

ZONING BOARD OF ADJUSTMENT  
WOLFEBORO, NEW HAMPSHIRE

RECEIVED

JUL 6 2016

MOTION FOR REHEARING

ZONING  
BOARD OF ADJUSTMENT

Name of  
Petitioner: Brian Lombard

Address of  
Petitioner: 64 Glendon St.

Wolfeboro NH

Phone: 603.867.2692

Please complete the following information:

1. Green Mountain Realty LLC is the owner of and or buildings located at  
16-18 Lehner St. Wolfeboro in Wolfeboro, New Hampshire.

2. On May 3, 2016, the Zoning Board of Adjustment  
considered an

Change of Use  
application for a Site Plan Review + Variance brought forward by

Families in Transition / Green Mountain Realty LLC

for property located at: Tax Map # 217.070,

16-18 Lehner St., Wolfeboro, New Hampshire.

3. On June 6, 2016, the Zoning Board of Adjustment voted  
to GRANT DENY the application, Case # 07.V.16.

4. The action of the Zoning Board of Adjustment was unlawful and unreasonable,  
and it is respectfully requested that the board grant a rehearing on this matter for  
the following reasons:

See attached letter from Attorney Paul Ajzeno

(Use Additional Sheet is Necessary)

Brian Lombard  
Petitioner Signature

7/6/2016  
Date

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July 6, 2016

**By Hand**

Fred Tedeschi, Vice-Chairman  
Wolfeboro Zoning Board of Adjustment  
9 Union Street  
Wolfeboro, NH 03894

**Re: 16-18 Lehner Street**  
**Case No. 07-V-16**

Dear Mr. Tedeschi:

This office represents Brian Lombard, owner and resident of 64 Glendon Street. My client requests the board reconsider its June 13, 2016 decision to grant a variance for the proposed use of 16-18 Lehner Street for temporary, transitional housing, as outlined in the board's decision. This letter supplements the Motion for Rehearing my client is filing today in the above case.

To begin with, the applicant failed to provide any information to prove the subject property had a hardship, as defined in, and required by, RSA 674:33, I(b)(5). The applicant failed to demonstrate, and the board failed to consider, RSA 674:33, I(b)(5)(A)(i), the first subpart of the "hardship" test. (For the reasons stated at the hearing and in this letter, my client also believes the proposed use is not reasonable.)

The Board in their written decision did not list any hardships for the property, but rather listed the attributes of the property that make it a very marketable and desirable commercial office space. Two of the three floors are currently fully rented; there is also revenue from the AT & T antenna on the building. The only thing the current owner lacks is a tenant on the third floor and vacancy is not a hardship. "[M]erely demonstrating that a proposed use is a 'reasonable use' is insufficient to override a zoning ordinance." Bacon v. Town of Enfield, 150 N.H. 468, 476 (2004) (J. Duggan, concurring).

Following the board's approach would mean an owner could claim hardship by showing a property is uniquely suited for a use not permitted by the ordinance, such as by having an elevator. This approach would mean an owner could use a property for uses both permitted and not permitted by the ordinance, thus undermining the purpose for zoning in the first place.

In other words, the unique characteristics of the property need to be the *cause* for the hardship. In reading the board's decision, I do not see where this was even considered.

A good example for the board to consider is the case of Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748 (2007). In a remarkably similar fact pattern, the applicant wanted to operate a half-way house in a building located in the central business district that "currently houses" both commercial and residential uses. Such a use was not permitted in the zone, or any zone in the city. The building had three floors, and the plan was to renovate part of the second floor and the entire third floor and leave the rest of the building undisturbed. Although the attributes of the building may have made it a fine candidate for a "halfway house," the New Hampshire Supreme Court found the prohibition against such uses in the zoning district in question did not interfere with the applicant's reasonable use of the property. The Court ultimately ruled that the evidence did not support a finding of "unnecessary hardship."

A good example of a situation where the unique characteristics of a property *did* properly cause a hardship is Harborside Associates v. Parade Residence Hotel, 162 N.H. 508 (2011), where the uniquely large size of a building justified the installation of two marquee signs that were larger than what the ordinance otherwise would permit. In other words, the applicant found that what was permitted as far as sign size was a hardship.

