

## CHAPTER II: POWERS AND DUTIES OF THE ZONING BOARD OF ADJUSTMENT

### AUTHORITY TO REGULATE THE USE OF LAND

The following statutes outline the authority of towns to adopt a zoning ordinance and the extent to which a zoning ordinance may regulate the use of land.

#### [RSA 674:16 Grant of Power](#)

- I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:
  - (a) The height, number of stories, and size of buildings and other structures;
  - (b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;
  - (c) The density of population in the municipality; and
  - (d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

#### [RSA 674:17 Purposes of Zoning Ordinances](#)

- I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:
  - (a) To lessen congestion in the streets;
  - (b) To secure safety from fires, panic and other dangers;
  - (c) To promote health and the general welfare;
  - (d) To provide adequate light and air;
  - (e) To prevent the overcrowding of land;
  - (f) To avoid undue concentration of population;
  - (g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;
  - (h) To assure proper use of natural resources and other public requirements;
  - (i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings; and
  - (j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.
- II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

### [RSA 674:18 Adoption of Zoning Ordinance](#)

The local legislative body may adopt a zoning ordinance under RSA 674:16 only after the planning board has adopted the mandatory sections of the master plan as described in RSA 674:2, I and II.

### [RSA 674:20 Districts](#)

In order to accomplish any or all of the purposes of a zoning ordinance enumerated under RSA 674:17, the local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 674:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Four groups are involved with the formulation and administration of a zoning ordinance and map: the planning board, the local legislative body, the administrative officer, and the board of adjustment.

1. **Planning Board** - primarily responsible for proposing the initial zoning ordinance and the zoning map, recommending amendments, holding public hearings on its own and petitioning amendments.
2. **Local Legislative Body** - city council or town meeting - adopts the original ordinance and approves any changes that are proposed.
3. **Administrative Officer** - local official, zoning administrator, building inspector or board of selectmen who administer and enforce the ordinance and map as written.
4. **Board of Adjustment** - hears appeals from any order, requirement, decision or determination made by an administrative official and administers special provisions in the ordinance dealing with variances and special exceptions.

Each of these groups can act only within the authority granted it by the enabling legislation ([RSA's 672-678](#)). The planning board cannot adopt or enforce the zoning ordinance. The local legislative body must follow statutory procedures in enacting the ordinance. The administrative official must apply the ordinance as it is written and cannot waive any provisions. The board of adjustment may grant variances, where justified, but cannot amend the zoning ordinance and map. Zoning ordinances involve more unusual conditions and extenuating circumstances than other land use regulations. Boards of adjustment are established to provide for the satisfactory resolution of many of these situations without burdening the courts.

The board of adjustment has the authority to act in four separate and distinct categories, which will be discussed separately:

- Appeal from Administrative Decision;
- Approval of Special Exception;
- Grant of Variance; and
- Grants of Equitable Waivers of Dimensional Requirement.

It should be noted that the board of adjustment does not have authority over decisions of the board of selectmen or enforcement official on whether or not to enforce the ordinance. The board does have the authority to hear administrative appeals if it is alleged that there was an error in any order, requirement, decision or determination made by the official. The board of adjustment also has the authority to hear administrative appeals of decisions made by the planning board, which are based on their interpretation of the zoning ordinance. Don't confuse your role as a zoning board member with that of the planning board. The intent is not to interfere with the planning board's authority

over subdivision and site plan review, but to allow for review of zoning matters by the zoning board of adjustment. (See *Dube v. Town of Hudson*, 140 N.H. 135, 663 A.2d 626 [1995].)

## APPEAL FROM ADMINISTRATIVE DECISION

(For a complete discussion on this topic see “Administrative Decisions in Planning and Zoning: How They’re Made, How They’re Appealed,” NHMA Law Lecture #3, Fall 2010.)

### [RSA 674:33 Powers of Zoning Board of Adjustment](#)

- I. The zoning board of adjustment shall have the power to:
  - (a) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and
  - (b) ...
- II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

(Also see [RSA 676:5](#), Appeals to Board of Adjustment, on page III-1.)

