THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2009-0505

SHAMASH CONCORD TRUST,
by Albert F. Shamash, Trustee;
ALBERT F. SHAMASH; and SONIA SHAMASH;
Appellants

v.

CITY OF CONCORD.
Respondent.

APPELLANTS' REPLY BRIEF

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(Oral Argument Requested)

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RELEVANT STATUTES, ORDINANCES AND RULES

ORDINANCES (of the City of Concord – included in Defendant's Trial Exhibit B):

5-1-8 Permit for Driveways.
All applications for a permit to repair, widen, reconstruct, or construct a driveway on residential or commercial property, to ensure conformance with the City of Concord's zoning laws pertaining to driveway locations, shall include the fee listed in Schedule I of Chapter 1 per permit application. Residential driveways shall be a minimum of five (5) feet from abutting property line, forty (40) feet from nearest adjacent driveway, and thirty (30) feet from street intersections according to the present Zoning Ordinance. Commercial driveways shall be in conformance with approved plans by the Engineering Services and Community Planning Divisions of the Community Development Department.

28-7-8 Access and Driveway Standards.
(a) *Restrictions on Backing Into a Street.* Except in connection with single-family detached dwellings and two-family dwellings, parking areas shall be designed so that, without resorting to extraordinary movements, vehicles may enter and exit the parking area without backing within or into a street, and without inhibiting pedestrian safety. Parking spaces for each dwelling unit in a duplex or two-family dwelling shall be independently accessible from a street.
(b) *Separation of Driveways in Residential Districts.* For all streets in residential districts, driveways entering such streets shall be located at least thirty (30) feet from street intersections, and at least forty (40) feet from other existing driveways on the same lot or an adjacent lot. One (1) driveway is permitted for lots with up to one hundred (100) feet of lot frontage. One (1) additional driveway is permitted for each additional one hundred fifty (150) feet of lot frontage. Where compliance cannot be achieved with these standards, the Planning Board may grant a conditional use permit pursuant to Section 28-7-11, Alternative Parking Arrangements, of this ordinance.
. . .

28-7-11 Alternative Parking Arrangements.
In order to provide for more flexible alternatives to satisfy the parking requirements of this Article, the Planning Board may issue a conditional use permit in accordance with the requirements of Section 28-9-4(b), Conditional Use Permits, of this ordinance, for one or more alternative parking arrangements in the following circumstances:
. . .
(f) *Driveway Separation Alternatives.* Where compliance cannot be achieved with the standards for driveway separation as contained in this article, the Planning Board may permit a reduction in the dimension or dimensions that cannot be achieved in order to allow the establishment of driveway access to a lot, provided that the Board finds that the reduction in dimension is the most minimal reduction which will still allow the access to be established to the lot while minimizing to the greatest extent possible the potential conflicts of turning movements

into and out of the driveway with other turning and through traffic movements on the adjacent street. . . .

28-8-6 Destruction, Abandonment and Termination.
Except as provided in this article, the abandonment or destruction of a nonconforming use under the criteria established herein shall result in the termination of the nonconforming status of that use or structure. The property shall thereafter conform to the regulations of the district and the nonconforming use may not be resumed.
(a) *Destruction.* A nonconforming structure shall not be reconstructed except in conformity with the provision of this ordinance. The destruction of a nonconforming structure shall be deemed to have occurred where any of the following conditions are met:
(1) The cost to repair damage to the structure is more than seventy-five (75) percent of the replacement cost of the structure; or
(2) The nonconforming structure has been found to be unsafe and unlawful by reason of physical condition due to a lack of repairs and maintenance, and has been so declared by any duly authorized public official.
(b) *Abandonment of a Nonconforming Use.* The term "abandonment" as used herein shall mean the intentional or implicit discontinuance of a nonconforming use for a specified period of time. The normal, seasonal cessation of a use, or a temporary discontinuance for purposes of maintenance, rebuilding after damage or destruction or maintenance or improvements permitted under this article shall not be included in calculating the period of discontinuance. Any one (1) of the following shall constitute evidence of the abandonment of a nonconforming use:
(1) In the case of a structure or of a structure and land in combination, the visible or otherwise apparent discontinuance of the use of a building, other structure or premises, resulting from an owner's overt act or failure to act including but not limited to the removal of characteristic equipment or furnishings used in the performance of the use without its replacement by similar equipment or furnishings within a period of twelve (12) months;
(2) In the case of nonconforming use of land, the cessation of such use for more than twelve (12) consecutive months or for twenty-four (24) months within any three-year period; or
(3) In the case of a nonconforming structure which is destroyed due to natural causes, the failure to apply for a Special Exception pursuant to Section 28-8-5(c), Replacement of Nonconforming Structures, of this ordinance, to commence restoration within one year, and to conclude restoration within two years of the date that the destruction occurred.
(c) *Termination.* Except as provided in Section 28-8-5(c), Replacement of Nonconforming Structures, of this ordinance, the abandonment or destruction of a nonconforming structure, building or use shall result in the termination of its nonconforming status.