The Board's decision also contained factual inaccuracies. The decision states the property was unique as it was four stories and 19,000 SF which is oversized for the town. The building is in fact three stories, not four. The fact is that there are three buildings in the 1,000 foot radius that are three stories high and contain similar square footage

A copy of Brian Lombard's letter dated May 31, 2016 is enclosed as well as it appears the board may not have taken his points concerning the meaning of hardship into consideration.

In evaluating the effect of the proposal on the value of surrounding properties, the board relied on certain information from "Mr. Norton" which it found to be "compelling." That information set forth changes in assessed values of certain properties located in cities other than Wolfeboro. To begin with, RSA 674:33, I(b)(4) requires an analysis of actual values, not assessed values. Assessed values are used for purposes of taxation

The following questions were raised at the hearing and the Board never requested further explanation or answers from the applicant:

- Why was the property value information from Manchester incomplete, due to it containing information from 31 abutters at 17 properties-less than three per property?

- Since most all of the abutting properties in the Manchester study were large apartment buildings and commercial properties, how could that information be used to analysis and conclude the effect on 11 single family and 7 small multifamily properties surrounding the Lehner Street property in Wolfeboro?
- Since Mr. Lombard had worked in Manchester for twenty-five years and knew the Manchester neighborhoods, he questioned if Mr. Norton's information was complete and accurate. After further review of the Manchester property information submitted by Mr. Norton, it turns out the information was not accurate. Mr. Norton looked at assessed property value increases from 1991 to present to make his case that all of the property values increased when in fact Families in Transition purchased most of the properties on Mr. Norton's list *between 2003 and 2013*; therefore, the evaluation information Mr. Norton provided in his conclusions is, at best, misleading.
- As stated at the hearing, common appraisal practices do not allow use of commercial properties as comparative properties to evaluate residential properties. Likewise, appraisers would not use properties in a city, i.e., Manchester, as comparables to evaluate property in a small town, i.e., Wolfeboro, no less a resort town.

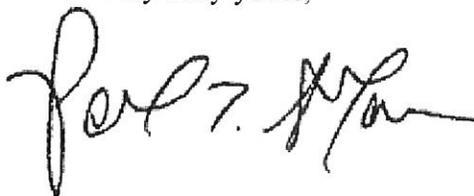
Finally, Families in Transition stated in their application and testimony that they would only service families with children in the Governor Wentworth Regional School District. In researching the Families in Transition website, the organization appears to accept Federal monies to help fund their facilities. In accepting Federal funds they are then required to accept any homeless people regardless of location; therefore, as I read the law, the applicant cannot restrict their occupants to only the Governor Wentworth Regional School District.

For the reasons stated above, I ask that the board grant the attached Motion, and schedule a hearing to rehear the above application.

If you have any questions, please do not hesitate to contact me.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul J. Alfano". The signature is written in a cursive, somewhat stylized script.

Paul J. Alfano

PJA/ap  
Enc.

May 31, 2016

Town of Wolfeboro ZBA  
PO Box 629  
Wolfeboro, NH 03894

Re: ZBA Case 07-v-1 Families in Transition 16-18 Lehner Street

Dear Chairman Tedeschi,

My name is Brian Lombard and I live at 64 Glendon Street. I am sending this letter to provide evidence of why this variance application fails to meet the requirements needed for granting of this variance by the Wolfeboro ZBA.

After the May 3<sup>rd</sup> ZBA meeting was adjourned I had a chance to review the application and zoning statues in more detail and I have found significant deficiencies with the applicant's Variance Request. Because I only found out about the May 3<sup>rd</sup> meeting a couple days before, I did not have enough time to study the zoning regulations before the meeting. Now I have read through the NH Handbook for Local Officials dated Nov 2015 made available by the Board of Adjustment in NH and the NH Planning Office, which I'm sure you and the other Board members are familiar with. While I did not testify to this during the open portion of the May 3<sup>rd</sup> ZBA meeting because I did not have this information, it still is admissible at this time because the ZBA already had this information available to them. I am just reminding them of the requirements and case law regarding the granting of a variance which this application does not meet.

