

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD

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Case Name: 324 Hanover Street, LLC v. City of Manchester
Case Number: ZBA-2022-05

ORDER

This matter concerns the appeal of a decision by the City of Manchester ("City") Zoning Board of Adjustment ("ZBA") denying an administrative appeal filed by 324 Hanover Street, LLC ("Applicant") in response to the City's denial of a building permit application.

FACTS

Applicant has owned a parcel of real property known as Tax Map 93, Lot 11 located at 324 Hanover Street, Manchester, New Hampshire ("Property") since November 26, 2018. Certified Record ("CR") at 120. The Property is approximately 0.207 acres with frontage on Hanover Street, Maple Street and Derryfield Lane. The Property was the site of a multi-family building that was destroyed by fire on December 7, 2017 prior to the Applicant acquiring title.

The Applicant sought to rebuild the structure on its existing footprint as allowed by the Manchester Zoning Ordinance 11.05(C)(3)(b), but failed to meet the required 2-year deadline for completion. The Applicant applied to the ZBA in February of 2019 and received a variance on May 13, 2019, to "rebuild a fire damaged 16 residential unit building on the same footprint, with no expansion, where the one-year period to rebuild allowed by [the] Ordinance has lapsed..." (Case #ZBA2019-019 at CR 72), (the "May Variance"). This variance effectively extended the deadline to commence construction to August 7, 2019, and to complete construction by August 7, 2021. The Applicant excavated and placed footings for the structure on August 3, 2019.

On September 12, 2019, the Applicant returned to the ZBA seeking new variances for a different building design (the "New Building") that did not strictly follow the previous building's footprint. CR 102-109. The ZBA granted these variances on September 13, 2019 (Case #ZBA2019-119 at CR 136), (the "September Variance"). On August 9, 2021, the Applicant filed an application for a building permit. CR 141. During the plan review process for the building

permit, the City Plans Examiner determined that the "...reconstruction period lapsed on August 7, 2021..." and therefore "...a new variance...will be required..." CR 147.

The Applicant filed an Administrative Appeal on September 17, 2021, claiming that the effective deadline for the variance under which they were seeking their building permit was September 13, 2021 pursuant to the timelines outlined in RSA 674:33, I-a(a). On November 10, 2021, the ZBA denied the appeal, claiming that "Variance case #ZBA2019-119 modified [the] prior variance case #ZBA2019-019" and therefore the conditional deadlines established in the prior case were still in effect. CR 197.

The Applicant filed a Motion for Rehearing with the ZBA which was denied on January 13, 2022. CR 212. On February 9, 2022, the Applicant filed this appeal with the New Hampshire Housing Appeals Board ("Board"). The Board held a pre-hearing conference on April 12, 2022, and a hearing on the merits on April 26, 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. RSA 679:9. See 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

The Applicant raises the following issues in its appeal to the Board:

Should the Board reverse the ZBA's decision and hold that 1) the Applicant's August 9, 2021, building permit application was timely filed; 2) the building permit should have been granted by the Plans Examiner in the normal course; and 3) no additional variance is required? See Applicant's Appeal, ¶ 36 & 48. The Board finds that, although not stated in precisely the same terms, the Applicant preserved its grounds for appeal in its Motion for Reconsideration. CR 208. See RSA 677:3,I.

The issues before the Board can be reduced to the following questions:

- 1) Was the September Variance an amendment to the May Variance or was the September Variance a new variance?
- 2) If the September Variance was an amendment to the May Variance, did the construction period lapse on August 7, 2021?
- 3) If the September Variance was a new variance, did a new two-year construction clock start upon approval?
- 4) If the September Variance was a new variance, should a building permit be issued without further relief from the ZBA?¹

Was the September Variance an amendment to the May Variance or was the September Variance a new variance?