The board of adjustment decides cases where a claim is made that the administrative officer has incorrectly interpreted the terms of the ordinance such as a district boundary or the exact meaning of an article or term. Most zoning ordinances contain terms that may be confusing and are, therefore, open to interpretation. An ordinance may fail to define what is meant by such requirements as “distance from a road.” Does this mean distance from the pavement, shoulder, side ditch, or right-of-way? An honest difference of opinion may easily occur as to the exact meaning when applied to specific circumstances.

In another situation, a person may, rightly or wrongly, question the administrator’s reasons for withholding a permit. Because the board of adjustment has the power to referee such cases, every person is afforded a timely hearing and decision without the expense of going to court. Again, it is important for the zoning board of adjustment to establish in their rules a reasonable time that an appeal of an administrative decision may be taken, as required by [RSA 676:5, I](#).

Although this is a relatively simple power, there are several pitfalls to be avoided.

In determining the intent and meaning of a provision of the ordinance and map, the board is restricted to a fairly literal interpretation. The intent of the law is an important consideration, but must be spelled out in terms specific enough to be understood. The board of adjustment cannot make its determination on the strength of a statement of purpose alone when that statement is not backed by concisely phrased provisions. *“The construction of the terms of a zoning ordinance is a question of law.... The proper inquiry is the ascertainment of the intent of the enacting body.... Where the ordinance defines the term in issue, the definition will govern.”* [citations omitted] *Trottier v. City of Lebanon*, 117 N.H. 148, [1977].

When an appeal is made to a board of adjustment under this provision, the board must apply the strict letter of the law in exactly the same way that a building inspector must. It cannot alter the ordinance and map or waive any restrictions under the guise of interpreting the law.

The petitioner may, of course, ask for a variance after the board of adjustment has defined the law, but this must be done by filing an application for a variance and considered by the board based on

the standards required for a variance. Sometimes two forms of relief are requested (e.g. an appeal of an administrative decision of interpretation of the ordinance and a variance request that is based on the outcome of the interpretation of the ordinance) and can both be decided as part of a single application, depending on local rules of procedure. There are no specific criteria for an administrative appeal as with a variance or special exception.

Decisions made by the administrative officer involving what the ordinance says and means are appealable. This includes situations such as a decision by the board of selectmen to issue (or deny) a building permit because of their belief that the proposed use is permitted (or not) in a particular zone. The same applies to decisions by the planning board or any other “administrative officer” regarding the terms of the ordinance. This does not mean, however, that decisions to enforce (or not enforce) the ordinance are also appealable to the board of adjustment. These decisions are discretionary and are not reviewable under RSA 676:5, II (b) or any other statute.

The board should be aware of the difference between an “opinion” and a “decision” of an administrative official. In *Accurate Transport, Inc. v. Town of Derry* (August 11, 2015), the court found that the ZBA had the power to “convert” the appeal of the code enforcement officer’s decision to an appeal of the planning board’s decision because the code enforcement officer had merely expressed an opinion at a technical review committee meeting that the use was allowed. The appealable decision came when the planning board agreed with the code enforcement officer’s opinion and voted to approve the application. Ultimately, the ZBA overturned the planning board’s decision that the use was allowed and the court did not review the validity of the ZBA’s decision because the petitioners did not properly challenge it on its merits.

(See a summary of the case by the NH Municipal Association on the OEP website <http://www.nh.gov/oepr/resource-library/laws-rules-cases/index.htm> Selected Supreme Court Decisions.)

In order to bring an appeal of an administrative decision, a person must have standing. Merely being a resident and taxpayer of a town is not enough to confer standing to appeal a decision of the administrative officer who determined that there was not sufficient basis to pursue an alleged violation of the zoning ordinance concerning the voluntary merger of two lots. (See *Goldstein v. Town of Bedford* [November 22, 2006].)

Similarly, in *Golf Course Investors of NH, LLC v. Town of Jaffrey & a.* [April 12, 2011], the court found that seven residents who tried to appeal a planning board decision to the ZBA that a condominium conversion did not require site plan review did not have standing as “persons aggrieved.” None were abutters, did not address how their properties would be directly affected, were actually in favor of the project with the acceptance of its size, and one had even attended the planning board meeting. To establish standing, an appealing party must show “some direct, definite interest in the outcome of the action or proceeding.” Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party’s property to the property for which approval is sought; (2) the type of change being proposed; (3) the immediacy of the injury claimed; and (4) the appealing party’s participation in the administrative hearings. (See *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541 [1979].)