After reading the NH Handbook for Local Officials I do not see any way that the Wolfeboro ZBA can grant this variance request because it fails several prongs of the variance test, the most important being the 5<sup>th</sup> question dealing with the hardship and uniqueness of the property.

On Page II-5 of the Handbook it states "*A variance is a waiver or relaxation of particular requirements of an ordinance when strict enforcement would cause undue hardship because of circumstances unique to the property.*" A variance is tied to what is the unique hardship of the property that restricts its reasonable use, not what is the hardship of the proposed use by the applicant.

On page II-12 of the NH Handbook it states "*By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular property in question makes it different from others can unnecessary hardship be claimed.*" Since there is no difference between the 16-18 Lehner Street property and many other similar large buildings in the Commercial District, no hardship exists and the most important prong of the variance application fails.

In answering Question #5, the applicant has chosen to focus their answers on the hardship of Families in Transition (an option holder on the property) in finding a suitable property in which to locate. The applicant never does address the hardship or uniqueness of the 16-18 Lehner Street property in their answer as required by case histories and this causes this prong of the application to fail. The

requirement is that the applicant must prove what aspect of the property is a unique hardship when considering it against other similar properties in the zoning district. The applicant never mentions any aspect or unique characteristic of the property that creates a hardship for the property. On page D-28 of the Handbook, it states from Harrington 152NH that *"The burden must "arise from the property and not from the individual plight of the landowner."*

The Wolfeboro ZBA CANNOT approve this variance because the applicant has failed to show any uniqueness or hardship of the property as required by many Supreme Court rulings described in the Handbook and several referenced in this letter.

This property is similar to many other large buildings in the commercial zone and is currently 2/3 rented with additional revenue from AT&T wireless communications antennas on the building. The third floor is already fit-up for office space and the only thing the owner lacks is a tenant. Having a vacate tenant space in a building does not qualify as a hardship. If the Wolfeboro ZBA were to grant this variance request, and it was not challenged, then the Town of Wolfeboro would open themselves up to many other non-permitted use requests from other large building owners. The ZBA would have a hard time denying them a variance too because they already have set a precedent by approving a non-permitted use to occupy the Lehner Street building without requiring that the applicant show any property hardship.

On Page D-30 of the Handbook, in the case of CRJ vs City of Manchester it states; *Finally, the court concluded the discussion of the use variance by noting that because CRJ had failed to demonstrate it met the first prong of the Simplex unnecessary hardship standard, it was not necessary to determine if the evidence supported a finding that CRJ met the other prongs of the test.* Since the applicant fails to meet the first and most important prong of this variance request, there is no need for the ZBA to consider the other evidence in this case.

As a side note, I have never seen any ZBA grant a variance to a building owner pleading a use hardship that allowed the owner to evict tenants already in the building that were permitted uses and then replace them with non-permitted use tenants. That makes no sense at all and that is what is being requested in this variance application.

I know there has been a lot of public pressure for the ZBA to approve this variance, but it is the ZBA Board member's responsibility to comply with the Zoning Laws and the State of NH Statutes regarding the granting of variances. The Handbook for Local Officials addresses this public pressure issue on Page II-17 when it states *"The board must review each of the five variance criteria and grant the variance, only if they are all met. The board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea."* The Supreme Court of NH has clearly ruled that a property hardship must exist for a variance to be granted. The applicant has not explained any hardship or uniqueness of the 16-18 Lehner Street property and that is because none exists, and therefore the ZBA must deny this variance request to comply with case law.

On page D-11 of the NH Handbook it states regarding the Simplex vs Newington case that *"The [Supreme] court then announced the new three-part standard by which owners can demonstrate unnecessary hardship:*

1. *"A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;*

2. *No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and*
3. *The variance would not injure the public or private rights of others.*”

On page D-14 of the NH Handbook it goes into a further explanation of these three questions.

