— 19 MAIN STREET: EXPERT TESTIMONY REQUIRES RESPECT —

July 19, 2022

Planning Board
8 Newmarket Road
Durham, NH 03824

RE: 19-21 Main Street – Parking Lot. Formal application for site plan and conditional use for parking lot on four lots and reconfiguration of the entrance. Toomerfs, LLC c/o Pete Murphy and Tim Murphy, property owners.…Map 5, Lots 1-9, 1-10, 1-15, and 1-16. Church Hill District.

Dear Members of the Board,

The pile of documents requiring your review is growing. I sympathize. Nonetheless, I hope you will read the attached article in light of the expert testimony that you have already received. Why do I bring up this topic?

Deliberations on the Conditional Use criteria for the 19 Main Street application have not reflected appropriate respect for pertinent testimony submitted by experts.

The Board's quasi-judicial role requires weighing conflicting expert testimony. As noted in *The Planning Board in New Hampshire: A Handbook for Local Officials (Updated: 2021)*:

> …you should strongly heed unrefuted expert opinions, even if they disagree with your point of view. [For more on expert opinions, see Land Use Decisions: Expert Opinions and the Board's Personal Knowledge, New Hampshire Town and City, November/December 2009.]

The above-referenced article includes numerous lessons from NH case law, including:

> …a real estate broker with 27 years' experience who had taken numerous courses in real estate marketing was qualified to offer expert testimony on the market value of real property. *Dwire v. Sullivan,* 138 N.H. 428 (1994).

and:

> …there are limits to the fact-finding discretion of land use boards, as was illustrated recently in the case of *Continental Paving, Inc. v. Litchfield,* 158 N.H. 570 (2009), in which a zoning board of adjustment (ZBA) decision was overturned when the board unjustifiably rejected the opinions of the applicant's environmental consultants and relied instead on other information.

Expert testimony submitted to you—none of which is posted as such but listed instead under less clearly identified "Citizen Comments"—includes:

- **Peter Stanhope 7-14-22**—Chief Appraiser/Certified General Appraiser of the Stanhope Group in Portsmouth, frequently testifies in court cases

- **Joan E. Friel, The Masiello Group** (**Realtor's Letter on Behalf of Sandy Urso 7-8-22**)—a residential realtor with 35 years of experience, almost entirely in Durham, i.e., with feet-on-the-ground knowledge of what features attract or dissuade buyers and affect sales prices.

- **Wilfred Wollheim 7-7-22**—"an aquatic ecosystem ecologist in the Department of Natural Resources and the Environment at UNH" who has "conducted extensive hydrological and water quality measurements in College Br. over the past 10 years, including working with the Town of Durham on its non-point nitrogen assessment in the early 2010's."

- **John Parry 3-21-22** and **John Parry 12-11-20**—an urban forester with a BS and MS in Forestry and 42 years experience working with State and Federal government forestry agencies, mostly in the specialty area of Urban and Community Forestry

- **Richard Hallett 3-17-22** and **Richard Hallett 12-9-20**—forest ecologist, particularly ecology of urban forests and author of papers on the ecology and health of forests in Boston, New York City, Philadelphia, and Baltimore.

In this case, the expert input from both Parry and Hallett has also been incorrectly characterized in Planner Behrendt's guidance to the Planning Board. Both the Planner's Review 6-22-22 and the Planner's Review 7-13-22 describe "opinions expressed by two foresters on behalf of the abutters." In fact, neither the Ursos nor the Andersens solicited those foresters' input. One abutter even noted in a private email that she has never heard of these gentlemen." Another wrote: "I have no knowledge of who these people are." No: The foresters drew on their professional expertise to write on behalf of the environment, the Town, and the broader negative fiscal impact of removing urban forests. ((One could, of course, characterize their expert input as verifying abutters' concerns over negative lifestyle and property value impacts of the proposal. However, their input should not be diminished in perceived value and objectivity by being misidentified in its origin.)

Under "Conclusions and Suggestions," the *Town & City* article notes:

> **When faced with expert opinions from the applicant's consultants, a land use board obviously has greater discretion (and often greater assurance that it has the full picture) when there are other expert opinions on the issues. This occurs when opponents organize to hire their own consultants.…**

Indeed.