## SPECIAL EXCEPTIONS

***"If the conditions for a special exception are not met, the board cannot allow it; however, if the conditions are met, the board must grant the special exception." Shell Oil v. Manchester, 101 N.H. 76 (1957)***

## RSA 674:33 Powers of Zoning Board of Adjustment

- IV. A local zoning ordinance may provide that the zoning board of adjustment, 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. Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception. (This paragraph was amended by [Ch. Law 93:2, SB50](#), 2013.)
- V. ...
- VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision. (This paragraph was added to RSA 674:33 by [Ch. Law 270:3, SB124](#), 2013.)
- VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2. (This paragraph was added to RSA 674:33 by [Ch. Law 267:9, SB101](#), 2013.)

Under this authority, the board of adjustment has the power to grant those exceptions that are clearly specified in the zoning ordinance. The legislative body, in enacting the ordinance, established what can be granted as an exception and the conditions which must be met before the board of adjustment may grant it.

A special exception is now only valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a 6 month window within which the special exception remains valid following the resolution of a planning application filed in reliance upon the special exception. (See the amendment to section IV of RSA 674:33 set out above.)

Unless a particular use for which an application is submitted is stated in the ordinance as being explicitly allowed by special exception, the board of adjustment is powerless to grant a special exception for that use. If this fact can be kept in mind, there should be no confusion between the meaning of “special exception” and “variance.”

A **special exception** is a use of land or buildings that is permitted, subject to specific conditions that are set forth in the ordinance. A **variance** is a waiver or relaxation of particular requirements of an ordinance when strict enforcement would cause undue hardship because of circumstances unique to the property.

A **variance** is permission granted to use a specific piece of property in a more flexible manner than allowed by the ordinance; a **special exception** is a specific, permitted land use that is allowed when clearly defined criteria and conditions contained in the ordinance are met. Providing for special exceptions makes it possible to allow uses where they are reasonable in a uniform and controlled manner, but to prohibit them where the specified conditions cannot be met. Requirements, in this sense, are measurable qualifications that are the same at all times and places and can be expressed in specific terms.

“It is important to remember the key distinction between a special exception and a variance. A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5,000 square feet is permitted in the zone so

long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone (formerly termed a ‘use’ variance), or to construct the new building partially within the side set-back line (formerly an ‘area’ variance); and, as is set forth below in more detail, the standards for any variance without distinction are the subject of much judicial interpretation and flux.

A use permitted by special exception is also distinguishable from a nonconforming use. As described above, a special exception is a *permitted* use provided that the petitioner demonstrates to the ZBA compliance with the special exception requirements set forth in the ordinance. By contrast, a non-conforming use is a use existing on the land that was lawful when the ordinance prohibiting that use was adopted. (See [\*1808 Corporation v. Town of New Ipswich\*](#), 161 N.H. 772 [2011].) (The supreme court held that the ZBA did not err in ruling that the office building permitted by special exception is not entitled to expand per doctrine of expansion of nonconforming use.)

In the case of a request for special exception, the ZBA may not vary or waive any of the requirements set forth in the ordinance (citations omitted). Although the ZBA may not vary or waive any of the requirements set forth in the ordinance, the applicant may ask for a *variance* from one or more of the requirements. (See, [\*1808 Corporation v. Town of New Ipswich\*](#), 161 N.H. 772 [2011].) (Court noted that petitioner was allowed to use its building for office space because it had a special exception and was allowed to devote 3,700 of its building’s square footage for such a use because it obtained a variance from the special exception requirement that the building’s foundation not exceed 1,500 square feet).<sup>1</sup>

The practical application of a special exception may be illustrated by a hypothetical case of a rural town that has no industrial zone but wants to allow industries to locate in a particular district under certain circumstances. One condition, which must be stated in the ordinance, might be that the proposed industry would not create a hazardous traffic condition. Whether or not the traffic conditions generated by a particular industry would be hazardous would depend on the type of operation proposed; the road in question; the set-back of buildings on nearby lots; the location of intersections, school crossings, parks and homes; and off-street parking provisions.

