State of New Hampshire
Supreme Court

MICHAEL BOCCIA &a.,
Petitioners/Appellants,

v.

CITY OF PORTSMOUTH,
Respondent/Appellee,

and

RAYMOND RAMSEY,
Intervenor/Appellee.

N.H. Sup. Ct. No. 2003-493

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OBJECTION TO MOTION FOR RECONSIDERATION

NOW COMES Michael Boccia &a. (collectively "the neighbors"), by and through their attorney, Joshua L. Gordon, and respectfully requests this honorable court to deny the motion for reconsideration filed by the intervenor, Raymond Ramsey.

As grounds it is stated:

1. Mr. Ramsey, the intervenor, has filed a motion for reconsideration arguing that this Court's recently announced decision should not apply to the parties, but only prospectively.

I. Constitutional Prohibition Against Retrospective Laws Applies to Legislation Only

1. To support his position, Mr. Ramsey cites several cases and notes the constitutional prohibition against retrospective application of laws. The cases he cites, however, and indeed the entire line of jurisprudence to which those cases belong, pertain only to *legislative* enactments.

See Eldridge v. Eldridge, 136 N.H. 611, 613 (1993) ("As a general rule, ***statutes*** are to be applied prospectively.") (emphasis added) (statute applied retroactively); *Croteau v. Croteau*, 143 N.H. 177, 181 (1998) (holding that statute determining property division in divorce did not apply retroactively because "no indication that the legislature intended that the statute be applied retrospectively"); *Pepin v. Beaulieu*, 102 N.H. 84, 89 (1959) (statute applied retroactively).

2. It is believed that every case construing the constitutional provision barring retrospective application of the laws, N.H. CONST., pt. I, art. 23, pertains to subsequently-enacted legislation, not to rules of law made by courts in the common-law process of adjudication. *See e.g.*, *Lower Village Hydroelec Assoc v. City, Claremont*, 147 N.H. 73 (2001); *Cagan's, Inc. v. Dep't of Rev. Admin.*, 126 N.H. 239 (1985); *State v. Ballou*, 125 N.H. 304, 308 (1984) ("The policy underlying [article 23] is to prevent ***the legislature*** from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of a law.") (emphasis added, quotations omitted); *Woart v. Winnick*, 3 N.H. 473, 379 (1826).

3. This case does not concern new legislation. It involves merely the intreptation of language that has been part of New Hampshire law for decades.

II. Common Law Rule is That Court Decisions Apply Retroactively

4. There is an entirely separate jurisprudence regarding the application of rules of law announced by courts.

> At common law, decisions overruling prior precedents were presumed to apply retroactively. Although we reject pat application of this rule, we note its soundness when applied in certain instances. A newly announced rule of law is ideally premised on the court's determination that this rule's application will reach results more just than those reached under prior law.

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> According to the common law view, by saying what the law is, the court says, in effect, what it should always have been. We are mindful of the persuasiveness of this proposition in instances . . . where the law has been changed solely to achieve justice and not to accommodate new social realities."

Waid v. Ford Motor Co., 125 N.H. 640, 641-42 (1984) (citations omitted); *see Linkletter v. Walker*, 381 U.S. 618 (1965). Thus, "[p]rinciples announced for the first time in opinions of the Supreme Court generally affect cases already commenced as well as cases arising after the date of the opinion." 5 R. Wiebusch, NEW HAMPSHIRE CIVIL PRACTICE AND PROCEDURE §62.54 at 582 (2003). *See e.g., Heron Cove Ass'n v. DVMD Holdings, Inc.*, 146 N.H. 211, 216 (2001) (applying decision retroactively); *Hutchinson v. Hutchinson*, 133 N.H. 772, 776 (1990) ("Appellate decisions in civil cases generally will be applied retroactively."); *Hall v. Tibert*, 132 N.H. 620, 621 (1989) ("At common law, appellate decisions in civil cases are presumed to apply retroactively."); *Panto v. Moore Business Forms, Inc.*, 130 N.H. 730, 742 (1988) (applying decision retroactively); *Stanley v. Walsh*, 128 N.H. 692, 693-94 (1986) ("it is the general common law rule that appellate decisions in civil cases operate retroactively").

5. The rule has survived various constitutional complaints. *See Hampton Nat'l Bank v. Desjardins*, 114 N.H. 68, 73 (1974) (rule does not violate impairment of contract, due process, *ex post facto*, or equal protection clauses).

6. In *Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. 656 (2003), this Court restated the general rule, and also summarized the exceptions to it by adopting the United States Supreme Court's three-part standard. Thus, the rule that decisions apply retroactively will be set aside upon consideration of:

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> (1) whether the holding establishes a new principle of law by overruling clear precedent or by deciding an issue that was not clearly foreshadowed; (2) whether the merits of the case warrant prospective application, viewed in light of the history of the rule in question, its purpose and effect, and whether retrospective application will advance or retard its operation; and (3) whether inequity would result from retrospective application.

