State of New Hampshire
Supreme Court

NO. 2006-0171

2006 TERM

AUGUST SESSION

Michael Scanlan, Geannina Guzman-Scanlan,

Jeanne Lilienthal, and Kimberly Barrone

v.

Town of Hampton, New Hampshire

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS
MICHAEL SCANLAN, GEANNINA GUZMAN-SCANLAN,
JEANNE M. LILIENTHAL, AND KIMBERLY ANN BARRONE

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QUESTIONS PRESENTED

1. Did the Hampton ZBA and the Superior Court err in granting and then approving a variance to build a condominium on Hampton Beach when there was no evidence presented sufficient to meet the elements of an area variance?
   Preserved: *passim*

2. Did the Superior Court err in ruling that the Hampton ZBA was not required to consider separately, with respect to each of six parcels of land for which variances were sought, the requirements necessary for the issuance of area variances, rather than consider the requirements collectively?
   Preserved: *See Brief of Traficante, previously submitted*

3. Did the Superior Court err in affirming the Hampton ZBA's grant of area variances when the ZBA failed to consider and vote separately on whether each requested variance satisfied the requirements for granting area variances?
   Preserved: *See Brief of Traficante, previously submitted*

4. Did the Superior Court err in ruling that the Hampton ZBA's grant of area variances was neither unlawful nor unreasonable, when the Court sustained the ZBA's finding of unnecessary hardship based on criteria for use variances rather than criteria for area variances?
   Preserved: *See Brief of Traficante, previously submitted*

5. Did the Superior Court err in ruling that the Hampton ZBA's grant of height variances was neither unlawful nor unreasonable, when the applicant admitted, and the court found, that the towers for which the variances were sought were not essential to the project, such that a variances was not required to avoid unnecessary hardship or achieve substantial justice?
   Preserved: *See Brief of Traficante, previously submitted*

6. Did the Superior Court err in affirming the Hampton ZBA's grant of area variances with respect to a parcel of property being leased by the applicant, who was neither the owner, a holder of a purchase and sale agreement, nor a holder of an option to purchase the property, as required by the ZBA?
   Preserved: *See Brief of Traficante, previously submitted*

7. Did the Superior Court err in ruling that the Hampton ZBA's grant of area variances was neither unlawful nor unreasonable, where the court abdicated its responsibility to review the ZBA's rulings that the granting of the variances was consistent with the spirit of the ordinance, and that substantial justice would be done if the variances were granted, when it based its conclusions solely on the statement that "there is no better group . . . than the Board of Adjustment" to make such determinations?
   Preserved: *See Brief of Traficante, previously submitted*

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. History of Hampton Beach Created its Current Character

In the mid-19th Century, Hampton was a quiet and sparsely-settled fishing town. In an effort to imitate the success of the grand hotels that were then operating in the White Mountains, a number of Seacoast entrepreneurs and politicians joined to establish the Exeter, Hampton & Amesbury Street Railway. Although never aimed at the wealthy people who made the White Mountains theirs, by making one of New Hampshire's few sandy ocean beaches accessible to workers at the textile mills and other industries in the Merrimack River Valley of both New Hampshire and Massachusetts, Hampton became a middle class vacation resort. During the years between 1899 and 1926 when the railroad operated, and then later when the Mile Bridge connecting Hampton to points in Massachusetts was completed,[1] Hampton Beach grew very rapidly.

The same group of investors formed the Hampton Beach Improvement Company, which entered a 99-year lease with the Town of Hampton and required the company to "use its best efforts to lease lots of land from the leased premises and have cottages and dwelling houses erected thereon and bring taxable property into the town and improve said leased premises for the best interests of the town, and will endeavor to have and maintain an orderly and respectable place there which shall be for the benefit of and credit to said town." LEASE TO H.B. IMPROVEMENT COMPANY, Rockingham County Registry of Deeds Vol. 564 Page 428 (Apr. 24, 1897).[2] Following the directive of the lease, the narrow strip of land between the ocean and the salt-

[1] *See Lorenz v. Stearns*, 85 N.H. 494 (1932), cert. denied, *Stearns v. Lorenz, 287 U.S. 565.*

[2] This system of ground-rent, *see Wilson v. Iseminger*, 185 U.S. 55 (1902), was probably a financing mechanism, formerly used to aid development in some eastern cities. *See e.g., Moran v. Hammersla*, 52 A.2d 727 (Md. 1947).

marches constituting Hampton Beach was laid out with Ocean Boulevard along the water, and Marsh (now Ashworth) Avenue paralleling it a few hundred yards in-land. Running between the wide Boulevard and Avenue are a series narrow streets designated with letters of the alphabet. This pattern, established by the Improvement Company, thus created a grid of 320 small – 50 by 100 feet – lots. PETER RANDALL, HAMPTON, A CENTURY OF TOWN AND BEACH, 1888-1988 (vol. 3) at 45-226 (1989) (also available online: <http://www.hampton.lib.nh.us/hampton/history/randall/randalltoc.htm>).

This history created Hampton Beach's character as a densely packed mix of small one- and two-story guest-houses, rooms with bed-and-board, and small hotels, along with restaurants and other hospitality businesses sprinkled along the beach and throughout the beach area. *See e.g.*, PICTURES, *Traficante Appendix* at 131. In 1982, a special Town Meeting authorized the sale of the land beneath structures to owners desiring to purchase upon the expiration of the 99-year lease in 1997. *See Hampton Beach Casino, Inc. v. Town of Hampton*, 140 N.H. 785 (1996); *Town of Hampton v. Hampton Beach Improvement Co.*, 107 N.H. 89 (1966).