It would not be possible to set uniform requirements in the ordinance, such as the number of persons who may be employed, that would prevent traffic hazards in all cases and yet not be needlessly restrictive in a specific case. By referring the matter to the board of adjustment, it is possible to consider each case on its own merits and still remain within the intent and purpose of the ordinance. *“There must... be sufficient evidence before the board to support a favorable finding on each of the statutory requirements for a special exception.”* [\*Barrington East Cluster Unit I Owner’s Association v. Barrington\*](#), 121 N.H. 627 [1981].

Special exceptions are sometimes used to control the location of specific commercial or industrial uses such as public utilities, gas stations and parking lots, which may appropriately be located in residential districts. Schools, hospitals, nursing homes, and other establishments with similar location problems often require approval as special exceptions subject to conditions spelled out in the zoning ordinance.

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<sup>1</sup> The Zoning Board of Adjustment in New Hampshire, NH OEP Spring Planning & Zoning Conference, May 2013; presented by Christopher L. Boldt, Esq., Donahue, Tucker, & Ciandella, PLLC.

The granting of a special exception does not alter the zoning ordinance, but applies only to the particular project under consideration. An application for an additional similar use on the same parcel would have to be considered separately by the board and approved or denied based on the application and the conditions required.

The board of adjustment cannot legally approve a special exception for a prohibited use if the ordinance does not identify that use. Also, the board cannot legally approve a special exception if the stipulated conditions do not exist or cannot be met. On the other hand, if the special exception is listed in the ordinance and the conditions are met, the board cannot legally refuse to grant the special exception even though it may feel that the standards are not adequate to protect the neighborhood. Three questions must be answered to decide whether or not a special exception can be legally granted:

1. Is the use one that is ordinarily prohibited in the district?
2. Is the use specifically allowed as a special exception under the terms of the ordinance?
3. Are the conditions specified in the ordinance for granting the exception met in the particular case?

In *Sklar Realty Inc. v. Merrimack and Agway, Inc.*, 125 N.H. 321 [1984], the supreme court added a new dimension to the validity of a special exception in certain circumstances. If conditions imposed by a planning board under site review authority substantially alter a plan for which a special exception has been granted, the board of adjustment must review its original approval. The court stated, “*We hold it was error to conclude that the special exception necessarily survived the change in... plans. The [planning] board may not enter a further order favorable... [to the applicant] unless the ZBA reaffirms its own order after a consideration of the second plan.*”

Language counts when reviewing a special exception. In [Cormier v. Town of Danville ZBA](#), 142 N.H. 775 [May 14, 1998], the ordinance allows excavations provided they are compatible with, and not injurious to, either natural features or historic landmarks or other historic structures. The board denied a special exception finding that the use would be detrimental to the historic and natural character of Tuckertown Road. The decision was appealed and upheld by the superior court. The supreme court reversed the ZBA, finding that there was nothing in the record to support the ZBA’s conclusion that the proposal would have an adverse impact on the road. The court reminded the board that “the law demands that findings be more specific than a mere recitation of conclusions.” Board members should be sure that factual conclusions like “adverse impact” are supported by factual findings contained in the record, whether from testimony, evidence, or board members’ personal knowledge of the area. If you determine that there WILL be something (adverse impact, detrimental effect, etc.), you should next ask yourself, and make sure the record reflects, WHY you came to that conclusion, i.e., “We find that there will be an adverse impact because of x, y, z.”<sup>2</sup>

### **Variations from the Terms of a Special Exception**

The question sometimes arises as to whether an applicant for a particular land use can obtain a variance from one of the terms of a special exception in order to qualify for a special exception. Clearly, where a use is allowed by special exception provided certain criteria are met, the special exception could not be granted if any one of the criteria is not satisfied. Similarly, the board could not first grant a variance for the unsatisfied criteria, then turn around and grant the special exception even if all other criteria are met.

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<sup>2</sup> 1998 Land Use Law Update, Timothy Bates, Esq., NH OSP Annual Planning and Zoning Conference, May 30, 1998.