Estate of Ireland v. Worcester Ins. Co., 149 N.H. at 658 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Opinion of the Justices*, 131 N.H. 644, 650 (1989); *Hampton Nat;l Bank v. Desjardins*, 114 N.H. 68, 75 (1974)).

7. In *Lee James Enterprises, Inc. v. Town of Northumberland*, 149 N.H. 728 (2003), this Court discussed the history of retrospective application of its decisions, and the exceptions explained in *Estate of Ireland*. It also noted that even were the Court to set aside the common law rule of retrospectivity, the "new law" still applies to the parties to the adjudication in which it is announced.

8. Although there are plausible arguments to the contrary, *see James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), it could not be otherwise. If it were, discrimination would be banished everywhere but Topeka, contraception would allowed everywhere but Connecticut, and the children of Claremont would be the only ones in New Hampshire without a right to an adequate public education. *Brown v. Board of Education*, 349 U.S. 294 (1955); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Claremont School Dist. v. Governor*, 138 N.H. 183 (1993). Landmark cases would apply to everybody except the person who sought to remedy the wrong. *Lee James Enterprises*, 149 N.H. at 730 (noting "the question of whether a decision of this court announcing a new rule of law applies prospectively or retroactively has not usually arisen until a

later case").

III. Rule That Court Decisions Apply Retroactively: *Estate of Ireland* Exceptions

9. But even without *Lee James Enterprises*, here Mr. Ramsey does not even meet the *Estate of Ireland* exceptions.

***Ireland* 1: Whether the Holding Was Foreshadowed**

10. *Estate of Ireland* held that a factor to consider was "whether the holding establishes a new principle of law by overruling clear precedent or by deciding an issue that was not clearly foreshadowed."

11. Until a few years ago, variance law had developed so that hardship had to be "so great as to effectively prevent the owner from making any reasonable use of the land," *Governor's Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983), and therefore overly difficult to prove with regard to constitutional property rights. In *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992), this Court upheld the denial of the variance, but over a significant dissent. There Judge Horton noted that the variance rule had become ungainly harsh. Although he was "uncertain what approach constitutes the proper approach to unnecessary hardship," he was "convinced that we have gone too far in our requirements." *Grey Rocks*, 136 N.H. 239 at 247 (*Horton, J.*, dissenting).

12. In *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), this Court took up Judge Horton's invitation, and "established a new, less restrictive standard," *Boccia v. City of Portsmouth*, __ N.H. __, slip. op. at 4 (decided May 25, 2004), for demonstrating unnecessary hardship. *Simplex* was a use-zoning case. Later, in *Bacon v. Town of Enfield*, 150

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N.H. __, 840 A.2d 788 (2004), this Court was "divided . . . on how to analyze unnecessary hardship in the context of an area variance." *Boccia*, slip. op. at 5. Given this uncertainty in the law, as well as the volume of variance cases in recent years together with the unusual number of concurring and dissenting opinions in a court generally given to unanimity, it has been obvious to any observer that the law of variances in New Hampshire has been in flux.

13. Moreover, it was readily apparent, from the decision in *Simplex* itself and from the Superior Court's order applying it to this case, that the *Simplex* rule did not address the issues of import in deciding area variances. Twenty five years ago this Court noted the differences between use and area variances. *Ouimette v. City of Somersworth*, 119 N.H. 292, 295 (1979). In the *Bacon* concurrence and in the *Boccia* decision, this Court pointed out that "many States use different tests for use and area variances." *Boccia*, slip op. at 6; *see Bacon*, 840 A.2d at 795 (*Duggan*, J., dissenting). Therefore, it can hardly be a surprise that this Court has finally developed separate tests for the two different situations. *C.f. Ouimette*, 119 N.H. at 295. While the exact contours of the *Boccia* rule could not have been forecast, that this Court would develop a rule designed to balance the interests, could.

14. When confronted with the 60-room hotel counter-proposal put forth by the neighbors that did not require any area variances, Mr. Ramsey did not seek to establish that it was not sufficient, not profitable, or otherwise not acceptable. Throughout this litigation, and despite the foreshadowing, Mr. Ramsey obstinately ignored the issues the neighbors repeatedly raised.

***Ireland 2*: Whether Retrospective Application Will Advance the New Rule**

15. *Estate of Ireland* held that a second factor to consider when determining if the

common law rule should be set aside was "whether the merits of the case warrant prospective application, viewed in light of the history of the rule in question, its purpose and effect, and whether retrospective application will advance or retard its operation."