The State took over ownership of the beachfront in the 1930s, and in the 1950s and 1960s, both the federal and New Hampshire governments spent millions constructing seawalls to protect against erosion from periodic storms. The State continues to maintain an interest in both the natural and built environment of Hampton Beach. *See e.g.*, RSA 216-B (Hampton Harbor Channel and Beach Erosion Control) (1963); RSA 216-J (establishing the Hampton Beach Area Commission) (2003).

II. Zoning Ordinance Protects Hampton Beach's Character

Although Hampton Beach's history is peculiar, its low-rise small-lot character was once typical of other eastern seaboard middle-class resorts, and the Hampton zoning ordinance firmly entrenches this character.

Hampton Beach is a resort community, and it's zoning district – "Business-Seasonal" – seeks to maintain that character. By the 1980s condominiums were perceived as a threat to traditional lodging facilities and also the service establishments which catered to day-trippers who are important to the summer economy. Condos bring year-round demands into an otherwise seasonal economy, HAMPTON, A CENTURY OF TOWN AND BEACH at 248, and "with kitchens and living rooms," do not necessarily bring customers to surrounding hospitality businesses. HAMPTON, A CENTURY OF TOWN AND BEACH at 249; *Trn.* at 72, 89; *Ordinance and Building Codes of The Town of Hampton, NH* § 1.6[3] ("dwelling" defined as "unit or structure . . . including permanent provisions for . . . cooking.").

Thus "in 1985, a Planning Board-sponsored zoning amendment passed, bringing the multi-family regulations in effect elsewhere in town to the Business Seasonal zone. This regulation required a 40-foot setback on a parcel when more than two dwelling units were to be built. Since most of the zone's lots were only 50 to 70 feet wide, the condominium construction stopped creeping toward the main beach and the Casino." HAMPTON, A CENTURY OF TOWN AND BEACH at 249. The ordinance does not run afoul of New Hampshire's anti-condo-discrimination

[3]The *Zoning Ordinance and Building Codes of The Town of Hampton, NH* is hereinafter referred to as simply *Ordinance*.

law,[4] because the ordinance applies to all multi-family developments and thus does not turn on condominiums' "form of ownership." Even though introducing a 40-foot setback into a district composed of 50-foot wide lots might seem unreasonable, it applies to *all* multi-family dwellings everywhere in town, which by their nature require room for recreation, light, and air.

[4]"No zoning or other land use ordinance shall prohibit condominiums as such by reason of the form of ownership inherent therein. Neither shall any condominium be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership. No subdivision ordinance in any city or town shall apply to any condominium or to any subdivision of any convertible land, convertible space, or unit unless such ordinance is by its express terms made applicable thereto. Nevertheless, cities and towns may provide by ordinance that proposed conversion condominiums and the use thereof which do not conform to the zoning, land use and site plan regulations of the respective city or town in which the property is located shall secure a special use permit, a special exception, or variance, as the case may be, prior to becoming a conversion condominium. In the event of an approved conversion to condominiums, cities, towns, village districts, or other political subdivisions may impose such charges and fees as are lawfully imposed by such political subdivisions as a result of construction of new structures to the extent that such charges and fees, or portions of such charges and fees, imposed upon property subject to such conversions may be reasonably related to greater or additional services provided by the political subdivision as a result of the conversion." RSA 356-B:5.

III. Zoning Ordinance Provisions

For the purposes of this case, two sections of Hampton's zoning ordinance apply. Article IV, "Dimensional Requirements," is a tabular page listing general area requirements for each zone in the Town, and is appended hereto, *Appx.* at 35. The provisions of article IV relevant here are:

- Minimum lot area per dwelling unit: 2,500 square feet. *Ordinance* § 4.1.1.
- Maximum height[5]: 50 feet. *Ordinance* § 4.4.
- Maximum amount of sealed surface per lot: 85 percent. *Ordinance* § 4.8.

Article VIII, "Multi-Family Dwellings," also appended hereto, *Appx.* at 38, describes the more specific requirements for multi-family dwellings, which apply "in all zones" in Hampton:

- "Multi-family dwellings shall provide a minimum of 400 square feet of recreation area per dwelling unit." *Ordinance* § 8.2.1
- "No multi-family dwelling shall be closer than forty (40) feet to any part of any other building or to any lot line." *Ordinance* § 8.2.3.
- "An open space buffer of at least twenty (20) feet shall be preserved along all boundaries of the site. . . All buildings shall be located at least twenty (20) feet from the interior edge of the buffer zone." *Ordinance* § 8.2.6.

The Ordinance defines "Dwelling Unit, Multi-Family" as: "Any building or group of buildings on a single lot containing three (3) or more dwelling units." *Ordinance* § 1.6. *Appx.* at 32. It defines "Dwelling Unit" in turn as: "A single unit or structure, providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping,

[5]Building height is defined as "[t]he vertical distance from the grade plane to the highest point of the building, excluding chimneys and residential antennae." *Ordinance* § 1.6. "Grade plane" is defined as "A reference plane representing the average of finished ground level adjoining the building at all exterior walls. When the finished ground level slopes away from the exterior walls, the reference plane shall be established by the lowest points within the area between the building and the lot line or, when the lot line is more than six (6) feet from the building, between the building and a point six (6) feet from the building. *Ordinance* § 1.6.

eating, cooking and sanitation." *Ordinance* § 1.6.

It is thus apparent to any reader of the ordinance, that on Hampton Beach's 50-by-100-foot lots, constructing a big multi-family building is impractical.

IV. Vertical's Proposal and its Deviation From the Ordinance

In 1999 a fire burned several buildings fronting the water on Ocean Boulevard. The land underneath them comprised six standard lots.[6] Currently Vertical Building & Development Associates, LLC, the developer here, owns four of the lots; the fifth is owned by the Town (a remnant of the old 99-year lease system), but leased by Vertical.