The answer to this question requires an analysis of the underlying ZBA applications, minutes of meetings and notices of decisions. Under New Hampshire law, “the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued. Accordingly, meaning depends on popular usage and the circumstances surrounding their use, unaffected by statutory definitions.” Dahar v. Department of Bldgs., 116 N.H. 122, 123, (1976), (quotations and citation omitted). Although the Court has stated that the scope of a variance generally presents a question of fact for the ZBA, 1808 Corp. v. Town of New Ipswich, 161 N.H. 772, 775, (2011), here, because the conditions were set forth in the variance applications, minutes, and notices of decision, the question of whether the September Variance is a new variance presents a question of law. See In the Matter of Patient & Patient, 170 N.H. 252, 254, 169 A.3d 465 (2017) (explaining that the interpretation of written documents is a question of law that we review de novo).

The May Variance

The May Variance Notice of Decision states the requested variance is

to rebuild a fire damaged 16 residential unit building on the same footprint, with no expansion, where the one year period to rebuild allowed by Ordinance has lapsed,

¹ At the hearing, both parties agreed that the site plan approval from the Planning Board is required for the new building.

... from the terms of Section(s) 11.05(C) Restoration of Damaged Non-Conforming Buildings, of the Zoning Ordinance ..., has been GRANTED as per documents submitted through May 1, 2019 ... Conditions(s): One year period to commence construction extended to August 7, 2019. The proposed building will be on the same footprint, same location, with no expansions.

CR 72 (underline in original).²

Zoning Ordinance Section 11.05(C)(2)&(3) allows the reconstruction of fire damaged non-residential, non-conforming structures with no increase in structure and use non-conformities, on the same footprint and dimensions. Section 11.05(C)(3)(c) requires construction to commence within one year and completion within two years. At the time of the May Variance, the Applicant intended, as a matter of right, to construct a building which met all other requirements under Section 11.05, but for the commencement of the construction time requirement. CR 3-6, 84. Therefore, notwithstanding the citations to several non-conformities in the Notice of Decision (not cited above), the variance granted was limited to extending the construction commencement time period for one year. See also CR 2-6 (Variance Criteria), 72 (Notice of Decision), and 73-84 (minutes of May 9, 2019 ZBA meeting); all supporting that the May Variance was limited to the issue of timing of construction.

The Applicant timely filed for a building permit and commenced construction with the installation of concrete footings on August 3, 2019. CR 150. The Applicant takes the position that “[t]he building permit issued and work commenc[ement] in a timely manner [] vest[ed] the right to rebuild on the existing footprint.”³ CR 104-105.

The September Variance

In the Zoning Brief, in response to the “ZBA REQUEST” the Applicant stated “[t]o allow building damaged by fire to be rebuilt beyond the scope of vested building.” CR 101. This language is clear that the request is to “rebuild beyond the scope of the vested building” that was destroyed by the fire. See Zoning Ordinance Section 11.05(C)(2)&(3), (restricting reconstruction of fire damaged building to same dimensions and footprint). The Variance Attachment, CR 103-107, clearly indicates that this proposal is for a new building with a different

² At some point during the permitting process, the Parties agreed that the building would be limited to twelve units. CR 103. The issue of the number of units is not relevant to this appeal.

³ The issue of vesting is not before the Board.

footprint from the fire-destroyed structure (hereinafter “New Building”). The discussion regarding the fire-destroyed structure and mention of the May Variance are for historical purposes. CR 103. See also CR 112-118 for elevation, site plan and floor plan drawings of the New Building that are clearly different than the fire-destroyed structure. Compare CR 81 (footprint of fire destroyed building). Further supporting that the Applicant represented to the ZBA that this is a new proposal, the minutes of the September 12, 2019, meeting state in part “Attorney John Cronin said...if the variance is not granted tonight, what you will be looking at is a replication of the old building.... He referred to the new plans and said this is a drastic improvement to the prior building....” CR 138.

The Notice of Decision for the September Variance states, in part, “to expand the reconstruction of a fire damaged non-conforming structure with side yard setbacks of ..., has been GRANTED as per documents submitted through August 23, 2019” CR 136 (underline in original).

