HERSHENSON, CARTER, SCOTT and McGEE, P.C.

P. Scott McGee
Nathan H. Stearns *
Micaela Tucker

Of Counsel
Peter H. Carter *

ATTORNEYS AT LAW
P. O. Box 909
Norwich, Vermont 05055-0909
802-295-2800

FAX 802-295-3344
www.hcsmlaw.com

General Practice of Law
Vermont and New Hampshire *

April 29, 2019

Robert Houseman, Director of Planning and Zoning
Town of Hanover, Dept. of Planning and Zoning
PO Box 483
Hanover, NH 03755
Robert.houseman@hanovernh.org

Re: Jeff and Lara Acker, Request for Rehearing
Christ the Redeemer Church, 28 Greensboro Road, Hanover, NH
Use Special Exception, ZBA Case No. 25015/014-Z2019-10

Dear Rob:

Please deem this letter and attached application materials to constitute a motion for a rehearing submitted on behalf of Jeff and Lara Acker, pursuant to NH RSA 677:2, in connection with the Hanover Zoning Board of Adjustment ("ZBA") March 28, 2019, decision ("Decision") in the above-referenced matter. The ZBA rendered its Decision in connection with an application by Christ Redeemer Church ("Applicant") to construct a 21,000 s.f. church and related infrastructure (the "Project") at 28 Greensboro Road (the "Property").

Jeff and Lara Acker own property and reside at 27 Greensboro Road, directly across Greensboro Road from the Property. The Ackers were a party to the proceedings in front of the ZBA, and their property will be directly affected by the Decision if the Project is eventually constructed.

1. The ZBA should grant a rehearing because the short time between defining the scope of the rehearing and the rehearing violated the ZBA's own motion to grant the rehearing and did not give the Ackers adequate time to prepare.

Initially, the ZBA should grant a rehearing because the short time frame between the notice of the date of the rehearing and the date of the rehearing violated the ZBA's own motion that it adopted when granting the first rehearing. The motion to grant the first rehearing that the ZBA adopted on January 28, 2019, specifically provided that "the board shall meet prior to the rehearing to determine what limits, if any, shall be placed on the scope of the rehearing in terms of evidence." Minutes of ZBA hearing, January 28, 2019. In addition, although absent from the minutes of the January 28th hearing, a transcript of that hearing clarifies that the vote included the following qualification put forth by then-acting ZBA chair Waugh: "we're going to make that determination far enough in advance of

the actual re-hearing that parties will be able to prepare." Transcript of 1/28/19, pp. 18-19. Both ZBA member Green and ZBA member Gardiner confirmed that that qualification was part of the motion. *Id.* at 19. Following the adoption of the January 28th, motion, the ZBA notified the parties on Friday afternoon, March 8th, that they would hold a rehearing on the following Thursday, March 14th. Email from Rob Houseman, 3/8/2019. The email notice stated that "Town Counsel will be following up with an email regarding the scope of the hearing." Email from Rob Houseman, 3/8/2019. The Town Counsel, however, did not follow up with an email, and it was not until March 11th, three days before the hearing when the attorney for the Applicant contacted Town Counsel, that the parties learned the scope of the hearing. Email from Tom Hanna, 3/11/2019.

Ultimately, the ZBA limited the scope of the rehearing primarily to legal arguments relating to the interpretation and application of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). When the ZBA conducted its deliberation sessions on March 21, 2019 and March 28, 2019, it became obvious that the Ackers were prejudiced by the short time frame to prepare for the rehearing. Due to the short time frame, the Ackers were not able to provide testimony from an attorney who specialized in RLUIPA to counter the Applicant's RLUIPA arguments that, based on the ZBA members statements made during deliberations, clearly left the ZBA with an unwarranted conclusion that their prior decision was vulnerable to challenge under RLUIPA.[1] Numerous statements from the ZBA members made it clear that they felt a need to craft a decision that would withstand a challenge under the "least restrictive means test" of RLUIPA even though the ZBA's prior decision was in accordance with the plain language of the Zoning Ordinance, supported by the evidence, and not a violation of RLUIPA. In fact, the ZBA even admitted that the prior decision was in accordance with the Zoning Ordinance: "our previous decision was based on details of the site and plan, additional facts taken from the record, as well as readily observable facts from our visits to the property. It was not unreasonable, capricious, or based on mere opinion and vague concerns." Decision at 8, ¶ 32.