Regards,

Robin

Attachment: "Land Use Decisions: Expert Opinions and the Board's Personal Knowledge," by David Connell, "legal services counsel with the New Hampshire Local Government Center's Legal Services and Government Affairs Department" at the time of the article's publication in *Town & City Magazine* (November 2009), which you may all receive. (See next page.) One can also read the article online.

https://www.nhmunicipal.org/town-city-article/land-use-decisions-expert-opinions-and-board%E2%80%99s-personal-knowledge

New Hampshire Municipal Association, *Town & City Magazine,* November/December 2009

Land Use Decisions: Expert Opinions and the Board's Personal Knowledge

By David R. Connell

Municipal land use boards have the challenging task of deciding cases based on mixtures of conflicting evidence from the applicants' teams of consultants: opposing abutters and their consultants; the boards' staff and consultants; and the board members' own knowledge of the community and the site. In their decision-making, boards have, for decades, relied heavily on two principles articulated by the New Hampshire Supreme Court in *Vannah v. Bedford*, 111 N.H. 105, 112 (1971), that appear to endow boards with enormous discretion: (1) a land use board does not have to accept the conclusions of experts and (2) a board may rely on its own knowledge and experience with the community and the vicinity of the application. In other words, a board not only may evaluate the validity of experts' opinions; the board also exercises expertise of its own with respect to local conditions. However, there are limits to the fact-finding discretion of land use boards, as was illustrated recently in the case of *Continental Paving, Inc. v. Litchfield*, 158 N.H. 570 (2009), in which a zoning board of adjustment (ZBA) decision was overturned when the board unjustifiably rejected the opinions of the applicant's environmental consultants and relied instead on other information.

The *Vannah* rules flow from a fundamental policy of administrative law to place certain quasi-judicial decisions in the hands of specialized administrative agencies. It is important for land use boards to understand the legal principles involved in order to make the best use of expert opinion evidence and their own knowledge and experience in decision-making. This article will first restate the familiar deferential standard of judicial review for land use board and other administrative agency appeals, which creates the context of the *Vannah* rules. Next, the *Vannah* case, itself, will be looked at in more depth. Then, some of the administrative and court rules of evidence that underlie the Vannah rules will be examined. The Supreme Court decisions that have applied *Vannah* will then be reviewed. Finally, some conclusions will be drawn as to the limitations of the *Vannah* rules, and some practical suggestions will be made for land use boards.

The Statutory Standard of Review in Land Use Appeals

It is well-established that decisions of local land use boards, as administrative agencies created by the Legislature for a particular purpose, are to be reviewed with deference by the superior court. Board of adjustment appeals are subject to RSA 677:6. "The superior court's review in zoning cases is limited. Factual findings of the ZBA are deemed *prima facie* lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable." *Daniels v. Londonderry*, 157 N.H. 519, 523 (2008). Although RSA 677:15 uses different language for planning board appeals, the Supreme Court has held that the standard of review is the same for ZBA and planning board appeals. Bayson Properties, Inc. v. Lebanon, 150 N.H. 167, 175-76 (2003). The same standard of review applies to decisions of state agencies under RSA 541:13. *In re: Bethlehem*, 154 N.H. 314, 320-21 (2006).

Vannah v. Bedford

Vannah v. Bedford was an appeal from denial of a variance. The trial court found that the ZBA's decision was unreasonable. In so doing the trial court emphasized the expert opinion evidence of a real estate appraiser as to value and traffic consultants as to future traffic impacts. The Supreme Court first noted that the zoning statutes

manifest a legislative intent to vest in a local board, whose members live close to the circumstances and conditions, authority to determine the public need and the means of meeting it in cases like the present one. It is only when the board has acted illegally, unjustly, or unreasonably that the courts can grant relief on appeal. In arriving at a decision, the members of the board can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. [citations omitted]

111 N.H. at 108. The Court reversed the trial court and upheld the ZBA:

The Board found that public rights would be injuriously affected by the granting of the variance because of the increased traffic and the traffic patterns which would result from the use of plaintiffs' property as a filling station. There was evidence to the contrary by expert witnesses. However, the Board could properly rely on its own knowledge of the area resulting from its familiarity therewith in arriving at its conclusion. It did not have to accept the conclusions of the experts. [citations omitted]

111 N.H. at 112. In support, the Court cited *O.K. Fairbanks Co. v. State*, 108 N.H. 248, 252 (1967), an appeal in which the Court upheld the jury verdict in a civil action to determine eminent domain damages:

The jury took a view of the premises in question. The knowledge and information gained thereby could constitute evidence to be considered by them in connection with the other evidence in the case in arriving at the amount of damages caused to the plaintiff. The opinions of the experts as to plaintiff's damage need not be blindly followed by the jury but are to be weighed by them and judged in view of all the evidence in the case. A jury can accept the testimony of the expert offered by one party and reject that of the experts offered by the other. It was for the jury to decide how much of the evidence to accept or reject. [citations omitted]

Thus, *Vannah* is rooted both in the statutory standard for administrative review and the principles for evaluating evidence in civil litigation.