<u>RULES (of the City's ZBA)</u>:

ARTICLE VIII – TYPES OF APPEALS
VARIANCES:

There are two types of variances which may be submitted to the Board – use variances allowing use of the land in a manner not allowed by the Zoning Ordinance and

dimensional variances which involve matters such as building setbacks and heights, lot coverages, lot area and frontage, sign sizes and heights, . . .

APPELLANTS' REPLY BRIEF

Appellants respectfully submit this Reply Brief in response to the Opposition Brief of the City of Concord ("Opposition") filed by the City Solicitor. Notably, the Opposition does not dispute either the key facts or the relevant chronology presented in Appellants' Brief (see pp. 5 - 12 and T-1 to T-3). Nor does the Opposition discuss, let alone attempt to rebut, fundamental elements in the law of abandonment and the law of area variances summarized briefly below. Consideration of these two areas of law allows for separate and independent grounds for reversal of the rulings of the court below and will enable this court to grant the modest relief requested by appellants: the right to resume parking two automobiles on a pre-existing parking area located on the "Shamash Property." Loss of this property right has deprived appellants of what the City's own Zoning Ordinance prescribes as minimally "adequate" off-street parking (four spaces) in an area of the City where on-street, overnight parking is expressly prohibited.

I. The Law Pertaining to Abandonment of a Vested Property Right

1. The Opposition makes no attempt to address the constitutional, statutory and case law authorities cited by appellants setting forth the legal elements required to establish the abandonment of a vested property right, namely: an intentional (clear, unequivocal, unmistakable) act or series of acts indicating a purpose to relinquish a known right; and actual abandonment (not by chance, accident, or inadvertence, or subsequent prohibition by the municipality). The Opposition errs in asserting, without citation of relevant authority and to the contrary, that a right can be "deemed . . . to be abandoned, even if the appellants did not specifically intend to abandon" it. (Compare Opposition, pp. 2-3, with the extensive authorities cited in Appellants' Brief, pp. 18-20.)

2. Of equal importance, the Opposition does not dispute the party claiming abandonment has occurred [the City in this case, not the property owner(s), the appellants] has the burden of proving each element necessary to sustain the claim of abandonment. There is nothing in the record to support the conclusion that either the City's Code Administrator or the ZBA even attempted to meet this burden when they summarily concluded the vested right to park automobiles in the pre-existing parking area had "lapsed" or been "abandoned." Nor did the court below make any such finding or apply this legal standard pertaining to burden of proof.

3. Instead of discussing or attempting to apply these essential elements of law, including the shifting of the burden of proof, the City simply quotes a dated maxim from Evans v. Gale, 17 N.H. 573 (1845)[1] and then asserts, without any actual relevance to this appeal, that "ignorance of the law is no excuse for violating a City ordinance." (Opposition, p. 5.)

4. In fact, no ordinance was violated by appellants at any time. The Zoning Ordinance provision quoted by the City (id.) merely describes a "standard" (adopted in 2001) which is subject to modification "[w]here compliance cannot be achieved." (See Sections 28-7-8 and 28-7-11 in Defendant's Exhibit B, reprinted above.)

