# State of New Hampshire
# Supreme Court

NO. 2015-0323

2016 TERM

JANUARY SESSION

**Joseph & Ellen Yarborough**

**v.**

**City of Portsmouth, Zoning Board of Adjustment**

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF

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## ARGUMENT

### I. Yarborough's Arguments are Preserved

The Yarboroughs never preserved nor attempted to argue that the zoning ordinance is inconsistent with the master plan, that the SR-B zone in its entirety is deficient, or that their case presents a takings, equal protection, due process, or other constitutional issue. Those matters are entirely of the City's creation, CITY'S BRF. at 9-10, and should not reflect any failure by the Yarboroughs. The Yarboroughs invoked the master plan only to demonstrate Portsmouth's purpose in the SR-B zone. YARBOROUGH BRF. at 3, 17, 23.

The Yarboroughs *did* preserve, however, their claim that the SR-B zone – presumably congruous elsewhere in the City – does not accurately reflect their particular neighborhood.

In addition to the preservation indicated in their opening brief, at the ZBA hearing the Yarboroughs pointed out that the church and condominium were not consistent with the SR-B district. VIDEO (June 17) at 02:27:21. In their ZBA rehearing request, quoting RSA 674, the Yarboroughs noted that "the provisions of the Ordinance, 'shall be made with reasonable consideration to, among other things, the character of the area involved.'" MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING, *Yarborough Appx* at 138, 140. In their superior court complaint, the Yarboroughs wrote:

> The Plaintiffs demonstrated to the ZBA that the neighborhood in which the Property resided was dissimilar to the vast majority of neighborhoods throughout the Single Residential B district in that it abutted a busy road, in that it abutted a large multi-family housing complex, in that the majority of the lots throughout the neighborhood were significantly larger than the minimum size required by the ordinance, and in that the majority of lots throughout the neighborhood comprised frontage dimensions significantly smaller than the minimum frontage dimension required by the ordinance.

COMPLAINT, *Yarborough Appx* at 161, 166. The City acknowledges that the Yarboroughs also

argued, both during oral arguments to the superior court and in their post-trial memorandum, that the SR-B district does not reflect their neighborhood. CITY'S BRF. at 10.

In its brief the City lengthily quotes the Yarboroughs' superior court pleadings, CITY'S BRF. at 10-11, and then says "[t]he issue regarding the neighborhood's character was only raised in reference to citing the *Simplex* case in addressing the issues of hardship and spirit of the ordinance." CITY'S BRF. at 11. The reverse is true; the Yarboroughs cited *Simplex v. Town of Newington*, 145 N.H. 727 (2001), to support their zoning inconsistency argument.

Even if the context of their *Simplex* citation is ambiguous, as averred by the City's lengthy quote, the Yarboroughs made clear throughout the litigation that they were alleging the SR-B zone did not reflect their neighborhood.

## II. Zone Must Match the Neighborhood

The Yarboroughs acknowledge that municipalities have authority to use zoning to change the nature of neighborhoods and discontinue objectionable conditions. *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361, 365 (2008). In *Nine A*, however, the court made an "undisputed" finding that "the Town of Chesterfield created the Spofford Lake District to reduce density in that area."

Portsmouth has enunciated no intent to change the neighborhood, nor created a special zone. Rather its goal is to preserve existing character, and "[d]iscourage teardowns for larger, new construction to preserve neighborhood character." MASTER PLAN at 13, 76, *Appx.* at 3; *Addn*. at 13.

Moreover, the City says that the only basis on which a court may find an ordinance does not match its neighborhood is "when and if the neighborhood has gone through significant and substantial changes since the time it was originally zoned." CITY'S BRF. at 12. That is not the law however:

> *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.

RSA 674:17, II (emphasis added).

In *Nine A*, 157 N.H. at 368, distinguishing *Belanger v. City of Nashua*, 121 N.H. 389 (1981), this Court made clear that in evaluating the relatedness of the ordinance and the neighborhood, while change-over-time is one such circumstance, "other considerations may be taken into account as well." An ordinance can, for example, be invalid *ab initio* if it does not accurately reflect the area it purports to regulate. *Mack v. Cook County*, 142 N.E.2d 785 (Ill. 1957)

(invalidating agricultural zoning of area around O'Hare airport because did not comport with area's industrial character).