It was not until the ZBA considered RLUIPA that it decided to change its decision. Indeed, the ZBA also admitted that no new factual information was provided at the rehearing: "no facts were introduced prior to or during the rehearing that were not in the case record." Decision at 7, ¶ 25. So on the exact same facts, with the only difference being the testimony on RLUIPA, the ZBA changed its decision, thus demonstrating that but for RLUIPA arguments the ZBA would not have changed its decision.

The resulting problem with the ZBA's approach was exacerbated when the members wrongly interpreted RLUIPA. The ZBA statements during deliberations made it clear that the members improperly focused on crafting a decision that would withstand the "least restrictive means" test of RLUIPA, 42 USC §2000cc(a)(1)(B), without ever questioning whether the prior decision to deny created a substantial burden—which is a required first step in reviewing a decision under RLUIPA.

---

[1] When the hearing date was announced the Ackers were in discussions to engage an attorney specializing in RLUIPA to attend a hearing at the end of April, which was consistent with the timing initially provided by the Zoning Administrator in response to the Acker's inquiries. When the timing was announced on March 8th, however, the attorney declined to engage due to the short time frame, and there was not adequate time to find a replacement attorney given the specialized area of RLUIPA law.

2. The ZBA improperly focused on crafting a decision to withstand a challenge under the "least restrictive means" test of RLUIPA without regard to whether their denial of the project created a substantial burden, and improperly changed its prior decision based on misplaced concerns about the application of RLUIPA to the prior denial.

The purpose of a rehearing is to give the ZBA the opportunity to correct its own errors or to consider additional evidence that was not available at the time of decision. *See McDonald v. Town of Effingham Zoning Bd. of Adjustment*, 152 N.H. 171, 174, 872 A.2d 1018, 1022 (2005) ("RSA 677:2 is designed to give the ZBA an opportunity to correct any errors it may have made."). Unfortunately, in this case the ZBA used the rehearing for neither of those purposes. The prior decision was not wrong, as the ZBA acknowledge in its rehearing Decision: "our previous decision was based on details of the site and plan, additional facts taken from the record, as well as readily observable facts from our visits to the property. It was not unreasonable, capricious, or based on mere opinion and vague concerns." Decision at 8, ¶ 32. There was nothing in the prior decision that needed to be corrected. In addition, the ZBA did not consider any new evidence: "no facts were introduced prior to or during the rehearing that were not in the case record." Decision at 7, ¶ 25.. The only "new" information that influence the ZBA's changing their decision from a denial to an approval with conditions were legal arguments about RLUIPA—legal arguments that were available to the Applicant at the time of the first decision. The ZBA's reversal of its prior decision did not comport with the purposes of a rehearing.

The ZBA's prior decision accurately, objectively, fairly and appropriately applied the Ordinance, as it is tasked to do under both New Hampshire statutes and the Hanover Zoning Ordinance. NH RSA 677:3.IV(a) provides that a zoning board of adjustment may, "in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance." In addition, Section 206 of the Hanover Zoning Ordinance enumerates the powers of the ZBA—it also does not require, or even empower, the ZBA to decide constitutional issues or issues related to federal law, including RLUIPA. Neither the statute nor the Zoning Ordinance requires or permits the ZBA to rule on issues of federal statutory interpretation, and local boards are discouraged from trying to interpret and apply statutes outside of zoning. *See McNamara v. Hersh*, 157 N.H. 72, 74-75, 945 A.2d 18, 20 (2008) ("Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act."). Nevertheless, the ZBA changed its decision based on its attempts to interpret a federal statute and complex related case law and its fear of getting sued, in disregard of the fact that its prior decision was not made in error.

The ZBA's deliberations made it clear that it believed that it had to change its denial to an approval with conditions, or else face a RLUIPA lawsuit even though the prior decision was an appropriate denial of CRC's application. Comments of ZBA members made during rehearing deliberations made it clear that the ZBA would not have changed its prior decision but for the ZBA's RLUIPA concerns.

> "Green: . . . the first question, is do we need to decide all these if we just find one, you know, that applies. And, for me, that one is the

unreasonable burden test of RLUIPA. Particularly with regard to the section that talks about using the least restrictive means to further compelling government interests. I feel that is sort of similar to what Bernie is saying about what he might have done in his first draft. I think in both drafts we didn't adequately explore whether conditions could be devised to mitigate the impacts that concerned the opponents." Transcript of 3/21/2019, p. 5 (Emphasis added.).