5. On the question of whether appellants should lose a vested property right (to another pre-existing parking area) because of a standard unknown when they applied for a driveway permit in October, 2002, it bears emphasis that their permit application and the proposed driveway layout was thoroughly reviewed, processed and approved by two managers (Al DeGrenier and Dave Smith) in the City's Community Development Department. This same department also employed another individual (Craig Walker) who had no involvement in this

[1] A cite check reflects the Evans case was last cited by this court for any purpose in 1914 and the line quoted from Evans in the Opposition has never been cited.

process; he apparently discovered and cited this ordinance provision (along with other provisions not at issue) for the first time almost four years later (to avoid having to admit his mistake of relying entirely upon a false oral allegation that the other, pre-existing parking area had been "recently created," see Appellants' Brief, pp. 6-8). As documented in the record below:

> Petitioners [appellants] had no knowledge of this standard, apparently enacted in November, 2001, until it was cited for the first time in September, 2006 by the Code Inspector in a long list of ordinance provisions he finally researched (C.R., pp. 114-116). The subsequent "retrospective application" of the standard . . . occurred years after the driveway permit was applied for and approved.
>
> The "prior knowledge" cases cited by the City . . . concern "hardship," one of five elements in a variance analysis, not the law pertaining to "voluntary discontinuance or abandonment." Even in those cases, "The New Hampshire Supreme Court has never ruled the fact that an individual purchased property with [actual] knowledge of restrictions is a sufficient basis for denial of a variance." Peter Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning § 24.17 (3d. ed., Supp. 2006). A careful reading of Hill v. Town of Chester, 146 N.H. 291 (2001) and Harrington v. Town of Warner, 152 N.H. 74 (2005), both cited in the [December 3, 2007] Order (pp. 5-6 [NMA pp. 30-31) and explained in some detail in the Loughlin treatise, indicate the "old rule" precluding the purchaser of property "with knowledge of restrictions" from obtaining a variance has been "rejected." Loughlin, supra at § 24.17 (Emphasis added). In Hill, 146 N.H. at 293, the supreme court concluded: "we agree that 'purchase with knowledge' is a non-dispositive factor" (or "nondeterminative factor") in the analysis of whether the "hardship" element for a variance can be satisfied. (Emphasis added.) See also Harrington, 152 N.H. at 83-84, where the court noted a "good faith . . . reli[ance] on the representations of zoning authorities or builders" can "counter" or satisfy "any heightened scrutiny" resulting from the property owner's "actual or constructive knowledge of the zoning restrictions" and "even a self-created hardship does not preclude the landowner from obtaining a variance," citing Hill.
>
> Neither the permit application itself nor the most direct and specific Zoning Ordinance provision pertaining to driveway requirements (Section 5-1-8, entitled "Permit for Driveways") mentions this standard. . . . Instead, they list three other physical requirements "according to the present Zoning Ordinance" -- namely, a five foot setback, 40 feet from adjacent driveway, and 30 feet from street intersections. Each was met by the petitioners in good faith after consulting with the knowledgeable City officials regarding what would be required to obtain the driveway permit. If any other requirement was in place, the City's officials responsible for applying it should have mentioned it and, if not satisfied with the situation, withheld approval of the permit, but

they did not do so. If the City had mentioned lot frontage and viewed the new driveway as a second driveway, the Planning Board could have become involved because, as noted above, it has the express authority to relax or modify this "standard." (See also Article 28-7-11 ("Alternative Parking Arrangements"), id. at pp. 20-21.)

Significantly, even after the [City's own] Code Inspector [Mr. Walker] and Code Administrator ['Ham' Rice] later got involved (acting, without adequate investigation, on a false allegation that the other parking area had been "recently created"), they did not mention the lot frontage standard at all, but instead focused on the five foot setback, 40 feet from adjacent driveway and three other ordinance provisions they felt were relevant, based on their insistence the Pre-Existing Parking had been "recently created" and was subject to these other requirements. C.R., p. 120. Even almost four years later, in September, 2006, when the City decided to unilaterally remove the existing "asphalt apron" leading to the parking and curb it, the City did not do so on the basis of the lot frontage standard, but only because of its continuing, mistaken belief that this parking area had been "recently created." This explains why, throughout this period, the Code Inspector and Code Administrator kept insisting only that the petitioners must supply a "live" witness as proof to refute their erroneous claim and allow the Pre-Existing Parking.