Opinion Evidence in Civil Actions

The rules of evidence applied in the superior courts and district courts are promulgated by the New Hampshire Supreme Court. Rules 701 through 705 deal with opinion testimony by lay witnesses and expert witnesses. Land use board members should have some awareness of the general principles to assist them in evaluating the opinions of others and, equally important, to assess the strength of their own knowledge and experience.

Non-Expert Opinion Testimony. Rule 701 pertains to opinion testimony by lay witnesses. It permits non-experts to testify to "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue." In other words, a non-expert opinion can be valuable when the person explains the basis of his or her knowledge and the subject does not require special expertise. The most common example of non-expert testimony in court is an owner's opinion of the value of his or her own property. *Joslin v. Pine River Development Corp.*, 116 N.H. 566 (1976) (real estate); *McNamara v. Moses*, 146 N.H. 729 (2001) (trees).

Much of the testimony at land use board public hearings, including the remarks of board members concerning their personal knowledge of the vicinity, would fit the category of non-expert opinion. Such opinion evidence is persuasive only to the extent that the speaker explains the underlying facts and the subject does not require the knowledge of an "expert."

Expert Opinion Testimony. Rule 702 pertains to opinion testimony by experts. It provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An expert's qualifications must be demonstrated, but the standard is relatively modest. The expert must have knowledge of the subject matter, by study or experience, superior enough to the knowledge of people in general that the expert's views "will probably assist the trier of fact." Thus, a real estate broker with 27 years' experience who had taken numerous courses in real estate marketing was qualified to offer expert testimony on the market value of real property. *Dwire v. Sullivan*, 138 N.H. 428 (1994). On the other hand, it must be kept in mind that "[e]xpert testimony is required only where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Porter v. Manchester*, 151 N.H. 30, 46 (2001).

The judicial system relies on the adversarial process in litigation to expose the weaknesses of an expert opinion through pretrial discovery and cross-examination at trial by well-prepared lawyers. Land use boards, for better or worse, do not function in such an intense adversarial environment. They must evaluate expert opinion as best they can with the tools available to them. (See discussion at the conclusion of this article.)

Facts Within an Administrative Agency's Specialized Knowledge

RSA 541-A is the Administrative Procedure Act, which governs the proceedings of State administrative agencies. Section 33 deals with evidence and the agency's use of its experience and knowledge. If an agency intends to take notice of "generally recognized technical or scientific facts within the agency's specialized knowledge," the agency must give notice and an opportunity for the parties to rebut or contest such facts. However, no notice is required if the agency merely uses its "experience, technical competence and specialized knowledge" in the evaluation of evidence. RSA 541-A:33, V (c) and VI; *Appeal of Grimm*, 138 N.H. 42, 53 (1993).

Land use boards, too, should keep in mind the distinction between using their knowledge and experience to establish relevant facts in a case, which should be carefully explained in the record, and simply using knowledge and experience to evaluate evidence submitted by parties, which is part of the process in every case.

Cases After Vannah

***Durant v. Dunbarton*, 121 N.H. 352, 357 (1981)**. This was an important case in establishing the authority of planning boards to rely on their own knowledge and experience and to enforce regulations with higher standards than those of the State. The subdivision regulations broadly required land to be suitable for development without danger to public health or safety:

The record reveals that the board took several views of the lot in question. They walked the land and twice examined the depth of water in test pits. They evaluated the topography of the land and subsurface conditions to determine whether the land would be suited for development of the proposed density. All of these considerations are permissible and desirable in subdivision review…. From its observations, the board concluded that the high water table in the area created the potential for groundwater contamination and flooding. The plaintiff makes much of the fact that the New Hampshire Water Supply and Pollution Control Commission approved the plan. However, the planning board is entitled to rely in part on its own judgment and experience in acting upon applications for subdivision approval. [citation omitted]

***Barrington East Cluster Unit I Owners Ass'n v. Barrington*, 121 N.H. 627 (1981)**. Here limits were expressly imposed on the discretion of land use boards. The ZBA approved a special exception for a proposed shopping mall with no evidence to contradict abutters' testimony that the project would diminish property values and create traffic congestion. The Court reversed, noting that the ZBA's decision must be based on "more than (the) mere personal opinion ... of its members."

