

State of New Hampshire  
Supreme Court

NO. 2020-0001

2020 TERM

JULY SESSION

Robert McDonald & Kathleen McDonald

v.

Town of Raymond

Planning Board & Zoning Board of Adjustment

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

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REPLY BRIEF

July 13, 2020

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## ARGUMENT

In their brief, the developer and the town (collectively the “developer”), in section II beginning on page 29, discuss the waiver provision, the central issue in this appeal. The developer argues it should prevail because the McDonalds “produced no evidence or reasoning showing why granting Mardan’s Waivers *would be contrary to the spirit and intent* of the road regulations.” BRF. at 36 (emphasis added, capitalization omitted).

Thus the developer appears to claim that the test to be applied is whether the proposed plan is “contrary to the spirit and intent” of the regulations. That, however, is a misstatement of the law in Raymond.

The superior court held:

Mardan and the Town note that RSA 674:44 was amended in 2009, at which time the Legislature “authorized planning boards to waive provisions in subdivision and site plan regulations without finding that conformity would pose a hardship to the applicant.” ...

Interestingly, ... [Raymond’s] Site Plan Regulation 7.009 contains the amended language of RSA 674:44, III. However, Site Plan Regulation 7.009.02 appears to be more restrictive than the statute: the introductory paragraph provides that “the Board may modify or waive these regulations so that substantial justice may be done and the public interest is secured,” but limits that authority to situations “[w]here the Planning Board finds that unnecessary hardship may result from strict compliance with these regulations.”

While the statutory language provides a universal limit on planning board authority throughout the state, individual towns are generally empowered to further limit the authority of their respective planning boards. Here, although the latter portion

of Site Plan Regulation 7.009 recognizes the broader authority granted by the 2009 amendment to RSA 674:44, the first portion of Site Plan Regulation 7.009 still indicates that the board may not grant waivers absent a finding of unnecessary hardship. Accordingly, *the Court concludes that it may only uphold the Planning Board's decision to grant the waivers at issue here if the record supports a finding that those waivers were required to avoid "undue hardship or injustice to" Mardan.*

COURT ORDER at 23-24, *Addendum to Opening Brf.* at 63-64 (citations and ellipses omitted, emphasis and paragraphing added).

The superior court correctly held that waivers may only be granted in Raymond if they are "required to avoid undue hardship or injustice to Mardan." The standard set forth by the superior court recognizes that not only must there be (1) "undue hardship or injustice," but also that (2) the undue hardship or injustice must be directed at "Mardan."

That is the correct standard created by the overlapping sections 7.009.01 and 7.009.02, of Raymond's waiver provisions. Neither the Town nor Mardan requested reconsideration of, nor appealed, that ruling.

Thus, whether the evidence would or would not support granting a waiver based on the "spirit and intent of the road regulations" is not a relevant consideration. The developer's brief is addressed to the wrong element. Nowhere in its brief does the developer discuss "undue hardship or injustice to Mardan."

The town and developer have accordingly waived a meaningful response to the McDonald's contention, and this court must find for the appellants.

Further, as noted in the McDonald's opening brief, because the hardship is directed at "Mardan," the hardship is not measured by conditions on the land

or details of the project. Rather it is directed to “Mardan” himself – his pocketbook. Because, as the developer abundantly pointed out, Mardan refused to submit financial information, there is none in the record.

Accordingly, the developer failed to prove unnecessary hardship as set forth in the Raymond rules, and this court must reverse.

Respectfully submitted,

Kathleen & Robert McDonald  
By their Attorney,  
Law Office of Joshua L. Gordon

Dated: July 13, 2020

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### **CERTIFICATIONS**

I hereby certify that this brief contains no more than 587 words, exclusive of those portions which are exempted.

I further certify that on July 13, 2020, copies of the foregoing will be forwarded to Laura Spector-Morgan, Esq.; Sharon Cuddy Somers, Esq.; and to Patricia M. Panciocco, Esq.

Dated: July 13, 2020

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Joshua L. Gordon, Esq.