"Eggleton: if we deny the building again, I think we do need to provide guidance under the various RLUIPA arguments that have been made in the case law that we've read." Transcript of 3/21/2019, p. 9 (Emphasis added.).

"Eggleton: I think there are ways you might be able to provide objective guidance to an applicant, and that would be to avoid potential issues with RLUIPA." Transcript of 3/21/2019, p. 10 (Emphasis added.).

"Green: I don't want to [attach conditions which make it *de facto* a denial]. I think we would just be right back here in the same RLUIPA place that we are if we try to do that." Transcript of 3/21/2019, p. 19 (Emphasis added.).

"Green: But there's another half it which is the least restrictive means test.
"Gardiner: Yeah.
"Green: That's the part that worries me more than the compelling government interest.
"Gardiner: Well, yeah.
"Eggleton: I think we need to be mindful of it with respect to grant or deny, but we also need to be mindful of it with respect to the conditions because the conditions you are talking about are well within the realm of the RLUIPA case law. . . ." Transcript of 3/21/2019, pp. 20-21 (Emphasis added.).

"Waugh: You know, we have this tradition in constitutional law that three tier . . .
"Gardiner: Test, yeah.
"Waugh: . . . method of analysis in a compelling interest as part of the third tier, aesthetics is not a compelling interest in any constitutional context and I don't think it's going to be found to be so in RLUIPA. I just, I don't think we should talk about that. I mean, that's going to be the thing that sinks the decision if you start saying the [inaudible] of aesthetics

> is a compelling interest."[2] Transcript of 3/21/2019, pp. 21-22 (Emphasis added.).
>
> "Green: I would say that if we, deny all those things [whether the ordinance is discriminatory under RLUIPA] are fair game on appeal. Aren't they?" Transcript of 3/21/2019, p. 32 (Emphasis added.).
>
> "WAUGH: So, just to sort of trying to bring this issue of RLUIPA to a conclusion, my understanding is that you all are comfortable with taking references to that out of the decision, but acknowledging the fact that, you know, we've already said on the record that it was a concern of some kind." Transcript of 3/28/2019, p. 61 (Emphasis added.).

The primary problem with the concerns expressed by the ZBA members is that the members either wrongly concluded that any denial would create a "substantial burden" under RLUIPA, or wrongly concluded that they did not need to make such a determination, and that they were therefore required to approve the project with conditions in order to satisfy the least restrictive means test of RLUIPA. The ZBA proceeded to craft a decision by focusing on surviving a RLUIPA least restrictive means challenge regardless of whether they thought the project satisfied the requirements of Section 207 of the Zoning Ordinance. This determination, however, does not comport with the applicable case law on RLUIPA, and there is no support for a conclusion that the prior denial of the application created a substantial burden under RLUIPA or otherwise violated any provisions of RLUIPA.

The "substantial burden" prohibition in RLUIPA is stated as follows:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

---

[2] The United States District Court for the District of New Hampshire in the case of *Signs for Jesus v. Town of Pembroke*, held that aesthetics is a substantial government interest.

> the Church's assertion that aesthetic interests alone can never suffice is belied by Supreme Court and First Circuit case law. *See e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)((plurality opinion) ("The twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety or esthetics."
>
> * * *
>
> the electronic sign ban at issue here advances a significant government interest in aesthetics.
>
> 230 F. Supp. 3d 49, 60-61 (2017).

> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.
>
> 42 U.S.C. § 2000cc(a)(1).

Under RLUIPA case law, a substantial burden only exists if the application of a zoning ordinance would create an actual and substantial burden on the exercise of religion. The case law is complex, but the application of this concept is amply illustrated in the US Department of Justice, Civil Rights Division, A Guide to Federal Religious Land Use Protections. The Justice Department gives two examples of a substantial burden:

> *A church applies for a variance to build a modest addition to its building for Sunday school classes. Despite the church demonstrating that the addition is critical to carrying out its religious mission, that there is adequate space on the lot, and that there would be a negligible impact on traffic and congestion in the area, the city denies the variance*
>
> *A Jewish congregation that has been meeting in various rented spaces that have proven inadequate for the religious needs of its growing membership purchases land and seeks to build a synagogue. The town council denies the permit, and the only reason given is "we have enough houses of worship in this town already, and want more businesses."*