When a board is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth within the zoning ordinance<sup>3</sup> and while the board may grant a special exception, it cannot waive the requirement for a special exception.<sup>4</sup>

The fact that a landowner does not qualify for a special exception does not mean that approval could not be obtained to achieve the same goal. The landowner could apply for whatever variance relief was necessary to allow the use without applying for a special exception. In [\*New London Land Use Association v. New London Zoning Board of Adjustment & a\*](#), for example, the court noted as follows:

“Denial of Lakeside’s request for a special exception, because it did not conform to the density requirement of the zoning ordinance, does not restrict its vested right to continue its motel operation, nor does it require Lakeside to change, in any way, the manner in which the motel units are now situated upon the land. A special exception is a use permitted upon certain conditions as set forth in a town’s zoning ordinance. 3 Rathkopf, Law of Zoning and Planning § 41.02 (1987). It is generally recognized in this State that, in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements as set forth within the zoning ordinance. *Shell Oil Company v. Manchester*, 101 N.H. 76, 78, 133 A.2d 501, 502 (1957); *Stone v. Cray*, 89 N.H. 483, 487, 200 A.2d 517, 521 (1938). A zoning ordinance is not discriminatory because it permits the continuation of existing structures and conditions while prohibiting the creation of new structures or conditions of the same type. *Stone, supra* at 485, 200 A.2d at 520. If Lakeside seeks permission to act outside the ordinance, it may apply for a variance from the density requirements of the ordinance. *New London v. Leiskiewicz*, 110 N.H. [462], 466, 272 A.2d [856], 859 (1970).<sup>5</sup>

## VARIANCES

### [RSA 674:33 Powers of Zoning Board of Adjustment](#)

Effective September 22, 2013

- I. The zoning board of adjustment shall have the power to:
  - (a) ...
  - (b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
    - (1) The variance will not be contrary to the public interest;
    - (2) The spirit of the ordinance is observed;
    - (3) Substantial justice is done;
    - (4) The values of surrounding properties are not diminished; and

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<sup>3</sup> *Tidd v. Town of Alton*, 148 N.H. 424, 427, 808 A.2d 3, 6 (2002) (Landowner not entitled to establish a campground by special exception since a requirement for the special exception was that there be no hazards created by automobile traffic and the evidence before the board was that there would be a hazard.)

<sup>4</sup> *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881, 886, 587 A.2d 603, 606 (1991) (The abutter alleged that a special exception was needed before the particular land use was permitted. Two of the Zoning Board of Adjustment members concluded that a special exception was needed. However, those members voted to waive the need for a special exception without addressing the need for or ability of a variance. The court ruled that the Zoning Board improperly “waived” the requirement for a special exception for the construction of 22 additional mobile home sites on a 42-acre tract of land.)

<sup>5</sup> 130 N.H. 510, 517-18, 543 A.2d 1385, 1388-89 (1988).

- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
- (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:
- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
  - (ii) The proposed use is a reasonable one.
- (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

I-a. Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance. (This paragraph was added to RSA 674:33 by [Ch. Law 93:1, SB50](#), 2013.)

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2. (This paragraph was added to RSA 674:33 by [Ch. Law 267:9, SB101](#), 2013.)

A variance is a relaxation or a waiver of any provision of the ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate the ordinance and may be granted by the board of adjustment on appeal. *“Variances are included in a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated.” Sprague v. Acworth, 120 N.H. 641 [1980]*

In the 2013 case of [Stephen Bartlett & a. v. City of Manchester](#), 164 N.H. 634, (see a summary of the case in Appendix D) the court held that *the ZBA must always examine the nonconforming use issue first* – even if the owner has ignored that and applied for a variance. That’s because *every* variance implicitly raises the issue of what an owner can do *without* a variance – that issue being highly relevant to the question of whether “unnecessary hardship” exists. **Lesson:** A ZBA *in every variance case* must first check to see what the status is of any nonconforming uses.<sup>6</sup>

A variance is now only valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a 6 month window within which the variance remains valid following the resolution of a planning application filed in reliance upon the variance. (See the addition of section I-a to RSA 674:33 set out above.)

The local ordinance cannot limit or increase the powers of the board to grant variances beyond statutory authority; this power must be exercised within specific bounds. In many prior decisions, the supreme court has declared that each of the following conditions must be found in order for a variance to be legally granted:

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<sup>6</sup> 2015 NHMA Law Lecture #1 - *Grandfathering: The law of Non-Conforming Uses & Vested Rights* by Bernie Waugh, Esq., Gardner Fulton & Waugh PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh PLLC.