***Condos East Corp. v. Conway*, 132 N.H. 431 (1989)**. In this case, the developer's and the planning board's consulting engineers agreed that the proposed subdivision road would be safe, but the planning board denied approval of the subdivision. The Court reversed, saying that the board "chose blatantly to ignore this expert advice, even though it was completely uncontradicted."

***Smith v. Wolfeboro*, 136 N.H. 337 (1992)**. The developer had State approval of an on-site septic system for the lot in question. The planning board denied approval, and the Court reversed. The case differed from *Durant*. First, the regulations provided that State approval was sufficient proof of adequate conditions for sewage disposal, in the absence of proof of "exceptional danger of health." In other words, the regulations established a presumption that State approval was sufficient. Second, the board's evidence was not compelling. The board relied primarily on a memo

from the board's chairman, who, the Court noted, was "not qualified in the record as an expert." The memo stated that a different type of septic system would be superior in preventing lake pollution. This was insufficient to justify denial of approval.

***Nestor v. Meredith*, 119 N.H. 632 (1994)**. The issues resembled those in *Vannah* except that, in this case, the ZBA approved the application. The ZBA was upheld in rejecting expert testimony as to the adverse impact of the applicant's proposed convenience store on the neighborhood and in relying on its own knowledge of the area.

***Star Vector Corp. v. Windham*, 146 N.H. 490 (2001)**. This is an interesting contrast to *Condos East*. The issue for the planning board in a site plan application was whether an indoor shooting range would pose an unacceptable risk of release of toxic and hazardous substances into the environment. Opponents submitted articles from medical and other professional journals and other reports concerning the dangers of lead contamination associated with shooting ranges and the effectiveness of air filtration systems in shooting ranges. The architect and vendors of the air filtration system actually proposed for the range testified that the system would be adequate. The Court affirmed the board's denial of the application, holding that the board could reasonably have rejected the applicant's consultants' opinions because of the conflicting documentary evidence.

***Richmond Co., Inc. v. Concord*, 149 N.H. 312 (2003)**. The applicant sought site plan approval for a shopping center in a zoning district that required compatibility with the existing historic and architectural character of the area. The City's architectural design review committee found the design suitable, but opposition was expressed by letters from local professionals and interest groups and the New Hampshire Division of Historical Resources. The Court upheld the planning board's denial of the site plan, ruling that there was "sufficient evidence before the board to allow it, in conjunction with its own judgment and experience" to justify the decision.

***Malachy Glen Assoc., Inc. v. Chichester*, 155 N.H. 102 (2007)**. The applicant applied for a variance to build in the 100-foot wetlands buffer. The applicant's consultant submitted an opinion that a set of detention ponds would protect the wetlands from storm water runoff. A ZBA member stated that a nearby pond had flooded and that the applicant's proposed paving of the site would worsen the flooding problem. There was no supporting evidence, no discussion of the point and no listing of flooding in the written decision as a reason for denial. Denial of the variance was reversed.

***Daniels v. Londonderry*, 157 N.H. 519 (2008)**. The ZBA granted a variance for a telecommunications tower. On the issue of diminution of property values, the applicant and opponents both submitted site-specific appraisals and other valuation studies, and the ZBA made personal observations. The ZBA had the discretion to find no diminution in value, and the variance was upheld.

***Derry Senior Development, LLC v. Derry*, 157 N.H. 441 (2008)**. The Supreme Court found this case to be "strikingly similar" to *Smith v. Wolfeboro*. The site plan regulations provided that DES approval of an on-site subsurface sewage disposal system was sufficient. The applicant obtained DES approval of a community system with four-inch collection pipes. The town engineer recommended six-inch pipes, and the applicant was willing to use them. The town Department of Public Works (DPW) recommended eight-inch pipes. At the public hearing a board member, the assistant director of the DPW, testified that all the community systems built in the 1980s in Derry had failed because the pipes were too small, and the application was then denied. Citing *Smith*, the Court held: (1) the DES approval established a presumption of adequacy of the applicant's design; and (2) the assistant DPW director's evidence of past system failures did not overcome the presumption, because it did not specifically establish that *six*-inch pipes, which the pending application proposed, had failed in the past.