**1. The zoning restriction, as applied to the applicant’s property, interferes with the applicant’s reasonable use of the property, considering the unique setting of the property in its environment.**

*“ Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.”*

**2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.**

*“Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose? This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or “unnecessary” hardship”*

**3. The variance would not injure the public or private rights of others.**

*“This is perhaps similar to a “no harm - no foul” standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance? Certainly, if a person uses his/her property to the detriment of a neighbor’s property value, then it can be argued that the neighbor’s “private rights” have been injured.”*

Here are the correct answers to these 3 questions for the Lehner Street property, which is very different from what the applicant stated in their application.

1. There is no unique quality or hardship associated with this property that makes it any different from other large commercial buildings in the Commercial Zone. This prong fails.
2. Granting this variance will go counter to the purpose of the ordinance. If the Town and voters had wanted to allow for this type of use in the Commercial Zone, then it would have been included as a Permitted use or one allowed under a Special Exception. Since this is not the case, then granting this variance will go counter to the ordinance and this prong fails.
3. Just about every abutter and adjacent property owner has testified that their property values will go down and their neighborhood lifestyle will be affected if the variance is granted. The tenants in the building testified that they and their clients will be negatively affected. There is nothing about granting this variance request and the applicant’s proposed use that will improve the neighborhood quality of life or increase property values. The Board should be able to discern from this

testimony that this proposed unpermitted use will as it states above cause “the neighbor’s “private rights” to be injured.” Granting this variance will cause harm to the neighboring property owners and this prong fails too.

As other Supreme Court cases since *Simplex Technologies vs Town of Newington* have emphasized, the first prong of the Simplex standard is the critical inquiry for determining whether unnecessary hardship has been established. To meet its burden of proof under this part of the Simplex test, the applicant must demonstrate, among other things that the hardship is a result of the property’s unique setting in its environment. This requires that the zoning restriction burden the property in a manner that is distinct from other similarly situated property. While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance’s equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the Landowner (applicant).

The zoning districts and ordinances were voted on by the residents of Wolfeboro and the people that live in these zones should feel protected by what is allowed and what is not. Transitional housing is not even allowed by Special Exception in the Commercial Zone, and that could be by design. If the applicant would like to be able to provide Transitional Housing in Wolfeboro, then they should work to have the Zoning Ordinances amended and voted on by the entire Town after there is a discussion of the proposed use and appropriate location.

The Supreme Court ruled on the following case that is almost exactly the same as the variance request before the Wolfeboro ZBA today. The ruling was in 1979, but on page E-1 of the current Handbook for Local Officials, it states *this case is still relevant and was not changed by the more recent Simplex vs Newington case.*

While this case dealt with a land case, it is still similar because the applicant was an option holder (as is Families in Transition) and they were claiming that they could not find another suitable property to fit their needs (similar in that Families in Transition is stating that the property is perfect for their use). The issue is not what makes it perfect for the option holder and future owner, but rather what is the hardship with the property that would require the relaxing of the Zoning Ordinance.

**Ouimette v. City of Somersworth, 119 N.H. 292 [1979] (See page E-1.)**

*Somersworth ZBA granted a variance to build above-ground gasoline storage tanks so defendant, Agway Petroleum Co., could expand their business onto land they held an option on in the business district B. Testimony centered on the hardship to Agway if the variance were denied. Evidence was presented that Agway could find no other suitable lot with the correct dimensions and slope for its above-ground storage tanks. Abutting business owner appealed issuance of the variance raising the issue of the authority of the local zoning board to grant a variance when the only hardship alleged results from the special needs of an option holder of the property as opposed to special characteristics of the property. The court found for the plaintiff, holding, in part, that “[t]he hardship alleged by the defendants is that Agway cannot expand its business if barred from moving to this lot because of the zoning ordinance. Reliance on these factors to support a variance reflects a fundamental misconception of the function of a variance in a comprehensive zoning scheme. Agway’s inability to move cannot support a variance from a comprehensive zoning scheme. The inability to use land for one particular purpose is irrelevant to whether a variance should be granted.”*

Also on page E-2 of the Handbook, it specifically states:

**“4. There must be special conditions related to the property that is the subject of the variance application.**

*The requirements regarding special conditions have not changed and must be kept in mind when applying the new standard for hardship. The statute allows the granting of a variance only when “owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship.” Unless there are special conditions regarding a particular piece of property that cause the ordinance to result in unnecessary hardship, a variance cannot be granted.”*

In the Handbook there are descriptions of numerous other Supreme Court rulings that explain that the property must show a hardship that is different than other properties in the same zoning district in order for a variance to be granted. Listed below are a few of those cases that are very similar to this application where the Supreme Court reversed ZBA approvals or concurred with their denial by the ZBA.