What is abundantly clear in the Justice Department guidance and in the case law, is that the applicant has the burden of demonstrating a substantial burden before it's even appropriate to discuss "compelling governmental interests" and "least restrictive means" issues. *See Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013) ("Because we decide that RCB has not shown a substantial burden, we need not address the question of whether the Ordinance is 'in furtherance of a compelling governmental interest' and is 'the least restrictive means of furthering' that interest.") To meet this burden, an applicant must show that there is some unmet need that it is trying to fill by using the property. *See Jesus Christ is Answer Ministries, Inc. v. Baltimore County*, Docket no. 18-1450 (4th Cir. 2019) ("is the impediment to the organization's religious practice substantial? The answer will usually be 'yes' where use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result.") (Emphasis added.).

Here, the Applicant offered nothing to suggest that its use of the Property would fill an unmet need. The only issue that the Applicant raised to support its argument that the denial created a substantial burden was that the denial, taken together with the denial of a variance 11 years prior, was a *de facto* substantial burden. The Applicant did not offer any evidence of how the denial actually created any burden on its religious exercise. In fact, the Applicant already has a home in Hanover, and has for many years. Decision, p. 5, ¶ 15. The Applicant did not even suggest that its current facility is inadequate for the religious needs of a growing congregation. In addition, there was unanimous

agreement that the Property could be used for religious use on some scale—just not on the scale proposed by the Applicant:

> "EGGLETON: . . . the testimony that we heard, which was very clearly that some church would work in this location. Nobody, nobody disagreed
> "GARDINER: Nobody disagreed.
> "EGGLETON: … that some size of church would work here, and, so, I think …
> "GARDINER: We all agree with that.
> "EGGLETON: … what, no, not just us, but the testimony from the public."
> Transcript of 3/28/2019, 44.

The situation presented by the ZBA's prior denial is analogous to the case of *Living Water Church of God v. Charter Tp. Of Meridan.* 258 Fed.Appx. 729 (6th Cir. 2007). In that case a municipality denied a special use permit that a church sought to build a 34,989 square foot school. *Id.* at 732. The church appealed, and the trial court held that denial of the special use permit substantially burdened the church. *Id.* On further appeal, the Circuit Court of Appeals for the Sixth Circuit reversed the trial court. In finding that the denial was not a substantial burden, the Sixth Circuit held as follows:

> The Township's denial does not preclude the church from moving its school to the church property; it does not require the church to forgo providing religious education; it does not preclude the church from enrolling students in its school; it does not prevent church members from entering the property and conducting worship or prayer services; it does not preclude the church from running religious programs and meetings in the evenings and on weekends; it does not preclude the church from accepting new members into its congregation.
>
> *Id.* at 738.

The court recognized that the denial burdened the church because it could not build its larger structure, it might have to file for another special use permit, and it had to expend time and money to draw up new plans for a reduced size facility. The court did not find a substantial burden, however, because the church was able to "carry out its church missions and ministries without it."

> Ideally, no doubt, Living Water would have an unlimited and ever-expanding place of worship with open doors to all who are interested--the same would surely apply to its school. The Township's action here, and the zoning ordinance in general, burdens this hope and objective. And although the Township's action may make Living Water's religious exercise more expensive or difficult, we cannot say that it places substantial pressure on this religious institution to violate its religious

> beliefs or that it effectively bars the institution from using its property in the exercise of its religion.
>
> *Id.* at 739.

As noted above, everyone involved in this case agreed that the Property could be used for some church function, just not at the scale and intensity of the use that the Applicant proposed. In addition, the evidence demonstrated, and the ZBA specifically found, that the Applicant already has existing facilities in Hanover. While the prior denial burdened the Applicant's hope and objective for a new and larger facility, there was no evidence in the record on which the ZBA could have reasonably determined that the Applicant satisfied its burden to demonstrate a substantial burden on its religious exercise. Accordingly, it was improper for the ZBA to allow considerations of "least restrictive means" to influence its decision.

3. The ZBA's decision does not comply with the Zoning Ordinance and is not reasonably supported by evidence in the record.