Kimberly Barrone and Jeanne Lilienthal, two of the appellants here, own land directly behind Vertical's. The Barrone property fronts K Street, comprises two structures, and accommodates three families. The Lilienthal property fronts J Street, and also comprises two structures – a three-story house with owner's private quarters, guest-rooms and lower level apartments, backed by a two-story structure with rental units. Michael Scanlan and Geannina Guzman-Scanlan, also appellants, own a lot with a two-story structure containing a two-bedroom apartment and thirteen guest rooms. It fronts J Street and sits directly across the street from Vertical's proposed development. All the appellants' lots and structures are grandfathered hospitality businesses in the Business-Seasonal zone, and Ms. Barrone, Ms. Lilienthal, and the Scanlans all rely on the rents for their income.

Before the fire neither the Lilienthal nor Barrone houses had any views of the ocean. The Scanlan property had partial views, and pedestrians on Ocean Boulevard were able to see it. *See*

[6]Lot lines for the four lots on Ocean Boulevard between J and K Streets were subsequently adjusted so that there are now three lots facing the ocean. The other two face J and K Streets respectively. This case thus refers to just five lots.

ORDER, *Traficante Appendix* at 371. All three abutters understand the importance of redeveloping the land, and have nothing to gain from delay. They consider the fire and the resultant vacant lot a personal tragedy – for them, their businesses, and their former neighbors – and a public tragedy for the loss of the town's tax-base, and the detriment to its business climate. *Traficante Appendix* at 195, 200; *Trn*. at 52. Their interest is in maintaining the allure of their properties for their customers, not having an overly tall building immediately near their property lines, making sure their businesses can be perceived by pedestrians and drivers on Ocean Boulevard, and in equitable enforcement of their town's ordinance. *Traficante Appendix* at 195 (testimony of Guzman-Scanlan).

The total land on which Vertical wants to build runs 200 feet along Ocean Boulevard, about 150 feet along both J Street and K Street, *Traficante Appendix* at 139, and comprises about two-thirds of an acre, or about 29,000 square feet. *Traficante Appendix* at 51.

Vertical proposes to build a 42-unit year-round condominium with two retail spaces and underground parking. The building it proposes would be about 75 feet tall, 192 feet wide along Ocean Boulevard, and 145 feet deep along J and K Streets. It would leave setbacks of about 4 feet on J and K Streets, about 5 to 6 feet in the back bordering the Lilienthal and Barrone properties. *Traficante Appendix* at 54. The building's footprint would occupy about 25,000 square feet, with an additional 2,000 square feet of sidewalks and other impervious surfaces. *Traficante Appendix* at 51. The building would fill virtually the entire block.

To build such a structure, Vertical would greatly exceed a number of protections contained in the zoning ordinance. *See* LIST OF VARIANCES REQUESTED, *Traficante Appendix* at 148.

- It would exceed the 50-foot maximum allowable height by about 25 feet – a 50 percent deviation.
- It would exceed the 40-foot minimum setbacks by about 35 feet – an 85 to 90 percent deviation.
- It would exceed the 20-foot open-space buffer by about 15 feet – a 70 to 80 percent deviation.
- It would exceed the 85 percent maximum allowed portion of lots that can be covered by impermeable surfaces by covering about 95 percent of the property – an 11 percent deviation.
- It would fail the 2,500 square foot minimum lot area per dwelling unit by about 700 square feet – a 72 percent deviation.
- It would provide 98 square feet of recreational area per unit, rather than the 400 square foot minimum – a 75 percent deviation.

Despite the magnitude of these deviations, the Hampton Zoning Board of Adjustment (ZBA) granted Vertical six variances from the ordinance. MINUTES, HAMPTON ZBA (Jan. 20, 2005), *Traficante Appendix* at 205. After their request for rehearing was denied, MINUTES, HAMPTON ZBA (Apr. 21, 2005), *Traficante Appendix* at 205, an appeal was taken to the Superior Court (*Kenneth McHugh*, J.). The court acknowledged that Vertical's building would "consume all of the space between streets J and K on Ocean Boulevard with the exception of some small setbacks," and that it is "different from any construction on Ocean Boulevard." The court also acknowledged that the "project will be large and involve the introduction of condominiums on Ocean Boulevard in the area of the Hampton Beach Casino," and that it will alter "the character of the property near the casino." The court nonetheless upheld the ZBA's ruling. *See* ORDER, *Traficante Appendix* at 368, 370.

This appeal followed.

SUMMARY OF ARGUMENT

After explaining the background of Hampton's character and its zoning ordinance, the abutters set forth the provisions of the ordinance. They then describe the size, mass, and density of the proposed building and how it exceeds the provisions of the ordinance.

The abutters first set forth the purposes of area variances generally, and the elements of proof necessary to be awarded an area variance. They note the thinness of the record and the developer's inadequate proofs.

The abutters then list each area variance criteria and argue that the developers failed to prove them: the developer's properties are like every other lot in Hampton Beach and not unique, the developer made no effort to compare its proposal to reasonably feasible alternatives, did not prove the abutters would not suffer a diminution in the value of their properties, failed to show that the project comports with the spirit of Hampton's zoning ordinance and is in the public interest as ordained by the ordinance, and did not show that substantial justice would be accomplished by the variances it sought.

The abutters then argue that the developer gains nothing by any attempt to re-label its project as "commercial" rather than the "multi-family dwelling" it is.

Finally, the abutters join the arguments made in their co-appellants' previously-filed brief.

