

State of New Hampshire  
Supreme Court

NO. 05-\_\_\_\_\_

MICHAEL SCANLAN, GEANNINA GUZMAN-SCANLAN,  
JEANNE M. LILIENTHAL & KIMBERLY ANN BARRONE

v.

TOWN OF HAMPTON, NEW HAMPSHIRE

NOTICE OF MANDATORY APPEAL OF MICHAEL SCANLAN, &a  
Pursuant to Supreme Court Rule 7(1)(A)

By: Joshua L. Gordon, Esq.  
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26 S. Main St., #175  
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# State of New Hampshire Supreme Court

## NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; or (7) a landlord/tenant action or a possessory action filed under RSA chapter 540.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

*Michael Scanlan, Geannina Guzman-Scanlan, Jeanne M. Lilienthal, Kimberly Ann Barrone v. Town of Hampton, Rock.Cnty.Super.Ct. No. 05-E-0265*

*Daniel Traficante & Pauline Traficante, Trustees, Dawn Realty Trust v. Town of Hampton, Rock.Cnty.Super.Ct. No. 05-E-0183*

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Rockingham County Superior Court (*Kenneth R. McHugh, J.*)

3A. NAME & ADDRESS OF APPEALING PARTY

Michael Scanlan & Geannina Guzman-Scanlan  
d/b/a Hampton Seafarer Inn  
4 J Street  
Hampton, NH 03842

Jeanne M. Lilienthal  
1287 Poplar St.  
Wynandotte, MI  
and also  
7 J Street  
Hampton, NH 03842

Kimberly Ann Barrone  
59 Glade Path  
Hampton, NH 03842

3B. NAME, FIRM, ADDRESS & TELEPHONE  
NUMBER OF APPELLANT'S COUNSEL

Joshua L. Gordon  
Law Office of Joshua Gordon  
26 S. Main St., #175  
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4A. NAME & ADDRESS OF OPPOSING PARTY

Town of Hampton  
100 Winnacunnet Rd.  
Hampton, NH 03842

Daniel & Pauline Traficante  
Trustees, Dawn Realty Trust  
Methuen, MA 01844

4B. NAME, FIRM, ADDRESS, & TELEPHONE  
NUMBER OF OPPOSING COUNSEL

for Town of Hampton  
Mark S. Gearreald, Esq.  
100 Winnacunnet Rd.  
Hampton, NH 03842  
(603) 926-6766

for Traficantes  
Charles A. Griffin, Esq.  
Griffin & Pudloski, PA  
56 Middle St., PO Box 598  
Portsmouth, NH 03802  
(603) 433-1830

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Developer:

Vertical Building & Development Associates, LLC

represented by:

Robert A. Casassa, Esq., & Peter J. Saari, Esq.,

Casassa & Ryan,

459 Lafayette Rd., Hampton,

NH 03842

(603) 926-6336

Appellants Scanlon &a. represented in trial court by:

Scott E. Hogan, Esq.

27 Riverside Farm Dr.

Lee, NH 03824

6. DATE OF CLERK'S NOTICE OF DECISION

Clerk's Notice of Final Order:

January 9, 2006

DATE OF CLERK'S NOTICE OF DECISION  
ON POST-TRIAL MOTION

Clerk's Notice of denial of motion for  
reconsideration: February 7, 2006

7. CRIMINAL CASES: DEFENDANT'S  
SENTENCE AND BAIL STATUS

n/a

8. APPELLATE DEFENDER REQUESTED?

n/a.

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

There no known basis for confidentiality.

10. IF ANY PARTY IS A CORPORATION, NAMES OF PARENTS, SUBSIDIARIES & AFFILIATES

The applicant is an LLC

11. DO YOU KNOW ANY REASON WHY ONE OR MORE SUPREME COURT JUSTICE WOULD BE DISQUALIFIED FROM THIS CASE?

There is no known basis for recusal.

IF YES, FILE MOTION FOR RECUSAL, SUPREME COURT RULE 21A

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes.

IF YES, COMPLETE TRANSCRIPT ORDER FORM

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH.