The ZBA's decision has undermined public confidence in the Hanover Zoning Ordinance. Numerous people, even those who do not live on Greensboro Road, have communicated to the Ackers their dismay that a use as significant and intensive as the Project could possibly be allowed by the ordinance. The proposed Project will bring 300 non-residents into an area that the Zoning Ordinance specifically reserves for single-family residential use and indicates a strong intent to protect that use by only allowing limited other uses that compliment and serve those residences. In light of the associated impacts from 300 people, including the traffic, noise and lights discussed in the record, it was not reasonable for the ZBA to concluded that the Project would not have an adverse impact on the character of the area. The unreasonable and confounding implications of the Decision are perhaps best illustrated by the ZBA's statement that a single rooster crowing can adversely affect the character of the area, but nevertheless concluding that 300 people driving, parking and engaging in activities in a single family residential area that is not their home, and all of the accompanying impacts identified in the Decision, are less impactful than a single rooster. Decision at 8, ¶ 28.

Even if the ZBA believed that this church, taken by itself, will not have significant adverse impacts on the character of the residential area around the Project, Section 207.1 of the Zoning Ordinance does not require a finding that the adverse impacts be "significant". Any adverse impacts on the character of the area are enough to disqualify the Project for a special exception. Nothing about the proposed Project is compatible with the character of the area, either as it is defined by readily observable physical characteristics of the existing area, which, as found by the ZBA, is almost entirely comprised of single family homes, or as it is defined by reference to the specifically stated polices and intent of the objectives for the SR district. The ZBA found adverse impacts from the Project, but only attempted to mitigate them by imposing a condition that limits occupancy of the church to 300 people. The 300 person occupancy is exactly what was described in the application, and most of the adverse impacts that the ZBA found, including from traffic, noise, and light, were based on this same number of people.

The facts as determined by the ZBA demonstrate that the Project, as described in the application and supporting materials, will have adverse impacts on the character of the area based on a Project to accommodate 300 people. Accordingly, there was not a reasonable basis to support the ZBA's Decision to grant the permit with the restriction of 300 people that the ZBA imposed. The Hanover Zoning Ordinance requires that ZBA must find that the following criteria are satisfied before it can grant a special exception:

> 207.1 A use of land and structures so designated in Article IV may be allowed as a special exception only on approval of the Zoning Board of Adjustment and only when:
>
> A. The use conforms to the general and specific standards established by this Ordinance and
>
> B. The Zoning Board of Adjustment has first determined that the proposed use will not adversely affect:
> (1) The character of the area in which the proposed use will be located;
> (2) The highways and sidewalks and use thereof located in the area; or
> (3) Town services and facilities.

The application for the project requested permission for a use of "Sunday Worship Service" for "approximately 300 people, 100 cars." Also, the RSG traffic study submitted in support of the application was based on 300 people and approximately 100 cars. Decision at 9, ¶ 34 ("[the RSG study] assumes church attendance of 300"). Based on the proposed occupancy of 300 people, however, the ZBA nevertheless specifically found that (a) the RSG study was unreliable, and (b) the Project would result in adverse impacts. The ZBA made the following findings:

> The RSG study does not adequately address the problem of traffic congestion and noise in six respects: It estimates the effect on traffic over a period of an hour, not the shorter time during which cars can be expected to drive to and from the church. It assumes an average number of trips based on the square feet of the building rather than expected attendance at a service. It assumes an average of 2.9 people in each car driving to the church. It does not address the traffic issue at the entrance to the church but only at the distant intersection of Greensboro Road and Route 120. It assumes church attendance of 300, while the capacity of the assembly room in the church is 415. It fails to consider the number of spaces in the parking lot. Decision at 9, ¶ 34.
>
> Mr. Swanson conceded that the study did not model traffic flow or congestion using shorter time periods than 60 minutes. As such, we find that the RSG study cannot be relied upon to estimate traffic flow and congestion during peak periods before and after church services. Decision at 9, ¶ 35.