ARGUMENT

I. Purpose of Variances is to Avoid Constitutional Hardship

The purposes of zoning is to protect a town's natural and built resources, and to protect against the "cumulative impact" of otherwise innocuous encroachments. *See Bacon v. Town of Enfield*, 150 N.H. 468, 471, 473 (2004) (protecting lake even from small structure). Towns are encouraged to create zoning districts for these purposes. *Stone v. Cray*, 89 N.H. 483 (1938). Among the purposes of Hampton's ordinance is to "preserve and improve the attractiveness of the Town of Hampton as a resort community and continue its desirability as a place in which to live and do business." *Ordinance*, preamble.

The availability of variances is "a means to ensure the constitutionality of zoning ordinances . . . by building in a mechanism that . . . avoid[s] imposing hardship on individual landowners." Variances are a "constitutional safety valve." *Bacon*, 150 N.H. at 477. They allow for "a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose." *New London v. Leskiewicz*, 110 N.H. 462, 466 (1970).

Zoning and re-zoning, however, are clearly the prerogative of the legislative body of towns, and not the function of variances or the ZBA. RSA 674:16 ("the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance"). When the ZBA grants a variance that deviates from the zoning ordinance, alters the municipality's zoning plan, or changes the character of a neighborhood, it usurps the town's legislative zoning-enactment authority.

> "In passing upon requests for variances, a board of zoning appeals exercises the limited function of insuring that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. The

> power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body. The use of variances to resolve such problems is prohibited where a legislative enactment is reasonably practicable, because the piecemeal granting of variances could ultimately nullify a zoning restriction throughout zoning district."

Hendrix v. Board of Zoning Appeals of City of Virginia Beach, 278 S.E.2d 814, 817 (Va. 1981); *see also Ex parte Chapman*, 485 So.2d 1161, 1164 (Ala. 1986) ("board of adjustment does not have the right to act arbitrarily or to amend or depart from the terms of the ordinance at its uncontrolled will and pleasure"); *City of Harrison v. Wilson*, 453 S.W.2d 730, 737 (Ark. 1970) ("A variance . . . cannot involve such a far-reaching departure from the regulations as to thwart the purpose of the zoning scheme or alter the essential character of the neighborhood."); *Pleasant View Farms Development, Inc. v. Zoning Bd. of Appeals of Town of Wallingford*, 588 A.2d 1372, 1375 (Conn. 1991) (A variance "should not be used to accomplish what is in effect a substantial change in the uses permitted in a residence zone. That is a matter for the consideration of the zoning commission."); *Build-A-Rama, Inc. v. Peck*, 475 N.W.2d 225, 229 (Iowa App.,1991) ("[B]oard of adjustment does not have the power to zone or rezone. Nor can the board of adjustment amend or set aside a zoning ordinance under the guise of a variance."); *Township of North Brunswick v. Zoning Bd. Of Adjustment*, 876 A.2d 320 (N.J.Super. 2005) (when "the grant of a variance substantially alters the municipality's zone plan, a board may be found to have usurped the zoning power"); *Banks v. City of Bethany*, 541 P.2d 178, 180 (Okla. 1975) ("The Board may not under the guise of a variance nullify the zoning ordinance and derogate the fundamental character, intent and true purpose of the zoning law."); *Van Meter v. H. F. Wilcox Oil & Gas Co.*, 41 P.2d 904 (Okla. 1935) ("The board of adjustment cannot have unconfined and unrestrained freedom of action. It is not at liberty to depart from the

comprehensive plan embodied in the ordinance."); *Levin v. St. Peter's School*, 578 A.2d 1349, 1354 (Pa.Cmwlth. 1990) ("zoning law principles limit the board's issuance of variances in order to keep this power from growing into a general legislative power"). Courts likewise cannot reconfigure a zoning ordinance by variance. *State v. Grant*, 107 N.H. 1 (1966) (court questioned wisdom of blue laws, but refused to invalidate in deference to legislative body of town); *State v. Ramseyer*, 73 N.H. 31 (1904).

It is for this reason that the elements necessary for variances are contained in the statute, and that "[t]he party seeking a variance . . . bears the burden of establishing each of the requirements." *Husnander v. Town of Barnstead*, 139 N.H. 476, 478 (1995). There must be sufficient evidence of each of the elements on which to base a variance. *Barrington East Cluster I Unit Owners' Ass'n v. Town of Barrington*, 121 N.H. 627, 630 (1981). In the law of area variance, the reasonableness of the applicant's proposed use is not material. *Vigeant v. Town of Hudson*, 151 N.H. 747, 753 (2005). Also irrelevant – except to show the general character of the neighborhood – is the non-conforming character of abutters' property.

On appeal, the interpretation of zoning ordinances is a question of law, and this Court is "not bound by the ZBA or trial court's application of zoning provisions to specific facts." *Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232, 236 (1995).

II. To be Awarded a Variance Vertical Must Prove Five Elements

The recent flux in the law of area variances has been well covered elsewhere. To be awarded a variance, Vertical must prove each of five elements:

- Hardship – "An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property."
- Hardship – "The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance."
- "The value of surrounding properties will not be diminished."
- "The variance is consistent with the spirit of the ordinance."
- "The variance will not be contrary to the public interest."
- "Substantial justice is done."

Boccia v. City of Portsmouth, 151 N.H. 85, 94 (2004). The ZBA is thus required to balance the applicant's interests, the abutters' interests, and the public interest. *See Saturley v. Town of Hollis, Zoning Bd. of Adjustment*, 129 N.H. 757, 761 (1987); *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 (2005).