***Continental Paving, Inc. v. Litchfield*, 158 N.H. 570 (2009)**. The applicant sought a special exception to build a gravel access road about 60 feet from a vernal pool and presented the expert opinions of a wetland scientist and a field biologist that the proposed road would neither contaminate sensitive areas nor adversely affect wildlife around the vernal pool. The ZBA denied the special exception, relying instead on a conservation fact sheet from New Hampshire Audubon and rules promulgated by the Maine Department of Environmental Protection that contained general information. The conservation fact sheet recommended a 100-foot buffer for water quality and 300 yards of natural habitat for vernal pool breeders. The Town argued that ZBA members had transformed the information in the documents into their personal knowledge, which they relied on in denying the special exception. The Court rejected this claim, ruling that the documents were only evidence, which was overwhelmed by the specific expert opinions of the applicant's consultants, whose credentials and methodology were unchallenged. The case was somewhat similar to *Star Vector*, but that case was not mentioned.

***Farrar v. Keene*, 158 N.H. 684, 690 (2009)**. This case involved a request for a use variance and area variance to convert a building from a single-family dwelling to a mixed office-residential use with substandard on-site parking. In contrast to

Continental Paving, the Court found the case well-suited for deference to the personal knowledge of the ZBA members:

After review of the record, we acknowledge that this is a close case. In close cases, where some evidence in the record supports the ZBA's decision, the superior court must afford deference to the ZBA. … The ZBA, composed of members of the community and having knowledge and understanding of the surrounding area, is in the best position to make decisions regarding use of the land. If the ZBA grants the variance and evidence in the record supports the decision, the superior court should defer to the ZBA's conclusion. … Here, the superior court did not give such deference to the local board. We thus conclude that the superior court erred in ruling that the record does not support the ZBA's finding of unnecessary hardship. [citations omitted]

Conclusions and Suggestions

Several conclusions may be drawn from review of the statutes, rules and cases, and certain recommendations suggest themselves:

First and foremost, a land use board that seeks to rely on the knowledge and experience of its members in a contested case will be successful only to the extent that members can articulate that knowledge during the public hearing and deliberations and in the written decision. If the board wishes to take notice of a certain relevant fact, a member must state the fact, the basis of the member's knowledge and the relevance of the fact to an issue in the application. In fairness, parties should have an opportunity for rebuttal. Then the significance of the fact should be explained during deliberations and in the written decision. If the board wishes to rely on its knowledge and experience to evaluate controversial evidence, it is up to a member to demonstrate such knowledge in intelligent questioning of consultants at the public hearing and analysis of the evidence during deliberations and in the written decision.

The Court recognizes and defers to the judgment of a land use board in evaluating a proposed project's effects on property values, character of a neighborhood and other local aesthetic values. The Court is less inclined, however, to defer to a board's discretion concerning matters of public health, safety or environmental quality, which call for "expert opinion" along the lines of Rule 702 of the rules of the evidence for the trial courts.

Uncontradicted expert opinion is an exceedingly challenging obstacle for a skeptical land use board to overcome. In principle, a board may simply disbelieve an expert,

but in a contested case the board must be prepared to attack the expert's qualifications and/or the quality of the expert's work in that particular case. This is difficult enough for lawyers in the adversarial litigation process: it is much more so for a quasi-judicial board. It takes astute questions and a thorough explanation in the written decision of why the board rejects the qualifications of the consultant or the consultant's opinion.

In the absence of higher standards in the local regulations, a state permit for a particular activity can be the equivalent of a strong expert opinion that public health or safety or environmental quality will be protected. Clear and convincing evidence will typically be required to contradict a permit from a State agency.

Professional journal articles and fact sheets from public interest organizations can be strong evidence, but they can rarely outweigh the specific opinion of a qualified expert who has analyzed the specific proposal before the board.

When faced with expert opinions from the applicant's consultants, a land use board obviously has greater discretion (and often greater assurance that it has the full picture) when there are other expert opinions on the issues. This occurs when opponents organize to hire their own consultants. Of course, this does not always happen, and then the only way for a board to obtain a second opinion is to hire an independent consultant. RSA 673:16 allows all land use boards to hire consultants if funds are available. But only the planning board has the express statutory authority to pass the cost on to the applicant under RSA 676:4, I (g), for subdivisions, and RSA 674:44, V, for site plans.

Given the ever increasing importance of expert opinion evidence in land use applications, the Legislature may wish to consider legislation to clearly empower all local land use boards to hire independent consultants at the expense of applicants.

David Connell is legal services counsel with the New Hampshire Local Government Center's Legal Services and Government Affairs Department. For more information on this and other topics of interest to local officials, LGC's legal services attorneys can be reached Monday through Friday from 8:30 a.m. to 4:30 p.m. by calling 800.852.3358, ext.384.