The Concord Zoning Ordinance is administered by the Community Development Department. The 2002 driveway permit application was reviewed and approved by the Community Development Department (see Exhibit "A" to Reply Memorandum) and both the Code Inspector and Code Administrator work within the Community Development Department. If these officials in the Community Development Department either did not know of, or were not concerned about the applicability of, the above lot frontage standard when the driveway permit was approved and for almost four years thereafter, it is unreasonable to 'presume' petitioners had knowledge of it and therefore that "petitioners implicitly indicated an intent to relinquish the vested right" (for the Pre-Existing Parking, see Order, pp. 5-6) when they applied for and received the 2002 driveway permit.

For the court's benefit, there is both statutory and case "authority" that makes such a 'shifting of justification' (see Order, p. 4, fn. 2) unreasonable. RSA 677:4 and 677:6, among other things, proscribe not just "illegal" but also "unreasonable" actions, and it is inherently unreasonable for a municipality not to turn square corners with a property owner or withhold relevant information for almost four years. A "good faith" reliance on government officials who are supposedly knowledgeable (and operating within their area of responsibility) can support an estoppel against enforcement of an unmentioned regulation that might otherwise apply. See Appeal of John Denman, 120 N.H. 568, 573 (1980), cited with approval in City of Concord v. Tompkins, 124 N.H. 463, 472 (1984) (where the court further noted: "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement. (Quotation marks and citation omitted.)"). Cf. Turco v. Town of Barnstead, 136 N.H. 256, 262-63 (1992) (issuance of

> building permit and reasonable reliance on it estopped and prevented town from failing to maintain road used by property owner); and Batakis v. Town of Belmont, 135 N.H. 595, 598-99 (1992) ("abruptly" changing and shifting the standard of review was municipal board's "most unreasonable act").

These points and authorities were briefed and presented to the court below (see, e.g., App., pp. 58-61), but were simply ignored, perhaps because they were thought to have no relevance at all.

6. The driveway permit application (filed in October, 2002, well before any question arose regarding the pre-existing parking used for two automobiles on the Shamash Property) is in the record (App., pp. 52-53). The sentence quoted by the City (Opposition, p. 2) comes from formulaic, 'boilerplate' language, submerged in a paragraph in the pre-printed form. This sentence also refers to the City of Concord Construction Standards and "Driveway Details," as well as "plans approved" by the City's Community Development Department, who, as noted above, approved the written "plans" for the driveway without raising any concern about the "standard" discussed above. It is an obvious and impermissible 'trap for the unwary' to allow the City to apply the standard retroactively (four years later) for the sole and unreasonable purpose of defeating a vested right (based on 'presumptive' knowledge of an obscure ordinance provision). If such retroactive application is permitted to deprive an owner of property rights, no approved permit to construct anything is free of unconscionable jeopardy when a municipal employee decides to cite an ordinance provision, unknown to members of his own department, for the first time years later. In other words, even if it was not 'unlawful' for Mr. Walker to attempt to impose the standard retroactively in 2006, it was clearly unreasonable to do so.

7. Interpretation of a zoning ordinance is a question of law to be reviewed de novo. See, e.g., Naser v. Town of Deering, 157 N.H. 322, 324 (2008). Neither the ZBA nor the court below

is entitled to any 'deference' for errors made in interpreting an ordinance, especially when important property rights are at stake. Notably, the Opposition is silent regarding the actual wording and reasonable interpretation of the Concord Zoning Ordinance provision on "abandonment," Section 28-8-6 (b), quoted above. This section makes no mention of "lapse" and defines "abandonment" quite specifically to include a time dimension ("discontinuance" for a period of at least 12 months). Nothing in the record suggests parking was voluntarily discontinued for any period of time, let alone the minimum one year prescribed in this section. See, e.g., Appellants' Brief, p. 22:

> A careful reading of the City's Zoning Ordinance and the case law reveals that, at least insofar as discontinuance is concerned, the time dimension is a fundamental element that must be satisfied, not one that can or should be overlooked. See McKenzie v. Town of Eaton Zoning Board of Adjustment, 154 N.H. 773, 775 (2007), where the supreme court affirmed the trial court's reversal of a ZBA decision regarding the requisite intent to abandon a non-conforming use, because "while the ZBA's consideration of intent may have been reasonable in the absence of the ordinance provision, the terms of the provision [prescribing a one year time period] allowed the ZBA no discretion in determining abandonment." (Emphasis added.) The McKenzie decision, quoting the Loughlin treatise on New Hampshire zoning law and practice, further noted that "most municipalities have taken the guesswork out of determining abandonment by enacting ordinances that give a specific time period of nonuse that constitutes abandonment." Id. at p. 778. The City could have amended the Zoning Ordinance to state what factors (other than actual nonuse for specified time periods) might constitute an "implicit" discontinuance resulting in abandonment, but the City did not do so in any respect. See Severance [v. Town of Epsom], 155 N.H. [359,] at 361 [2007] . . . for this principle (requiring amendment rather than unlawful or unreasonable interpretation of a zoning ordinance).