The ZBA record in this case is small. It consists of Vertical's application for a variance, PETITION FOR RELIEF (Jan. 20, 2005), *Traficante Appendix* at 14, which contains some short descriptions of the six variances it sought. There is an offer of proof made by one of the abutters' attorneys, along with some exhibits – deeds and leases, portions of the ordinance, some maps and pictures, minutes of the ZBA meetings and votes, a consultant's analysis finding that the proposed condominium does not conform to the Hampton Beach Master Plan, competing letters from two appraisers, and letters from several of the abutters. Notably absent from the ZBA record is any

testimony or evidence to support the five elements Vertical must prove to be awarded a variance. Instead, there seemed to be much weight given to the opinion of the Hampton Beach Area Commission, a state-wide appointed advisory board, which focused on the aesthetics of the proposal rather than on the statutory variance criteria. *See* MINUTES, HAMPTON ZBA (Jan. 20, 2005), *Traficante Appendix* at 208.

It is apparent from the record, however, that the ZBA proceeding giving rise to this appeal was either the third or fourth proposal Vertical made, and that the ZBA's resulting decisions were either once or twice presented to the Superior Court. Vertical made no effort, apparently, to enter the record of those prior proceedings into the record in this case. *See Trn.* at 17-18. Whatever facts might have been contained therein are therefore not available and cannot be considered by this court. *Little v. Town of Rye*, 120 N.H. 533 (1980) (Supreme Court unable to review record not put before it).

III. Vertical Failed to Prove the Elements Necessary for an Area Variance

A. Special Conditions of the Property

The "landowner must show that the hardship is a result of unique conditions of the property, and not the area in general." *Bacon v. Town of Enfield*, 150 N.H. 468, 479 (2004) (*Duggan* & *Dalianis*, JJ, concurring). "A hardship exists only if the ordinance unduly restricts the use of the land due to special conditions unique to that particular parcel of land." *U-Haul Co. of New Hampshire & Vermont, Inc. v. City of Concord*, 122 N.H. 910, 912 (1982). Thus, if a hardship is shared by other property in the zoning district, there is no hardship that is unique to the applicant's lot, and thus no grounds for a variance. In order to be unique, there must be factors about the "property which distinguish it from all others similarly restricted." *Ouimette v. City of Somersworth*, 119 N.H. 292, 295 (1979).

And the uniqueness must concern the land, not Vertical's proposal or circumstances. "A variance by definition is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner. . . . Therefore, it is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight that is the criterion, for unnecessary hardship." *Carbonneau v. Town of Exeter*, 119 N.H. 259, 262-63 (1979) (quotations and citations omitted); *Harrington v. Town of Warner*, 152 N.H. 74, 81 (2005) ("[T]he burden must arise from the property and not from the individual plight of the landowner.").

Vertical made no attempt to show that there are any special conditions of its property. It did not dispute that it owns or has options on standard Hampton Beach lots. *Trn*. at 31. That the same entity owns contiguous lots does not constitute a uniqueness, *Garrison v. Town of*

Henniker, __ N.H. __ (decided Aug. 2, 2006), rather it is an opportunity. Moreover, there are other examples of common ownership in Hampton Beach, *Trn.* at 30, one of which is just around the corner on K Street. MINUTES, HAMPTON ZBA (Jan. 20, 2005), *Traficante Appendix* at 206. Unfortunately there have been other fires in Hampton, and that also is not unique. *See Libbey v. Hampton Water Works Co., Inc.*, 118 N.H. 500 (1978).

This Court has heard cases where the properties were unique. In *Boccia*, 151 N.H. at 93, the property was traversed by wetlands and had an odd narrow shape in a peculiar neighborhood. In *Vigeant*, 151 N.H. at 749, the property was situated between two highways, was very long and narrow, contained wetlands, and had drainage problems along one of the roads. In *Rancourt v. City of Manchester*, 149 N.H. 51, 54 (2003), the lot was unusually large for its zone, and despite being in the City, was wider in the rear than in the front, sat in a country setting, and had and a thick wooded buffer so that stabling a horse would go unnoticed in the otherwise residential district.

Even if Vertical argued its assemblage is unique, it is not sufficient to essentially re-zone standard Hampton Beach lots into something they are not. The Hampton ordinance, for example, does not allow buildings over 50 feet tall in any zone, and requires 40-foot setbacks for multi-family dwellings in all zones, yet the variance granted here would allow a 75-foot tall structure built nearly to the lot lines on all sides. Because there is nothing unique about Vertical's property, it cannot show hardship, and the variance was awarded in error.

If acquiring contiguous lots can be considered a hardship, it is one Vertical made all by itself. A claim of unnecessary hardship cannot be based upon conditions created by the owner. *Ryan v. City of Manchester Zoning Board of Adjustment*, 123 N.H. 170 (1983) ("Even if we

were to hold that the parking area constituted a special condition justifying a finding of hardship, the hardship would be due to the [owner's] own actions."); *Robillard v. Town of Hudson Zoning Bd. of Adjustment*, 120 N.H. 477, 481 (1980) ("A person is charged with knowledge of the zoning restrictions placed on his property"); *Biggs v. Town of Sandwich*, 124 N.H. 421 (1984) (septic setback known to owner before construction). *See also, Bruce L. Rothrock Charitable Foundation v. Zoning Hearing Bd. of Whitehall Tp.*, 651 A.2d 587 (Pa.Cmwlth. 1994) (hardship warranting variance must be due to conditions of property and not to circumstances generally pertaining in neighborhood, must not have been created by applicant, and must not alter essential character of neighborhood, and variance must represent minimum variance necessary to afford relief). *De Felice v. Zoning Bd. of Appeals*, 32 A.2d 635 (Conn. 1943) (expenditure of money on machinery for non-permitted use not grounds for variance).