- I. Did court err in approving the ZBA's grant of six variances where area, dwelling units, setback, unsealed surface, recreation area, buffer, and height limitation requirements, and other provisions of the ordinance were not met?
- II. Did the ZBA err in failing to properly consider and discuss whether the five variance criteria were met for each variance, rather than consider them as a block where the variances have different impacts on private and public rights, and where the ZBA did not adequately consider the injustice or hardship each might cause, and the parties and the public cannot discern what is the basis for the granting of each variance?
- III. Did ZBA err in failing to make specific findings as to its reasons for granting each of the six variances so that the parties, the public, and this court can discern what was the basis for granting each variance?

13. LIST SPECIFIC QUESTIONS (CONTINUED)

- IV. Was there sufficient evidence provided by the applicant on which the ZBA based its grant of six variances?
- V. Was the ZBA overly lax in its consideration of the variances for the project because it was the fourth submission by the applicant for the lots?
- VI. Did the ZBA unlawfully disregard the ordinance's requirements regarding multi-family residential units concerning setbacks, buffers, recreational space, and other matters, thus essentially re-zoning for a particular lot, by arbitrarily choosing requirements intended for other zones and uses, and by failing to adequately take into consideration the private injuries and public consequences of the proposed project?
- VII. Did the ZBA err in ruling that there would be no diminution of value of the surrounding properties despite evidence that the variances would effect abutters' views, the quantity and quality of abutters' light and air, the appeal of the abutters' property to vacationers who are the abutters' source of income, the character of the neighborhood, and would create maintenance problems for the abutters, impinge on their privacy, and other negative economic effects?
- VIII. Did the ZBA err in ruling that the variances would be in the public interest when the density, scale, height, mass, and character of the project is not in accord with the Hampton Beach Master Plan, will negatively affect traffic flow and the availability of parking, and other matters?
- IX. Did the ZBA fail to adequately take into account the hardship factors spelled out in *Boccia v. City of Portsmouth*, when other than a fire in 1999 there is nothing unique about the property when compared to the lots which surround it, when there was no data concerning the feasibility of a better-conforming project, when the lots' owners knew of the difficulties when they acquired them, and other matters?
- X. Did the ZBA err in ruling that the variances would do substantial justice when the project will limit access to sun and air, reduce view corridors, increase the likelihood of shading, flooding, elevator noise, loss of privacy, and threats to the safety and enjoyment of the abutters' properties, and will also effect the character of the beach itself?
- XI. Did the ZBA err in failing to consider restrictions in the deeds to the lots on which the applicant wishes to build that may prevent development as envisioned by the applicant, and did the court further err in its ratification of the ZBA's failure?

13. LIST SPECIFIC QUESTIONS (CONTINUED).

XII. Did the court err in not considering issues even though all matters raised in the Superior Court were also addressed in the plaintiffs' motion for rehearing before the ZBA?

XIII. Did the court err in approving the ZBA's granting of the variances where it did not properly consider the necessary elements for the granting of area variances?

XIV. To the extent they are not stated here, this appeal incorporates the questions raised by the co-appellants.

14. CERTIFICATIONS

I hereby certify that, upon information and belief, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

\_\_\_\_\_  
Joshua L. Gordon, Esq.

I hereby certify that on or before the date below copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

March 9, 2006

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Joshua L. Gordon, Esq.

**ATTACHMENTS**

(1)	CLERK'S NOTICE (of court order) (Jan. 9, 2006) .....	8
(2)	ORDER (Jan. 6, 2006) .....	9
(3)	CLERK'S NOTICE (denying motion to reconsider) (Feb. 7, 2006) .....	22

## TRANSCRIPT ORDER FORM

**INSTRUCTIONS:**

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

<b>LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED</b>						
Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Steno/Recorded	Previously Prepared?*	Deposit
12/2/05	Trial	½ day	<i>McHugh, J.</i>	Leah Wolczko	no	\$450
<b>DO NOT SEND DEPOSIT AT THIS TIME</b>						<b>TOTAL DEPOSIT: \$450</b>

SCHEDULE OF DEPOSITS

Length of Proceeding

Deposit Amount

Hearing or trial of one hour or less

\$ 175

Hearing or trial up to ½ day

\$ 450

Hearing or trial of more than ½ day

\$ 900/day

Previously prepared portions

Number of pages x \$.50 per page per copy if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

\* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.