16. Since Judge Horton's dissent in *Grey Rocks*, the old standard (exemplified in *Governor's Island*) has been significantly relaxed. It is evident, if from nothing else the example of a zoning-compliant 60-room alternative, that Mr. Ramsey would not have been able to prove hardship under that old standard. He would have been unable to make the required showing – that he could make no reasonable use of his land without a variance. Thus, the ultimate result for Mr. Ramsey is that on remand he now has an opportunity to get a variance for which he formerly never would have had a chance.

17. In light of both this history and Mr. Ramsey's strategic failure to attempt to establish ***hardship*** in a meaningful way, neither the merits of this case nor the importance of Portsmouth's zoning ordinance to its citizens justify excusing him from proving it.

***Ireland 3*: Whether Inequity Would Result**

18. *Estate of Ireland* suggested that the third factor to consider was "whether inequity would result from retrospective application," but *Ireland* also cast doubt on the continuing validity of this prong of the test. *Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. at 659.

19. Regardless, no inequity will result from application of the rule in this case for several reasons. First, the rule adopted by this Court is in line with the position advocated by Mr. Ramsey in his oral argument.

Judge Broderick: Is reasonableness guaged by how much money you make . . . ?"
Attorney Griffin: "That's part of the balancing test. It's one of the factors in the equation"

Boccia v. Portsmouth, ORAL ARGUMENT at 11:34:12 to 11:34:29.

Judge Duggan: If the goal is to make money . . . .would that be determinative?
Attorney Griffin: I don't think it would be determinative. . . . I think that is part of the equation of which there are numerous other factors.

Boccia v. Portsmouth, ORAL ARGUMENT at 11:38:10 - 11:38:25.

Attorney Griffin: "This court needs to provide a framework, but allow the board of adjustment a degree of flexibility to apply that framework as it applies to each piece of property that comes before it."

Boccia v. Portsmouth, ORAL ARGUMENT at 11:51:20.

20. In its decision, this Court provided a framework. It set forth a test for "hardship" for ZBAs to apply to property owners seeking variances. *Boccia*, slip. op. at 8-9. The framework, as suggested by Mr. Ramsey's lawyer, is flexible and includes consideration of financial factors. Mr. Ramsey cannot now claim surprise when the Court did what he asked.

21. Second, as noted in this Court's decision, Mr. Ramsey got his property re-zoned in 1998. Although from the court's order in that case it is apparent that Mr. Ramsey mentioned a 100-room hotel during the litigation, he apparently got re-zoning for a hotel, but not for a *100-room* hotel. Mr. Ramsey created the box into which he wants to place his hotel. It would have been far more forward for him to have created the right-size box at the outset, rather than in little steps – first re-zoning, then a variance from that zoning. In any event, whatever inequity may appear here, it is one Mr. Ramsey himself created.

22. Third, the most recent stage of this litigation began in July, 2003 when the

Superior Court (*Gillian Abramson*, J.) remanded the case to the ZBA. That was a year ago, and represents a fair estimate of the amount of time variance cases can take. If this Court exempts from *Boccia* all pending area variance cases, for a time there will be two side-by-side sets of variances cases in ZBAs and courts across the State – the pre-*Boccia* cases that would be decided under *Simplex* with no guidance for area variances, and those filed after the date of this Court's *Boccia* decision governed by the *Boccia* test. Having two simultaneous tracks of variance cases requiring courts to apply two different sets of law – one well geared for the job and one not cognizant of area variances – would be an unwieldy result of applying *Boccia* prospectively as Mr. Ramsey suggests.

D. Mr. Ramsey Cannot Meet the *Ireland* Exceptions

23. Accordingly, Mr. Ramsey's variance application does not meet the *Estate of Ireland* exceptions. Moreover, because *Lee James Enterprises* holds that even if it did, the "new law" announced in *Boccia* would apply to him nonetheless. Mr. Ramsey has advanced no reason to deviate from the common law rule that decisions of this Court apply to the parties and retroactively. Accordingly, his motion for reconsideration should be denied.

WHEREFORE, the neighbors respectfully request this honorable Court to deny Mr. Ramsey's motion for reconsideration.

Respectfully submitted
for Michael Boccia &a.
by their attorney,

Dated: June 14, 2004

Joshua L. Gordon, Esq.
Law Office of Joshua Gordon
26 S. Main St., #175
Concord, NH 03301
603-226-4225

I hereby certify on this 14th day of June 2004, a copy of the foregoing is being forwarded to Thomas Keane, Esq.; Robert Sullivan, Esq.; Charles A. Griffin, Esq.; Robert G. Eaton, Esq.; and Raymond Taylor, Clerk, Rock. Cnty. Super.Ct..

Dated: June 14, 2004

Joshua L. Gordon, Esq.