> if RSG's traffic study understates traffic congestion on Sunday mornings, which seems almost certain because attendees will arrive in a 15-20 minute period rather than over an entire hour, then larger and noisier vehicles will join cars idling on Greensboro Road in front of neighboring properties and on the property. Decision at 10, ¶ 40.
>
> Another concern is that the RSG study doesn't take into consideration that the walk from parking lot to the building is quite long, and we expect that a large percentage of drivers will pause at the entrance of the building to drop off their passengers, especially in the winter. This could result in traffic backing up all the way to the property entrance at Greensboro Road and beyond. Decision at 10, ¶ 42.
>
> RSG concluded that CRC traffic will not adversely affect the highways of the area, satisfying 207.1.B(2). But that conclusion may only be valid for typical attendance of 300, and it does not necessarily satisfy 207.1.B(1) because neither RSG nor applicant's noise expert assessed noise from cars and buses queued on Greensboro Road on Sunday mornings. We conclude that applicant has not provided convincing evidence that traffic flow and congestion will not have adverse impacts on the neighborhood when attendance grows over 300. Decision at 11, ¶ 44.[3]

A specific problem with this last statement is that the ZBA found that the Applicant did not assess noise from traffic at all. In the face of such a finding, there is no basis for the ZBA to conclude, by reverse implication, that the lack of any assessment somehow establishes that there is no adverse impact. These findings of adverse impacts cannot be squared with the requirement in Section 207.1(B)(2) to determine that that the project would not "adversely affect . . . the highways and sidewalks and use thereof located in the area," or, that the project would not "adversely affect . . . the character of the area." The Ordinance does not require that an adverse impact must be substantially adverse or unduly adverse, or some other qualified version of adverse that would potentially allow a negative impact to nevertheless not be adverse. The plain language of the Ordinance requires that a finding of adverse impact automatically disqualifies the project for a special exception approval.

In addition, these findings of adverse impacts are substantial enough to also disqualify the Project for a special exception under Section 207.1(B)(1), because they are significant enough to adversely impact the character of the area. These impacts are completely inconsistent with single family residence use, or other uses that compliment and serve the residences, as required by the specifically stated policies and intent in objective statement for the SR2 district where the Project will be located and where the bulk of the Project's impacts will be experienced. The proposed Project, and any other use with similar impacts, will change the character of the area away from the express intent of the Town Zoning Ordinance.

3

The ZBA attempted to mitigate these adverse impacts by imposing an occupancy limit of 300 people. Because these adverse impacts were found based on the application presented for 300 people and the RSG traffic report that was based on attendance of 300 people, however, imposing a limit of 300 people does nothing to mitigate these impacts. Ultimately, the only other basis that the ZBA offered for the 300 person occupancy limit is that it is closer to the 150 seat First Congregational Church in Hanover Center that they found would not be adverse than the 415 person occupancy proposed by the applicant. The determination that 300 people will not be adverse is completely arbitrary. There is no evidence in the record that the ZBA found to be reliable that supports the imposition of a 300 person occupancy limit as an adequate mitigation to the project's adverse impacts, and allowing the Project with this condition was not reasonably supported by the evidence.

Another shortcoming of the ZBA's Decision is that the ZBA did not make findings regarding the character of the area that are sufficient to support the grant of a special exception. NH RSA 677:3.IV(a) requires that "All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance." Because the statute requires the Decision to be made in harmony with the zoning ordinance, it was unreasonable for the ZBA to determine the character of the area without reviewing the specifically stated purpose and intent of the zoning ordinance. *See Trustees of Dartmouth College v. Town of Hanover*, 110618 NHSC, 2017-0595 (Nov. 6, 2018) (requiring review of the zoning ordinance to determine whether a project was harmonious with "the town and its environs": "Any conclusion that the IPF lacks conformity or is not harmonious with the character and development of this neighborhood, or the town and its environs, is directly contradicted by the applicable zoning regulation and is unreasonable.") (emphasis added).

At no point in its Decision, however, did the ZBA examine the Zoning Ordinance for guidance on the character of the area intended by the drafters of the Zoning Ordinance. The Zoning Ordinance provides the following specifically stated objective for the SR Zone:

> Objective: The designation Single Residence is for a district to provide for one family dwelling units as is typical in many New England villages. With adequate safeguards, certain other types of uses such as forestry, agricultural and governmental uses will be permitted. These types of uses not only complement the single-family homes, but serve these homes as well. Three districts are provided in the Single Residence designation. In each of the districts, similar uses are allowed, but there are varying lot regulations depending on the location of the district's present land development, and its relation to surrounding districts. (Emphasis added.)

The specifically stated intent of the SR zoning district matches with the ZBA's findings as to the readily observable characteristics of the area.

