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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

**In Case No. 2008-0901, Marc Sneider v. Town of Windham,
the court on July 31, 2009, issued the following order:**

Having considered the parties' briefs and the appellate record, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). The intervenor, Brian Bauchman, Jr., appeals a superior court order reversing the decision of the Town of Windham Zoning Board of Adjustment (ZBA) that granted a use variance for the expansion of the existing towing company on his property. The intervenor argues that the superior court erred by: (1) ruling that the ZBA's decision was based upon a misunderstanding of a prior court order; (2) ruling, in the alternative, that several factors weigh against the awarding of a variance; and (3) reversing the ZBA's decision rather than remanding the matter for further proceedings consistent with its order. Finding no error, we affirm.

The intervenor first argues that the superior court erred by unreasonably inferring that the ZBA, in granting the variance, had misconstrued the court's March 10, 1997 order in Case No. 95-E-470 (the 1997 order). 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. Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007). We will uphold the superior court's decision unless the evidence does not support it or it is legally erroneous. Id. The superior court based its inference upon the ZBA's decision to grant the variance "for expansion of the existing Towing Company" The property is located in the town's rural district, which is intended for rural, residential, and non-commercial uses. Windham, N.H. Ordinances § 602. The record shows that the intervenor had not previously obtained a variance to allow him to operate his towing company on the property, nor did the 1997 order permit him to do so. The superior court reasoned that the ZBA could not, therefore, lawfully approve an "expansion of the existing Towing Company" on the property. We conclude that the superior court's decision is supported by the record and is not legally erroneous.

The intervenor next argues that the superior court erred by ruling, in the alternative, that "several factors exist which weigh against the awarding of a use variance in this case even if the business had been permitted" by the 1997 order. An applicant seeking a variance must demonstrate, among other things, that special conditions exist such that a literal enforcement of the provisions of

the ordinance will result in unnecessary hardship. Malachy Glen, 155 N.H. at 105. In his application, the intervenor asserted that denial of the variance would result in unnecessary hardship in part because the property, though located within the rural district, is situated on a heavily-traveled State highway and is .6 miles from the Neighborhood Business District and .9 miles from an industrial district, where commercial uses similar to the intervenor's proposed use are permitted. The superior court ruled that the property's location next to a highway and its proximity to more commercial districts are insufficient reasons for granting a variance. Although the intervenor argues that the superior court did not consider the evidence as a whole and did not specify which variance criterion he failed to satisfy, we conclude that the superior court's order "sets forth both sufficient findings of fact and essential rulings of law to support the ultimate decision." See Harrington v. Town of Warner, 152 N.H. 74, 86 (2005).

Finally, the intervenor argues that assuming the ZBA misunderstood the 1997 order, the superior court erred by reversing the ZBA's decision, rather than remanding the matter to the ZBA for further proceedings. On appeal, the superior court may, in its discretion, remand a matter to the zoning board of adjustment for further proceedings consistent with its order. See RSA 677:11 (2008). In this case, however, given the superior court's ruling that the intervenor could not satisfy the criteria for a variance even if the 1997 order had permitted him to operate his towing company on the property, we find no error in the superior court's decision. See Malachy Glen, 155 N.H. at 105 (remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion).

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**

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