Thus, it was error for the court below to rule otherwise and fail to find what the City did is unlawful or unreasonable under its own ordinance, as well as the Constitution, statutes and case law presented.

II. The Law Pertaining to Area Variances (From a Physical Setback Requirement)

8. Turning to the alternative request for a variance (made concurrently with the appeal on abandonment to the ZBA), the Opposition makes no effort to explain why or how (on what legal basis?) the City could treat an application for an area variance as an application for a "use" variance. The consistent line of cases decided by this court, cited and discussed in Appellants' Brief (pp. 23-34) as well as presented to the court below (see, e.g., appellants' Trial Memorandum, App-29 to App-30, and their reconsideration motion, App-62 to App-63),[2] make it clear that relief from a physical setback requirement is an area variance, *not* a use variance. The ZBA's arbitrary decision to convert a request for an area variance (also referred to as a "dimensional" variance in Article VIII of the ZBA's Rules, quoted above, to distinguish it from a "use" variance) into something else was both unlawful and unreasonable and the court below committed reversible error in affirming this conversion and failing to apply the applicable law pertaining to area variances. See, e.g., Vigeant v. Town of Hudson, 151 N.H. at 752-53 ("If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.").

[2] These cases include: Boccia v. City of Portsmouth, 151 N.H. 85, 87-88 (2004) (two physical setbacks for "off-street parking," 15 foot rather than 100 foot front setback and 15 foot rather than 40 foot vegetative buffer and four other setbacks, all treated as "area variances"); Vigeant v. Town of Hudson, 151 N.H. 747, 749 and 751 (2005) (request for relief from a "fifty-foot setback" requirement treated as an "area variance"); and Malachy Glen Associates v. Town of Chichester, 155 N.H. 102, 104 (2007) (encroachment onto a 100-foot wetland buffer to allow construction of a self-storage facility was treated as an "area variance"). See also Harrington v. Town of Warner, 152 N.H. 74, 78 (2005); citing Boccia, 151 N.H. at 90: "Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed 'area variances.'" The variance from a five-foot setback was requested by appellants at the suggestion of the City's Code Administrator and only because of the physical characteristics of this portion of the Shamash Property: namely, a steep drop-off (approximately 10 feet) into the backyard (bordered by an old fence and stone wall); there is no dispute off-street parking has always been permitted at this location and in this neighborhood: it is not a new or changed "use."

9. The Opposition is entirely silent on why the less restrictive standards for an area variance have not been met. Instead, the Opposition (at p. 4) employs a "straw man argument"[3] in suggesting denial of the variance was proper because "the requested variance . . . would permit parking which overlaps and crosses into designated sidewalk space." Appellants have never claimed a right to park on the sidewalk, even though automobiles on other driveways in their neighborhood routinely do so without any question or enforcement action of any kind by the City. (This is what the ZBA chairman may have been referring to when he used the term "naughty parkers" at the February 7, 2007 hearing to interrupt and cut-off a part of appellants' presentation. See Certified Record, pp. 24-25.) Moreover, all driveways within the City allow automobiles to cross over "designated sidewalk space" to access the roadway surface. Again, the Opposition is silent on how users of these other driveways are somehow able to do so without 'crossing into designated sidewalk space' -- a physical impossibility.

10. There is considerable evidence in the record below, ignored by the court below, that the pre-existing parking posed no "safety hazard" at all and the City's witnesses at the ZBA hearing never claimed otherwise. See Appellants' Brief, pp. 28-29; and, e.g., the Statement of Wilbur A. Glahn, III (App., 41-43, at paragraph 5[4]).