> 18. "The SR-2 Zone in which Applicant proposes to place the church extends for roughly 200 or 300 yards on either side of Greensboro Road from its western terminus with Route 120 all the way to Great Hollow

> Road and then north on Hanover Center Road. The Zone is characterized by modest single-family homes, primarily pre-war cape style homes on relatively large lots."
>
> 19. "There is one commercial use in the neighborhood. That is a relatively non-obtrusive one-story multi-use building that remains as a non-conforming preexisting use about one quarter mile to the east of the proposed project. Several open space subdivisions, including Velvet Rocks, Silent Brook and Berrill Farms developed in the late 1990-early 200's lie in the area. They are in the RR district. They are adjacent and to the north with drives through the Zone providing access to Greensboro Road.

By not reviewing the specifically stated purpose and intent of the zoning district, however, the Decision fails to recognize the extent to which the stated purpose and intent and the readily observable characteristics of the surrounding area reinforce each other and instruct the ZBA to only allow other uses that "not only complement the single-family homes, but serve these homes as well." Nothing about the Applicant's Project complements the single family homes, and the evidence demonstrates that the proposed use is not intended to serve the homes in the area, but rather will draw numerous, up to 300, people at a time into this residential neighborhood for non-residential uses.

Further evidence of the importance of the stated objective for the SR district is found in the Town Plan. The Town Plan specifically warns against allowing intrusions from increased development that might change the character of the area. Map 3-4 of the Town Plan identifies the subject Property as part of a "neighborhood" that roughly encompasses the SR-2 Zone described in the ZBA's Decision. The only differences are (a) designation of some of the land as open space, (b) "LR" designations for the developed portions of the Open Space subdivisions from the 1990s and early 2000s, (c) the inclusion of the nonconforming commercial use parcel, and (d) the inclusion of specific parcels designated for Public Use. The Guide provides the following recommendations:

> "In established neighborhoods, permitted densities and dimensional controls should allow change and expansion only in ways that preserve and enhance the established character of each neighborhood."
> "Protect and enhance the stability and character of each neighborhood. Allow change and expansion only in ways that preserve and enhance the established character of each neighborhood. Increased park and recreational land should be provided to serve these neighborhoods. Traffic calming measures should be provided as needed.

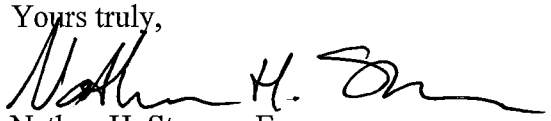
The Town Plan's warning against any "change" and not just adverse impacts, and its strong indication of a desire to preserve the established character of the neighborhood, offers further support that the purposes and intent of the SR district are to be interpreted to provide strong protections for the single family homes in that district. By allowing a use that is clearly not intended to "complement and serve" the single family homes in the district, the ZBA's Decision is not harmonious with the purposes

and intent of the Zoning Ordinance and violates NH RSA 677:3.IV(a) and Section 207.1 of the Ordinance.

Finally, the conditions the ZBA imposed do not adequately address all of the adverse impacts from the Project. The ZBA imposed a 300 person occupancy limit at any time during the approved hours of operation, but did not analyze whether this level of occupancy would have additional impacts at times other than Sunday mornings. The Applicant's proposal contemplates that it could host significant events at times other than Sunday mornings, including "special occasions: weddings, funerals," and "any further auxiliary uses . . . consistent with normal function as a house of worship." Application, p. 7, May 29, 2018. Under the Decision as drafted, the Applicant can host events for 300 people during any of the permitted hours of operation (7:00 AM – 9:00 PM weekdays and 8:00 AM – 9:00 PM weekends). Decision, p. 12, Condition D. The traffic study, however, does not include any analysis of whether adding the same level of maximum occupancy traffic, i.e., 102 cars entering and 112 cars exiting, to existing peak rush hour traffic will create safety issues or unreasonable congestion. At a minimum, the ZBA should add an additional condition to restrict maximum capacity events during weekday rush hours.

For the foregoing reasons the ZBA's Decision was made in error and is not reasonably supported by the evidence. Accordingly we respectfully request that the ZBA grant a rehearing on the use special exception matter.

Yours truly,



Nathan H. Stearns, Esq.

cc: Jeff and Lara Acker
Thomas R. Hanna, Esq.
Michael J. Tierney, Esq.