**Hanson v. Manning, 115 N.H. 367 [1975] (See page E-2.)**

*Hardship scrutiny has been brought into the present era when the court found evidence that the zoning restrictions would make development of the plaintiff’s land more difficult because of the existence of ledge and wetlands. The court pointed out, however, that there was nothing to distinguish the plaintiff’s land from other land in the same area with respect to suitability for which it was zoned. It then went on to hold that “[a]lthough RSA 31:72 (now RSA 674:33) authorizes the granting of a variance when the literal enforcement of the ordinance will result in ‘unnecessary hardship,’ it does so only when that hardship is ‘owing to special conditions.’ Absent ‘special conditions’ which distinguish the property from other property in the area, no variance may be granted even though there is a hardship.”*

**Maureen Bacon v. Town of Enfield, No. 2002-591, N.H. [January 20, 2004] Argued: June 12, 2003. Opinion issued: January 30, 2004. (See pages II-10, D-17.)**

*Justice Duggan stated that “Even under the Simplex standard, merely demonstrating that a proposed use is a ‘reasonable use’ is insufficient to override a zoning ordinance. Such a broad reading of Simplex would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations.”*

*In conclusion, Justice Duggan found that Bacon had failed to demonstrate unnecessary hardship. He suggested that there were other reasonable alternatives to the proposal (this too harkens back to a pre-Simplex analysis), finding that the proposal was a request of convenience, not one of necessity.*

**Garrison v. Town of Henniker [August 2, 2006] (See page D-34)**

*The superior court reversed the grant of the variances by the ZBA, finding that: “The problem with GME’s application and the record in this case is that, while they support a conclusion that the zoning restrictions interfere with GME’s proposed use of the property, they do not support a finding that the restrictions interfere with the reasonable use of the property. That is, there is no evidence in the record that the property at issue is different from other property zoned rural residential. While its size*

may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."

*GME appealed to the New Hampshire Supreme Court, which upheld the superior court's decision to reverse the grant of the variances. For starters, the Supreme Court repeated that under the first prong of the three-pronged Simplex standard to show unnecessary hardship, GME had to demonstrate to the ZBA that the zoning restriction, as applied to its property, interferes with their reasonable use of the property, considering the unique setting of the property in its environment. GME argued several points on appeal but the most important, for our purposes, was its claim that the evidence before the ZBA demonstrated that the property was unique. The court rejected this argument after setting forth the burden that GME had to meet:*

*As discussed above, to demonstrate "unnecessary hardship" applicants must show that "a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment." Simplex, 145 N.H. at 731-32. The reasonable use factor "is the critical inquiry for determining whether unnecessary hardship has been established." Harrington, 152 N.H. at 80. The reasonable use factor "requires a determination of whether the hardship is a result of the unique setting of the property." Id. at 81. The applicant must show that "the hardship is a result of specific conditions of the property and not the area in general." Id. The property must be "burdened by the zoning restriction in a manner that is distinct from other similarly situated property." Id. While this does not require that the property be the only such burdened property, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." Id. The burden must "arise from the property and not from the individual plight of the landowner." Id.*

The neighborhood is not against the concept of providing housing assistance in Carroll County, we just do not feel this is the right location for their proposed operations. There are other properties in and around Wolfeboro for sale that can provide the proposed transitional housing in a more reasonably sized building without affecting the existing neighborhoods. The applicant should really propose an amendment to the Zoning Ordinances that will allow Transitional Housing in the appropriate neighborhood in Wolfeboro.

