENIED.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: July 10, 2023

Elizabeth Menard, Clerk