Accordingly, and despite the City's focus on timing, the age of the neighborhood in relation to the inception of zoning is not relevant.

The Yarboroughs' argument is that whenever or however it occurred, whether by accretion or otherwise, the SR-B zone does not – and perhaps never did – accurately describe the neighborhood in which they live. Because variances are a substitute for constitutional litigation, a variance is the proper remedy. *Bouley v. City of Nashua*, 106 N.H. 79, 84 (1964) ("Variances are provided for by zoning statutes so that litigation of constitutional questions may be avoided and a speedy and adequate remedy afforded.").

## III. Frontage Does Not Regulate Density

The superior court made density an issue by upholding the ZBA's determination on the grounds that the ZBA was justified in using frontage to regulate density. *See* YARBOROUGH BRF. at 29 (quoting court). The City defends the court's reasoning, saying:

> [D]ensity includes both a *two*-dimensional aspect (requiring spacing between homes) and a *three*-dimensional aspect (limiting the number of dwellings per acre).

CITY'S BRF. at 15 (emphasis added).

This Court has made clear, however, that frontage is at most a *one*-dimensional aspect.

> While the [lower] court was correct in construing 'dimension' as a component of 'size,' we disagree that 'frontage' is a dimensional requirement. Rather, 'frontage' is defined as the 'linear distance of property along street, highway, river, or lake.' As a result, the *sine qua non* of 'frontage' is the property's location, making it more a creature of geography than geometry.

*Cosseboom v. Town of Epsom*, 146 N.H. 311, 315 (2001). This court further explained:

> "Size" is defined as "physical magnitude, extent, or bulk: the actual, characteristic, normal, or relative proportion of a thing."… "[S]ize" includes both "dimension" and "area": two mutually exclusive terms, with "dimension" representing a linear measurement and "area" representing a spatial measurement. "Frontage," however, is not encompassed within either of these categories, and is not a constituent of "size."

*Cosseboom*, 146 N.H. at 314-15.

Size is measured in acres – it is two dimensional; frontage is measured in feet – it is a linear attribute. Density is a measure of units per *acre*, and therefore also a two-dimensional aspect. Thus frontage does not measure density. The court's reliance on density to deny a frontage variance, and the City's defense of it, cannot be aligned with *Cosseboom*.

The City's citation to *R. A. Vachon & Son, Inc. v. City of Concord*, 112 N.H. 107, 112 (1972), does not help. CITY'S BRF. at 16. In *Vachon*, this Court defined when a lot may be

considered grandfathered. It held that when zoning becomes more restrictive, owners of zoning-compliant lots do not have a constitutional right to provisions of the old ordinance, but that owners of non-compliant "substandard" lots may. In distinguishing these conditions, the Court loosely grouped frontage with dimension, and that is the portion of *Vachon* cited by the City.

*Cosseboom* is 29 years newer than *Vachon*, is directly on point, and its technical differentiation of size, frontage, and dimension is not dicta.

Given the lower court's reliance on impermissible reasoning, it committed the several errors delineated in the Yarboroughs' opening brief, YARBOROUGH BRF. 29-30, and this Court should reverse.

## IV. Frontage Does Not Regulate Spacing

The City suggests that the purpose of its frontage requirement is to regulate spacing between houses. CITY'S BRF. at 16. The suggestion is drawn not from this Court, any Portsmouth planning document, nor the record, but from a secondary source which purports to cite for the proposition, *Metzger v. Town of Brentwood*, 117 N.H. 497 (1977).

While "spacing of homes," CITY'S BRF. at 16, may be a logical result of frontage minimums in the rural area at issue in *Metzger*, 117 N.H. at 299 (whether frontage on non-public right of way subject to gates and bars counts toward minimum frontage requirement), not here. In the Yarboroughs' urban neighborhood, where the lots are regular rectangles and the houses are "cheek by jowl," ORDER (Mar. 25, 2015) at 4, *Appx*. at 210, 219, spacing between houses is determined by side-yard setbacks, not frontage. The typical lot on Middle Road is 50 feet wide with 10-foot setbacks, resulting in houses with roughly 20 feet between (although at least one pair is closer, *see* Neighborhood Map, YARBOROUGH BRF. at 7).