I hope you will deny this variance after reading all of the points made in this letter along with the case law to back it up.

Sincerely,



Brian Lombard, PE  
64 Glendon Street  
Wolfeboro, NH 03894



*Town of  
Wolfeboro*

Planning and Development

**NOTICE OF DECISION  
WOLFEBORO ZONING BOARD OF ADJUSTMENT  
6 June 2016  
Affirmed  
13 June 2016**

**TM# 217-70**

**Case #07-V-16**

**Applicant: Families in Transition/Green Mountain Realty LLC  
Variance**

Families in Transition/Green Mountain LLC ("FIT") has applied for a variance to convert the third floor<sup>1</sup> of property located at 16-18 Lehner Street to 7 bedrooms to provide temporary housing for 5-7 families. Such a use is not defined in, and therefore is not permitted by, the Wolfeboro Zoning Ordinance.

The board held public hearings on May 3, 2016, May 10, 2016 and June 6, 2016 and received written and verbal testimony from those in favor and those opposed to the proposed facility. That testimony is incorporated, although not reiterated, herein, other than as discussed by the board during its deliberations.

After reviewing all of that testimony, the board finds and rules as follows:

**1 & 2. The variance will not be contrary to the public interest and will observe the spirit of the ordinance**

The criteria that the grant of the variance will not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance. To be contrary to the public interest the variance must "unduly, and in a marked degree"

<sup>1</sup> Office and counseling space will occupy the second floor of the property; however, these uses are permitted by the zoning ordinance and do not require a variance.



conflict with the ordinance such that it violates the ordinance's "basic zoning objectives." There are two inquiries a board should make in reaching a decision regarding this criteria:

Whether it would alter the essential character of the locality.

Whether granting the variance would threaten the public health, safety or welfare.

Although two of the board members felt that the conversion of this existing 5,000 square feet of commercial space to residential space was not consistent with the public interest and the spirit of the ordinance, particularly when the cumulative impact of all such potentially similar variances was considered, the majority of the board found that the proposed use was not contrary to the public interest and observant of the expressed purposes of the C-1 district.

The purpose of the district is "to protect the character of the existing downtown, maintaining its pedestrian scale, while promoting a healthy mix of retail, professional office, medical and residential uses within the district and promoting mixed uses on individual properties. It is intended to enable the downtown to remain a vibrant, compact commercial center, serving the needs of community residents, the region and tourists as the economic center, and to promote a complementary and diverse mix of commercial and residential uses." § 175-88.7.

Uses permitted in the district include nursing or convalescent homes, and the like; multifamily dwellings, beds and breakfasts, and inns. Uses permitted by special exception include affordable nonprofit housing for the elderly and affordable nonprofit workforce housing. See §175-91 and 92. Currently existing uses in the neighborhood, in addition to commercial uses, include multifamily dwellings, a community center, and a nonprofit child advocacy center.

The majority of the members felt that the proposed use--temporary transitional housing--is similar to the existing, and uses permitted by right and by special exception in the district and promoted the purpose of mixing uses on individual properties. It therefore would not alter the essential character of the locality. Moreover, the board noted that this space could be converted to residential space as of right if it were, for example, converted to apartments.

The majority also discussed the public health, safety and welfare. While the majority recognized the concerns expressed by some members of the public regarding the addition of seven homeless families to the area, they noted that one cannot control who moves into a neighborhood, regardless of the type of housing they may occupy. The board also noted that the FIT facilities in other locations in New Hampshire had not produced any negative impacts on the public health, safety and welfare in those communities.

For the foregoing reasons, and based on all of the evidence in the record, the majority of the board concluded that the variance will not be contrary to the public interest and will observe the spirit of the ordinance.

3. Substantial justice will be done by the granting of the variance

Perhaps the only guiding rule as to the factor of substantial justice is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The New Hampshire Supreme Court has also considered whether the proposed use is consistent with the area's present use in determining whether substantial justice is done by the grant of a variance, unless the zoning ordinance was adopted specifically to alter the neighborhood.

