

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0806, Samuel Zannini, Jr. v. Town of Atkinson, the court on July 20, 2007, issued the following order:

The plaintiff, Samuel Zannini, Jr., appeals an order of the superior court upholding the denial of his application for a variance by the Town of Atkinson Zoning Board of Adjustment (ZBA). We reverse and remand.

“Factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable.” Garrison v. Town of Henniker, 154 N.H. 26, 29 (2006). We, in turn, review whether the record reasonably supports the trial court’s findings. See id. at 30. Although remand is ordinarily required where a ZBA has applied an incorrect legal standard, it is not merited if a reasonable fact finder could have reached just one conclusion. See Malachy Glen Assocs. v. Town of Chichester, 155 N.H. ___, ___, 920 A.2d 1192, 1196 (2007).

It is the burden of any applicant seeking a variance to establish: (1) that the variance is not contrary to the public interest; (2) that special conditions lead to unnecessary hardship if the ordinance is literally enforced; (3) that the variance is consistent with the spirit of the ordinance; (4) that substantial justice is accomplished; and (5) that granting the variance will not impair surrounding property values. See id. In this case, the ZBA initially found that the variance was not contrary to the public interest and would not impair surrounding property values, but that the plaintiff had failed to establish the unnecessary hardship, spirit of the ordinance, and substantial justice prongs.

The trial court affirmed the ZBA’s findings under the spirit of the ordinance and substantial justice prongs, but remanded the matter to the ZBA for the limited purpose of applying Boccia v. City of Portsmouth, 151 N.H. 85 (2004). In an earlier order, we upheld the limited remand, expressing no opinion as to the merits of the variance. See Zannini v. Town of Atkinson, No. 2005-0007 (N.H. Jan. 20, 2006) (Zannini I). Upon remand, the ZBA found that the plaintiff established unnecessary hardship under Boccia. Accordingly, the sole issue in this appeal is whether the record reasonably supports the trial court’s upholding of the ZBA’s findings that the variance was inconsistent with the spirit of the ordinance, and would not accomplish substantial justice. We conclude that it does not.

The requirement that a variance comply with the spirit of the zoning ordinance is related to the requirement that it not conflict with the public

interest, and under both elements, the ZBA is to consider whether granting the variance would alter the essential character of the locality, or threaten public health, safety, or welfare. See Malachy Glen Assocs., 155 N.H. at ___, 920 A.2d at 1196-97. The ZBA having found that the variance request does not conflict with the public interest, a finding the defendant has not challenged, it could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance. Moreover, we agree with the plaintiff that certain comments of the ZBA's chair reflected in the ZBA's minutes, which the trial court relied upon in upholding the ZBA's finding on this prong, are contradicted by the unrefuted evidence in the record. See id. at ___, 920 A.2d at 1197.

The "substantial justice" inquiry requires the ZBA to examine whether "any loss to the individual [by strictly enforcing the ordinance] . . . is . . . outweighed by a gain to the general public," and "whether the proposed development [is] consistent with the area's present use." Id. at ___, 920 A.2d at 1199 (quotation omitted). The record does not reflect that the ZBA engaged in this analysis. Moreover, we agree with the plaintiff that no reasonable finder of fact could find, upon this record, that granting the variance would not accomplish substantial justice. The record demonstrates that the proposed use is permitted and consistent with the present neighborhood, and that no abutters have opposed the variance. Nor is there any evidence that the general public will realize an appreciable gain from the denial of the variance. See id.

Finally, we reject the defendant's contention that the trial court's order in Zannini I has res judicata or collateral estoppel effect upon this appeal. Inasmuch as we affirmed the trial court's limited remand and implicit retention of jurisdiction over the merits of the variance request in Zannini I, the order is not final as to the variance request. See Putnam Lumber Co. v. Eddie Nash & Sons, 141 N.H. 670, 671 (1997); Petition of Donovan d/b/a Donovan Group Home, 137 N.H. 78, 81 (1993). We reverse the trial court's order to the extent it upheld the denial of the variance request, and direct the trial court upon remand to order the ZBA to grant the requested variance.

Reversed and remanded.

DALIANIS, DUGGAN, and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**