If by "spacing" the City means uniformity of house placement, the cadence of the neighborhood was established long ago, and the Yarboroughs' proposal fits neatly into it.

If the court and ZBA meant "spacing" when they determined that frontage regulates density, then the hardship imposed on the Yarboroughs by denying them the reasonable use of their property is unnecessary, owing to the special conditions of their property and the neighborhood in which it resides.

## V. What is the Pertinent Neighborhood?

The Yarboroughs' neighborhood consists mostly of residential lots on the south side of the street. Also on the south side is the Chase orphanage, with 245 feet of frontage, and two houses with just 40 feet of frontage on Middle Road.

On the north side there is a church, with 244 feet of frontage, and the condominium complex, which occupies the remainder of the north-side frontage.

The superior court acknowledged the church, the condominium, and the orphanage, but inexplicably neglected the two houses with 40 frontage feet. The court also disregarded the fact that the Yarboroughs' house is immediately next door to a multi-family home.

In its brief the City attempts to set aside the condominium because it is in a different zone, CITY'S BRF. at 12-13, and the orphanage because it pre-dates zoning. CITY'S BRF. at 12.

The character of the neighborhood, however, is created by all these structures, regardless of when they were built, or how the city accommodated them.

Whether or not the north side of the street, with church and condo, is considered or not, the Yarboroughs' side shows a consistent "50' wide rhythm." Their proposal fits methodically into that rhythm, and should have been allowed.

## VI. Yarborough's House is the Only One Significantly Off Center

The City characterizes all the houses near the Yarboroughs' as non-centered in their lot. CITY'S BRF. at 3. While this may be true to some degree, it is a small degree – except for the Yarboroughs'.

While four other lots are large enough to subdivide, and one is wide enough, the Yarboroughs' is the only lot in the neighborhood that: 1) is large enough to be halved while maintaining density and other zoning restrictions, 2) has its house so situated that it can be split down the middle and both resulting lots would maintain the street's 50' rhythm, and 3) is wide enough so that a house can be built on the new lot that would match its neighbors.

## VII. Variances are About Proposed Use, Not Personal Circumstance

In suggesting the Yarboroughs did not prove hardship, the City relies on a quotation from the ZBA's decision that "it had not been a burden to keep the house on a[] conforming lot in existence for decades," CITY'S BRF. at 19, and alleges that the Yarboroughs' lot "has been similarly enjoyed by prior owners over the last 125 years." CITY'S BRF. at 20.

For the same purpose the City relies on a unsubstantiated quotation from an abutter that "[i]t is our understanding that the Yarboroughs seek to subdivide their lot in order to maximize their investment," CITY'S BRF. at 20-21, and alleges that "[t]he Yarboroughs are attempting to potentially double their investment." CITY'S BRF. at 20.

Consideration of variances is confined to the conditions of the land and its environment, *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005) (special condition of land); *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 518 (2011) (special condition of building), and not individual circumstances of the applicant. *Margate Motel, Inc. v. Town of Gilford*, 130 N.H. 91, 95 (1987) ("[T]he criterion for unnecessary hardship is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight.") (quotation omitted).

Accordingly, it is not relevant whether or how the Yarboroughs' predecessors were able to use the land. And there is no basis or relevance for the accusation that the Yarboroughs seek profit; they are merely trying to accommodate their growing family and careers.

## CONCLUSION

The Yarboroughs have two alternatives to their current proposal. They could build a sizeable garage 10 feet from their westerly lot line with a second-storey office and storage space, which would have the same effect on neighborhood green space as their current proposal, yet be generally less attractive. Or they could tear down their existing home and build a 80-foot wide manor house which would also eliminate neighborhood green space, but would not fit local character. It is believed neither of these alternatives would require variances.

Their current proposal however, is humble, attractive, and designed to match its environs. The variance they requested is modest, and should have been granted.

Respectfully submitted,

Joseph & Ellen Yarborough
By their Attorney,

**Law Office of Joshua L. Gordon**

Dated: January 8, 2016

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## CERTIFICATIONS

I hereby certify that on January 8, 2016, copies of the foregoing will be forwarded to Jane M. Ferrini, Esq., Portsmouth City Attorney.

Dated: January 8, 2016

Joshua L. Gordon, Esq.

## ADDENDUM