The majority of the board found that granting variance will do substantial justice because the benefit to town at large far outweighs the minimal loss from the deviation from the zoning ordinance. The majority discussed the gain of transitional housing that the town both lacks and needs, and found that denying the variance would deprive the town of these services only at the gain of rigidly enforcing the ordinance.

Based on all of the evidence in the record, the majority of the board concluded that substantial justice would be done by the granting of the variance.

4. The values of surrounding properties will not be diminished by the granting of the variance

While one board member felt that FIT had not met its burden of demonstrating that surrounding property values will not be diminished by the grant of the requested variance, the majority of the board found that the information submitted by Mr. Norton on behalf of FIT to be compelling. That information concluded that properties adjacent to 28 of 31 of the FIT facilities elsewhere in the state had actually seen an increase in their assessed values. While the board acknowledged that many of those buildings had been dilapidated and thereafter improved by FIT, while the property at issue was already in good condition, it noted that given the existing good condition of the building and the neighborhood, the maintenance of the exterior in good condition would, at most, have a neutral impact on the value of surrounding properties.

The majority also noted that the testimony presented by local realtors was not based on any actual evidence, but instead based on national studies of properties and neighborhoods that were not comparable to this family focused transitional housing.

For the foregoing reasons, and based on all of the evidence in the record, the majority of the board concluded that surrounding property values will not be diminished by the granting of the variance.

5. Literal enforcement of the provisions of the ordinance will result in unnecessary hardship because no fair and substantial relationship exists between the general public purposes of the

ordinance and the specific application of that ordinance to the property and the use is a reasonable one

As an initial matter, the board considered whether the property was unique in its surroundings, and a majority found that it was. The building is located 3 to 4 blocks from the local school, and within walking distance to many services. The building is 4 stories including a basement and 19,000 square feet, which is oversized for the neighborhood, if not the town, and is dominant on the lot, which is small at 11,700 square feet. Moreover, the building is unique in that no other non-municipal building in the neighborhood town has an elevator, a third floor, sprinklers, or is ADA compliant.

The majority of the board also found that there is no fair and substantial relationship between the purpose of the ordinance and the application of the ordinance to the property and that the proposed use is a reasonable one. The majority found that the restriction on temporary transitional housing was not necessary to fulfill the ordinance's underlying purpose, given that the district anticipates mixed uses; and that the proposed use is consistent with existing and permitted uses in the district, many of which allow extended stays by unrelated persons who need special care. The board noted that allowing this use in the local mix of preexisting uses, particularly given that there would be no alteration to the exterior of building and no requirement for additional services, was reasonable.

The majority of the board noted that the first two floors of the building would remain commercial, which satisfies the mixed use purpose of the district. The proposed use was not meant to be someone's permanent residence, which might "tip" the balance in the neighborhood to too much residential; but was more like an inn, dorm, or boarding house, all of which are defined in, and permitted by, the zoning ordinance.

**Board Decision:**

For the foregoing reasons, and based on all of the evidence in the record, the board therefore concluded that the literal enforcement of the zoning ordinance to this unique property would result in unnecessary hardship.

After much deliberation, the board voted 3 to 2 to approve the variance with the following conditions:

1. All of the documentation submitted in the application package by the applicant and any requirements imposed by other agencies are part of this approval unless otherwise updated, revised, clarified in some manner, or superseded in full or in part. In the case of conflicting information between documents, the most recent documentation, and this notice herein shall generally be determining.
2. The first and second floor shall be restricted to nonresidential use.
3. The application, as submitted to the ZBA, may not satisfy the submittal requirements for a Site Plan Review.

4. The Notice of Decision shall be recorded at the Carroll County Registry of Deeds and the applicant shall pay all recording fees.
5. This Variance shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for a good cause.

  
Fred Tedeschi, Chairman

NOTE: Certain persons have the right to appeal the ZBA's decision to the superior court, or to file a motion for rehearing with the ZBA, as the case may be, within 30 days of the date the ZBA made the decision. Any person who wishes to exercise their appeal rights must do so consistent with applicable State statutes and should immediately consult with an attorney of their choosing to be sure their appeal rights are protected."