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[3] "A straw man argument is an informal fallacy based on misrepresentation of an opponent's position. To 'attack a straw man' is to create the illusion of having refuted a proposition by substituting a superficially similar proposition (the 'straw man'), and refuting it, without ever having actually refuted the original position." Source: Wikipedia, http://en.wikipedia.org/wiki/Straw_man (last accessed October 15, 2009) (emphasis in original).

[4] It is my clear recollection that we and the Ramsays parked on this strip of land [on the Shamash Property] on a daily basis. . . . Access to this parking area was quite easy because the Washington Street roadway was not curbed and we would drive directly from the street onto this parking area. When the two cars were parked in this area of the Shamash Property, the cars did not interfere with, or encroach on the City sidewalk.

11. The Opposition does not dispute that the formulated rationales for denial of the variance it now relies upon (including the "safety hazard" concern discussed above) were drafted for, and presented to, the ZBA members by others (namely, the City's Code Inspector and the City Solicitor) at a private meeting held in violation of the Right to Know Law (in response to the First Remand ordered by the court below). This meeting occurred in January, 2008, eleven months after the February 7, 2007 hearing when the variance was denied.

12. The Opposition (see p. 9) fails to mention that, when considering a variance, the meaning of the phrase "contrary to the public interest" that it mentions has already been addressed by this Court in several recent decisions, as noted in Appellants' Brief (p. 29):

> Nine A, LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008), . . . recites the requirement that to be contrary to the public interest a variance "must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives" (citing Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007) for this holding).

There is no evidence in the record that either the City or the court below applied this standard with respect to the requested variance or made any finding whatsoever that the variance requested would "unduly, and in a marked degree, conflict with" the City's Zoning Ordinance.

13. Nor does the Opposition explain how two parking spaces where the City's Zoning Ordinance requires a minimum of four spaces is "adequate" for purposes of deciding whether "literal enforcement of the ordinance results in unnecessary hardship." (Id.) Significantly, the Opposition does not identify what the ordinance's "basic zoning objective" is or, for that matter, its "spirit, intent and purpose," such that granting a variance would allegedly be a "clear violation" of it. (Id., p. 10.) Self-serving, "ad hoc" suppositions based on "vague concerns," not

founded on the record presented and made without reference to any specific ordinance provisions, are clearly insufficient when subjected to meaningful judicial review.[5]

III. Summary and Conclusions

14. As demonstrated above, the Opposition does not address key points of the developed law pertaining either to abandonment of a vested property right or to area variances which should govern the outcome of this appeal. Appellants will not restate here the serious and disturbing issues stemming from the City's serial violations of the Right to Know Law and the public meeting requirement (on the First and Second Remands ordered by the court below), nor dwell further on the ZBA's clear failure to address the member recusal issue on a timely basis or give appellants any opportunity to be heard or present the relevant facts for its consideration (see, e.g., Appellants' Brief, pp. 30-33); the Opposition makes no attempt to deny these violations and irregularities occurred. Appellants respectfully submit the rationalizations belatedly offered by the City (largely a product and outgrowth of these violations and irregularities) are unavailing to counter the conclusion that the City acted unlawfully and/or unreasonably, within the meaning of the applicable appeal statutes, under the prevailing standards for meaningful judicial review stated in Appellants' Brief (pp. 15-18) and not contested in the Opposition.

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[5] Cf. Derry Senior Dev. v. Town of Derry, 157 N.H. 441, 443, 451 (2008) (overturning trial court's affirmance of planning board decision):

> [Because] the record reveals no evidence suggesting that the plaintiff's proposed system would not adequately protect all water supplies, the board unreasonably and unlawfully denied the plaintiff's application for site plan approval. Accordingly, we reverse and remand. . . .
> Although the board is entitled to rely upon its own judgment and experience in acting upon applications for site plan review, the board may not deny approval on an ad hoc basis because of vague concerns. Smith [v. Town of Wolfeboro], 136 N.H. [337,] 343, 344 [1992]. Further, the board's decision must be based upon more than the mere personal opinion of its members. Condos East Corp. v. Town of Conway, 132 N.H. 431, 438 (1989).

DATED: October 19, 2009

Respectfully submitted

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who further certifies he delivered two copies of this pleading to the City's attorney: Paul Cavanaugh, Esq., 4 Green Street, Concord, N.H. 03301 on the date noted immediately above.