Moreover, Vertical knew or constructively knew of the zoning ordinance before it acquired its lots. "When a landowner purchases land knowing it is inadequate for a particular purpose, arguably it is not the zoning restrictions which interfere with that use, but rather the purchaser's own failure to plan properly." *Hill v. Town of Chester*, 146 N.H. 291, 293 (2001) ("landowners are deemed to have constructive notice of the zoning restrictions applicable to their property"). "To counter the fact that the hardship was self-created because the landowner had actual or constructive knowledge of the zoning restrictions, the landowner can introduce evidence of good faith." *Harrington v. Town of Warner*, 152 N.H. 74, 84 (2005).

> Good faith can be established in several ways: showing that the owner has complied with the rules and procedures of the ordinance; showing that the owner has attempted to use other alternatives to relieve his hardship prior to requesting a variance; showing that the owner had relied on the representations of zoning authorities or builders; or showing that the owner had no actual or constructive knowledge of a requirement, violation, or limitation on land that he purchased.

Harrington, 152 N.H. at 84 (showing of good faith made by letter from selectmen prior to purchase).

Vertical made no effort to make such showings here. Even if owning six contiguous lots facing the ocean on Hampton Beach can be considered a hardship, Vertical has no basis on which to claim relief from that which it created. In any event, the purpose of variances is to ensure property rights are not unnecessarily curtailed, not to effectively undo a legitimate zoning ordinance.

B. Reasonably Feasible Alternatives

To get a variance the applicant must also show that the benefit it seeks "cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance."

"In evaluating the economic impact factor with respect to area variances, zoning boards and courts will not grant a variance merely to avoid a negative financial impact on the landowner. Moreover, there must be a showing of an adverse effect amounting to more than mere inconvenience. [I]n considering whether to grant an area variance, courts and zoning boards ***must*** balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors." *Bacon*, 150 N.H. at 477 (quotations and citations omitted, emphasis added).

In other words, "there must be no reasonable way for the applicant to achieve what has been determined to be a reasonable use without a variance. In making this determination, the financial burden on the landowner considering the relative expense of available alternatives ***must*** be considered. *Vigeant v. Town of Hudson*, 151 N.H. 747, 753 (2005) (emphasis added);

McKibbin v. Lebanon, 149 N.H. 59, 61 (2003) (consideration of investment expectations); *Carter v. Derry*, 113 N.H. 1, 4 (1973) (considering evidence of original cost, current market value and decline in value).

Moreover, the applicant must produce hard evidence of infeasibility. "Mere conclusory and lay opinion concerning the lack of reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence." *Garrison v. Town of Henniker*, __ N.H. __ (decided Aug. 2, 2006) (quotations omitted).

Vertical made no attempt here to prove there were no other financially feasible alternatives. It proffered no evidence that a smaller number of condominium units, or another use, would not be financially remunerative. Certainly there was no "dollars and cents evidence." The abutters, who run hospitality businesses and have some knowledge of Hampton Beach's seasonal cycles, suggested a less intensive use that might be feasible, acceptable, profitable, and capable of construction either without variances or with less egregious deviations from the ordinance. *Trn*. at 32.

While this Court chided the developer in *Boccia* for not offering any alternative possibilities, it might be excused from such a showing because it was that case that clearly enunciated a change in the law. The hearing in this matter, however, was well after *Boccia*, giving Vertical no such excuse.

Even if Vertical made some showing of infeasibility, it was not sufficient to grant a variance that would allow a building vastly larger than anything the ordinance allows and which would indelibly alter the character of the neighborhood.

C. Diminution in Value of Surrounding Properties

An applicant for a variance is required to show, in dollars and cents terms, that surrounding properties will not be diminished in value due to the variance. In *Hussey & United States Aggregates, Inc., v. Town of Barrington*, 135 N.H. 227, 234 (1992), for instance, the Barrington ZBA was presented with "detailed appraisal data" showing the effects of a variance.

Vertical did offer a letter prepared by an appraiser. The letter claims the appraiser "identified no evidence of measurable market influences that will result in diminution of market value . . . in the immediate market area." LETTER TO PAMELA KOPKA FROM PETER STANHOPE (Oct. 17, 2004), *Traficante Appendix* at 177. The letter has nothing backing it up, however, and contains no detailed appraisal data. The abutters also offered a letter from a real estate appraiser, who estimated that the value of the Scanlan-Guzman property would drop by 20 to 30 percent because their view of the ocean will be less than before the fire, because headlights from the parking garage will shine into their inn, and because Vertical's protruding balconies will lessen their privacy. The appraiser also noted that the Lilienthal and Barrone properties "will be devalued between 25 and 35 percent" because both protruding balconies and a large building just four feet away will affect privacy, it would eliminate any possibility of ocean views, and because Vertical's building will cast shadows "during a good portion of the day" making them less attractive as summer rentals. LETTER TO CHARLES GRIFFIN FROM BILL MOUFLOUZE (Apr. 8, 2004), *Appendix* at 39.

One member of the ZBA questioned whether the diminution element was proved. MINUTES, HAMPTON ZBA (Jan. 20, 2005), *Traficante Appendix* at 209, given one abutter's testimony regarding her own commercial appraisal which found that "some degree of ocean view

resulted in a higher property value." *Traficante Appendix* at 195 (testimony of Guzman-Scanlan).

In any event, given this record, there is no reliable way the ZBA could have concluded there would be no diminution in value to the abutters' properties or businesses. Even if there was some proof, it did not justify a variance that would allow construction of a building so large and out of character with the neighborhood.