- a. The variance will not be contrary to the public interest;
- b. The variance is consistent with the spirit of the ordinance;
- c. Substantial justice is done by granting the variance;
- d. Granting the variance will not diminish the value of surrounding properties; and
- e. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

In 2009, [RSA 674:33](#) was amended to codify the five variance criteria, including diminution of property values and, more importantly, overrule the separate criteria for “area” variances established by the landmark decision in [Michael Boccia & a. v. City of Portsmouth & a.](#), 151 N.H. 85, 104 [2004].

The legislature clarified its action by including a statement of intent in [SB147](#) (Chaptered Law 307 of 2009) 307:5 Statement of Intent. “The intent of section 6 of this act is to eliminate the separate “unnecessary hardship” standard for “area” variances, as established by the New Hampshire Supreme Court in the case of *Boccia*, and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in [Simplex Technologies, Inc. v. Town of Newington & a.](#), 145 N.H. 727 [2001], as those standards have been interpreted by subsequent decisions of the supreme court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the *Simplex* decision, as exemplified by cases such as [Governor’s Island Club, Inc. v. Town of Gilford & a.](#), 124 N.H. 126 [1983].”

**COMMENT: Proving a Negative**

***“The applicant still has the burden of persuasion on all five variance criteria, but my advice to ZBA members is not to be procedural sticklers when it comes to the “public interest” criterion. If an applicant makes even a conclusory statement like: “As you can see, there’s no adverse effect on the public interest,” that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it. To put it another way, if the applicant satisfies the other four criteria, a denial based solely on the “public interest” criterion is, in my view, unlikely to be upheld in Court unless your decision identifies some specific way in which the proposed variance is contrary to that interest.”***

1999 Municipal Law Update: The Courts; H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

## The Five Variance Criteria

### 1. The variance will not be contrary to the public interest.

In the case of [Gray v. Seidel](#), 143 N.H. 327 [February 8, 1999] the New Hampshire Supreme Court reaffirmed the variance standard in [RSA 674:33, I\(b\)](#) [1996], which states that the board has the power to “[a]uthorize... [a] variance from the terms of the zoning ordinance as will not be contrary to the public interest if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” [emphasis added] The court clarified that RSA 674:33, I(b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., “will not be contrary”) to the public interest if granted.

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public? (See [Chester Rod and Gun Club, Inc. v. Town of Chester](#), 152 N.H. 577 [2005] on page D-24.)

## 2. The spirit of the ordinance is observed.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, [RSA 674:16-20](#). In general, the provisions must promote the “*health, safety, or general welfare of the community.*” They do this by lessening congestion in the streets; securing safety from fires, panic and other dangers; and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. “*This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.*”<sup>7</sup>

For instance, a zoning ordinance might control building heights specifically to protect adjoining property from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent if the ordinance clearly states that this is the sole purpose for the building height limitation. On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property, the granting of the variance might be improper.

As another example, consider the question of frontage requirements. Most zoning ordinances specify a minimum frontage for building lots to prevent overcrowding of the land. If a lot had ample width at the building line but narrowed to below minimum requirements where it fronted the public street, a variance might be considered without violating the spirit and intent of the ordinance, because to do so would not result in overcrowding. There are many other variations of lot shapes and sizes that might qualify for a variance; the principles remain the same. The courts have emphasized in numerous decisions that the characteristics of the particular parcel of land determine whether or not a hardship exists.

However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. **The board cannot change the ordinance.**

In [Maureen Bacon v. Town of Enfield](#), No. 2002-591, [N.H. Jan. 20, 2004], the ZBA denied a variance for a small propane boiler shed attached to the outside of a lakefront house because (1) it did not satisfy the *Simplex* “hardship” standard; (2) it would violate the spirit of the ordinance; and (3) it would not be in the public interest. The supreme court noted that there were three grounds for the superior court’s decision and explained, “In order to affirm the trial court’s decision, we need only find that the court did not err in its review concerning at least one of these factors.”

Focusing on the “spirit of the ordinance” factor, the court concluded, “*While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and over development could be inconsistent with the spirit of the ordinance.*”

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<sup>7</sup> Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 4.