A plain reading of the record documents for the September Variance shows that there is no nexus in the documents provided or representations made to the ZBA by the Applicant to tie the May Variance to the September Variance. Taken as a whole, the documents submitted, together with the representations made by the Applicant at the time the September Variance was granted, supports that the September Variance was intended to be a standalone approval.

Because the September Variance is a standalone approval, the provisions of RSA 674:33, I-a(a) provide a two-year time period to exercise the rights under the variance.

The answer to Question #1 above is that the September Variance was a new variance. Question #2 above is therefore moot. The answer to Question #3 above is YES.

Should a building permit be issued without further relief from the ZBA?

The Court has addressed the obligations of the municipality to the applicant in the planning and zoning context:

Given the complexity of zoning regulation, the obligation of municipalities to provide assistance to all their citizens seeking approval under zoning ordinances, ... and the importance of the constitutional right to enjoy property, ... we cannot accept that the mere filing of a variance application limits the ZBA or superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place.

Bartlett v. City of Manchester, 164 N.H. 634, 641, (2013), (citations and quotes omitted).

The Applicant filed a building permit application for the New Building on August 9, 2021, that states “DESCRIPTION OF WORK: Construct 12 unit multifamily structure, per plans.” CR 140-141. The only mention of the fire-destroyed building is under “Occupancy,” which states “[e]xisting Multifamily property that was razed and has foundation in place.” CR 141. The plans submitted show a new structure with a different footprint. CR 142. The City provided a Zoning Review on August 23, 2019, stating:

Relief from side setback to allow 3’ 6” and 7’ 2” setbacks where 10’ is required, also allow increase in floor area ratio to 1.4 where 0.75 is maximum allowance, all as per plans submitted August 23, 2019.

CR 101.

The Applicant filed an application for a Variance on August 23, 2019, citing several sections of the Zoning Ordinance and including a comprehensive narrative describing the proposed New Building. CR 102-109. On August 30, 2019, the City issued a Zoning Review that states, in part, “NOT PERMITTED PER 11.05(C) 3 (c&d). CR 124. On September 4, 2019, the City issued a letter formally denying the building permit, citing the August 30, 2019 Zoning Review. CR 126.

A comparison of the documents shows that the City provides conflicting and confusing zoning analysis regarding the relief necessary. The City admits that “[i]t has never been the City’s practice to make ZBA applicants ‘guess’ at what relief they need or make them obtain multiple variances for a single project in a piecemeal fashion through multiple applications.”⁴ See Applicant’s Appeal, ¶ 31 and City’s Answer ¶31 (quote in original).

The Applicant submitted a good-faith application for a variance to construct the New Building that included a narrative and comprehensive plans for the New Building. The ZBA relied upon the Applicant’s representations when it acted to approve the variance. The Notice of Decision for the September Variance states in part that the variance is granted “as per documents submitted through August 23, 2019.” These documents clearly show the New Building. CR 136. The September Variance was a separate application from the May Variance.

⁴ Notwithstanding that the City incorrectly argues the Applicant was asking for a relief from the fire-destroyed structure. See City’s Answer, ¶ 31.

Any reference to the May Variance during the September Variance proceedings were for historical background purposes.

Given the information provided to the ZBA at the time that it granted the September Variance, the Board finds that the September Variance was a new variance and comprehensive in its relief from the provisions of the Zoning Ordinance. The Board also finds that the two-year time limit for the Applicant to exercise the variance was stayed from the date of the Applicant's building permit application to construct the New Building (August 9, 2021), CR 143, through the date of this Order.⁵ The issue of the necessity of site plan review approval is not before the Board and therefore the Board takes no position on same.

In light of the above, the Housing Appeals Board REVERSES the City of Manchester Zoning Board of Adjustment's decision consistent with this Order.

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

Elizabeth Menard

Elizabeth Menard, Clerk

Date: June 27, 2022

⁵ Although the issue of site plan review is not before the Board in this appeal, the City raised the matter in its pleadings and the issue was discussed orally at the hearing. The Board assumes, without deciding, that if the Applicant timely files a site plan review application prior to the expiration of the two-year variance period that the six-month post site plan approval period under RSA 674:33, I-a would apply.