D. The Spirit of the Ordinance

It is the proper role of zoning ordinances to protect the character of the neighborhood. RSA 674:17, II ("Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality."); *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001) ("zoning ordinances must be consistent with the character of the neighborhoods they regulate"); *Devaney v. Town of Windham*, 132 N.H. 302 (1989) (setbacks preserve character of neighborhood); *see also Taficante v. Pope*, 115 N.H. 356 (1975) (deed restrictions maintain character of Ocean Boulevard in Seabrook).

Although zoning ordinances often contain conflicting spirits, it is not hard to discern the ordinance's intent regarding Hampton Beach. The town has an interest in protecting the Beach's low-rise small-structure character, in maintaining the human-sized spirit of the street fronting Hampton Beach, and in preventing tall buildings that would cast shadows onto the sandy beach during the late summer. The town's interest, in short, is to "preserve and improve the attractiveness" of the town "as a resort community." *Ordinance*, preamble, *Traficante Appendix* at 119. The ordinance limits buildings to a maximum of 50 feet *throughout the town*, squarely

requires 40-foot setbacks for multi-family housing in the business-seasonal zone, and attempts to limit overcrowding.

In considering requests for variances, ZBAs and courts must take into account the rationale for the ordinance. *See e.g., Saturley v. Hollis,* 129 N.H. 757 (1987) (in variance determination ZBA correct to consider septic setback intended to safeguard wetlands); *Biggs v. Town of Sandwich*, 124 N.H. 421 (1984) (same); *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21 (1972) (in imposing conditions on variance ZBA correct to "observe the spirit of the ordinance").

Although a *de minimus* impact may not violate spirt of ordinance, *Bacon v. Town of Enfield*, 150 N.H. at 480, when a variance will result in changing the character of the neighborhood, it must be given higher scrutiny. *Harrington v. Town of Warner*, 152 N.H. 74, 84 (2005). And when a variance has a "very substantial impact on the neighborhood" it warrants the high scrutiny given to use variances, even though it is from dimensional requirements. 15 P. Laughlin, NEW HAMPSHIRE PRACTICE, LAND USE PLANNING AND ZONING § 24.03A (2000), *citing* 3 A.H. Rathkopf & D.A. Rathkopf, THE LAW OF ZONING & PLANNING § 58:4 at 58-12 (2004).

The danger in granting a variance that creates a deviation from the character of the neighborhood is the problem of creeping variances: "Setting precedents that do not follow zoning is to open a door that will not easily close." LETTER FROM JEANNE LILIENTHAL TO HAMPTON ZBA (Jan. 20, 2004), *Traficante Appendix* at 201. When the character of a neighborhood has changed, ZBAs and courts must later take the changed nature into account. *See e.g., Tessier v. Town of Hudson*, 135 N.H. 168 (1991) (where town had routinely given permits to build on non-

conforming lots, practice could not be reversed without legislative re-zoning); *Belanger v. City of Nashua*, 121 N.H. 389, 393 (1981) (ZBA must take into account fact that surrounding area had changed substantially since it was zoned for single family residential use); *Walker v. City of Manchester*, 107 N.H. 382 (1966) (ZBA correct in awarding variance to convert residence in residential district into funeral home where permits had previously been given to neighbors to convert large homes into apartments). If such a big deviation from the ordinance is granted in this case, and were then to be granted to other properties similarly situated, *Tessier*, 135 N.H. at 168 (requiring issuance of variance to owner in light of town's practice of issuing variances to others similarly situated), development and growth in Hampton Beach would be unharmonious and contrary to the goals of "orderly growth" stated in the ordinance. *Ordinance*, preamble, *Traficante Appendix* at 119.

In *Shopland v. Town of Enfield*, 151 N.H. 219 (2004), for example, a landowner wanted a variance to build a modest addition to a house in a zone containing setbacks from a lake. Because the spirit of the ordinance was protection of the lake, this Court remanded to determine whether there was some reasonably feasible alternative to the owners' plans. In *Devaney v. Town of Windham*, 132 N.H. 302 (1989), the lot was, like in Hampton Beach, very small. After the owner built within the setbacks and thus too close to lot-lines, the court issued an injunction to remove the house.

In Hampton Beach, Vertical's proposal violates several elements of the master plan and the ordinance regarding height, density, mass, sealed-surface area, setbacks, and open-space buffers. Vertical's proposal is simply not in keeping with the moderate-height nature of Ocean Boulevard and adjacent streets, and for that reason its request for a variance should be rejected.

E. The Public Interest

The public interest can best be determined by reference to the language of the Town zoning ordinance. "The legislative body of a town is the ultimate law and policy making body and when the citizens vote as a legislative body, they express the public interest of the Town." *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577, 579 (2005).

The preamble to Hampton's zoning ordinance explicitly places the public interest before private interests. *Ordinance*, preamble, *Traficante Appendix* at 119. The specific height, bulk, and density limitations in the Hampton Beach business-seasonal zone are unambiguous expressions of the public interest. The ordinance has changed numerous times, *see* HISTORY OF THE ZONING ORDINANCE & BUILDING CODES OF THE TOWN OF HAMPTON, NH, *Traficante Appendix* at 146, but the multi-family provisions with their 40-foot setbacks have remained the same since they were adopted in 1985, and have been consistently enforced.

Recent votes of a town meeting are also good indications of the public interest. *Chester Rod and Gun Club*, 152 N.H. at 577. In 2004, a warrant article was placed on the ballot for Hampton's annual town election. It provided:

> On petition of twenty-five registered voters that the Town of Hampton maintain and enforce all current maximum building heights in each and every zone of Hampton, until such time that all residences of Hampton are served by municipal sewer service.

The resolution passed 3,145 votes to 1,243. SPECIMEN BALLOT, ANNUAL TOWN ELECTION, HAMPTON, NEW HAMPSHIRE TUESDAY, MARCH 9, 2004, Article 30, *Traficante Appendix* at 137.

Even if the article is not binding, and even though it contains conditions regarding municipal sewers, it is a clear expression that the public has an interest in maintaining the 50-foot

height limitation which applies in *all zones* in Hampton. In addition the Hampton Beach Master Plan recommends retention of the 50-foot limit. At the beach, the height limitation is crucial because anything higher creates shadows on the beach itself during the late summer, fall and winter. Because the beach is the reason people come to Hampton, shadowing it is not in the public interest. *See Traficante Appendix* at 90. Excessive height and bulk also creates problems for egress in the event of fire, for both those in the tall building that cannot be reached by conventional ladders, and the abutters who have little room between them and the new building.

Given that the ordinance and a recent vote are the clearest expressions of the public interest, the ZBA and court were in error in granting a variance to Vertical that would allow substantial deviations from the language of the ordinance.

F. Substantial Justice

"Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use." *Simplex Technologies, Inc.*, 145 N.H. at 731. The substantial justice element in variance law suggests a weighing of these interests. *U-Haul Co. of New Hampshire & Vermont, Inc. v. City of Concord*, 122 N.H. 910, 912 (1982), *see also Labrecue v. Salem*, 128 N.H. 455 (1986).

Vertical made no more than conclusory allegations that its project results in substantial justice. There is little doubt, however, that the structure it wants to build will change forever the character of the beach, of the town, and of the abutter' properties. *Trn*. at 41. In awarding such great deviations from the clearly-expressed wishes of the people of Hampton, the ZBA and the court failed to give the public interest sufficient deference and erred in granting the variances.

IV. Tail Wagging the Dog – Vertical's Proposal is a Multi-Family Dwelling

The only way Vertical can claim compliance with the zoning ordinance is to call its proposal commercial rather than multi-family.

The Hampton zoning ordinance generally provides that in the business-seasonal zone, although heights are capped at 50 feet regardless of use, *Ordinance* § 4.4, setbacks may be just 4 feet. *Ordinance* §§ 4.5.1, 4.5.2, 4.5.3. For multi-family dwellings, however, setbacks must be 40 feet, *Ordinance* § 8.2.3, and vegetation buffers 20 feet, *Ordinance* § 8.2.5. The multi-family dwelling requirements apply "in all zones." *Ordinance* § 8.1.

Hampton's zoning ordinance defines a "Dwelling Unit, Multi-Family" as "[a]ny building or group of buildings on a single lot containing three (3) or more dwelling units." A "dwelling unit" is defined as "[a] single unit or structure, providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation." *Ordinance* § 1.6.

In *Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232 (1995), this Court found that a three-story house was a "multi-family dwelling," prohibited by that town's zoning ordinance in a shorefront district:

> The bottom floor comprises a full kitchen, a full bathroom, a living room, and two rooms that the trial court found could be easily converted into bedrooms by the placement of beds or other sleeping facilities. The middle floor, which the court determined to be the primary living space, also comprises a full kitchen, a full bathroom, and two bedrooms. Another full bathroom is located on the top floor. The bottom level can be entered without passing through the upper levels, and the upper levels can be entered without passing through the bottom level.

Healey, 140 N.H. 235.

Vertical's proposal would have 42 separate living units with an elevator allowing access to

all of them from the street, and all would have bathrooms, kitchens, bedrooms, and living rooms. There thus can be no doubt that Vertical's proposal is a multi-family dwelling.

Hampton's zoning ordinance does not define "commercial." This Court has held, however, that for purposes of the Right-to-Know law, "[i]nformation is commercial if it relates to commerce." *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997).

Vertical's proposal provides for two retail units on the building's street level. If Vertical proposed a commercial building, it would be allowed to build with four-foot setbacks.

Although it has not directly confronted the issue in the record below, Vertical may suggest that its proposal is commercial because of the two retail units on the first floor. In its application for a variance, however, it checked the box beside "multi-family" and described its proposal as "a 42 unit residential condominium with ground floor retail space." *Traficante Appendix* at 15, 16.

It would be unreasonable to call the proposal commercial. To do so would require describing the project something like "two units of commercial spaces with 42 dwelling units above" – an upside down sort of description. Given that the proposal clearly is 42 residences with two stores downstairs, and not the opposite, the proposal is a multi-family dwelling, and therefore must conform to Article VIII of the ordinance which requires 40-foot setbacks and 20-foot buffers in all zoning districts.

Moreover, the multi-family requirements are sensible planning. When people live in a place year-round, they require recreation space, increased parking, and quality living conditions, rather than merely the daytime commercial and transitory concerns of a resort community. The goals of zoning go beyond the mere presence or absence of a kitchen.

Even if the proposal were regarded as commercial, it would relieve Vertical only of the setback requirements. The 50-foot height limitations, the recreational requirements, and the percentage of sealed surface area are the same for all zones and all uses in the Town of Hampton.

V. Join Traficante's Brief On Remaining Issues

The appellants submitting this brief join the brief previously submitted by Daniel and Pauline Traficante for all issues raised therein.

CONCLUSION

Based on the foregoing, the appellants request that this Court reverse the decisions below.

Respectfully submitted,

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By their Attorney,

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Dated: August 28, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for the Scanlan appellants request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are complex and counsel believes the Court would benefit from an opportunity to have questions addressed.

I hereby certify that on August 28, 2006, copies of the foregoing will be forwarded to Charles A. Griffin, Esq.; Robert G. Eaton, Esq.; Robert A. Casassa, Esq. and Peter J. Saari, Esq.; and Mark S. Gearreald, Esq.

Dated: August 28, 2006

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APPENDIX