In *Malachy Glen Associates, Inc. v. Town of Chichester*, [March 20, 2007], the supreme court stated that “The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.” [*Chester Rod and Gun Club v. Town of Chester*, 152 N.H. at 580]

*[T]o be contrary to the public interest... the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality... Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.”*

The new statutory language was tested in the case of *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508 [2011]. The opinion discusses each element in the context of two separate variances granted to permit the installation of two different types of signs on a hotel property, and is currently the only case our supreme court has decided that interprets the meaning of the newly revised statute. Based upon the language of the opinion, we now can state the following regarding application of the elements to actual applications for relief:

- a. Public interest and spirit of the ordinance. As held in *Farrar v. Keene*, 158 N.H. 68 [2009], the two elements are related. For a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance’s basic zoning objectives. There are two methods to answer this question:
  1. Examine whether granting the variance would alter the essential character of the neighborhood; or
  2. Examine whether granting the variance would threaten the public health, safety or welfare.

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New Hampshire Local Government Center, page 32. [October 2012]

### 3. Substantial justice is done.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by granting a variance that meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

Any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also, the court will examine whether the proposed development is consistent with the area’s present use. (*Malachy Glen Associates v. Town of Chichester* 155 N.H. 102 (2007) [October 2012])<sup>8</sup>

### 4. The values of surrounding properties are not diminished.

Perhaps Attorney Timothy Bates says it best in the OEP training video, Zoning and the ZBA:

*“Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial*

<sup>8</sup> NHMA Law Lecture #1 - Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32.

*application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur.”*

*“The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values.”<sup>9</sup>*

Also, in *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632, 644 A.2d 548 [1994], the court stated that the resolution of conflicts is a function of the zoning board of adjustment.

## **5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

The term “hardship” has caused more problems for boards of adjustment than anything else connected with zoning, possibly because the term is so general and has so many applications outside of zoning law. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed. The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a zoning board. Even in the same town, different results may be reached with just slightly different fact patterns. *“This does not mean that either finding or decision is wrong per se, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire’s land use regulatory scheme.”* (*Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632, 644 A.2d 548 [1994].)

On January 29, 2001, the New Hampshire Supreme Court issued an opinion in [\*Simplex Technologies, Inc. v. Town of Newington & a\*](#), which dramatically changed the standard for granting zoning variances. The court refined the long-held standard for unnecessary hardship and established three conditions that must be used by boards of adjustment when determining if a hardship exists. (See Appendix E for background information about this significant court decision.)

On May 25, 2004, the New Hampshire Supreme Court issued an opinion in [\*Michael Boccia & a. v. City of Portsmouth & a\*](#), which further refined variance law to distinguish between use and area (dimensional) variances. In *Boccia*, the court concluded that it must distinguish between *use* variances and *dimensional* variances, observing that the hardship criteria of *Simplex* could only logically be applied to uses of land.

This distinction between “use” and “area” variances has caused confusion for boards and has been the subject of much litigation. The legislature addressed this issue in 2009 with the passage of SB147 to remove this distinction and codify the five variance criteria in the statute. Boards must now use the “reasonable use” and “relationship” criteria from the *Simplex* decision for determination of unnecessary hardship for all variance cases. The statute also now codifies the much stricter pre-*Simplex* standard for unnecessary hardship derived from [\*Governor’s Island Club v. Town of Gilford\*](#), 124 N.H. 126 [1983] which would still apply if the applicant was unable to meet the *Simplex* standards.

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<sup>9</sup> Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 3.

Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* (the *Governor's Island* standard) in order to demonstrate unnecessary hardship, a landowner may now establish unnecessary hardship by satisfying the following conditions:

[RSA 674:33, I\(b\) \(5\) \(A\) Powers of Zoning Board of Adjustment](#)

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property. (the relationship test)

**Why does the new law codify the old *Governor's Island* standard in addition to the *Simplex* standard if *Governor's Island* was overruled by *Simplex*?**

*Simplex* did not entirely overrule *Governor's Island*. In *Simplex*, the court said the definition of unnecessary hardship, as established in *Governor's Island* and subsequent cases, had become “too restrictive in light of the constitutional protections by which it must be tempered.” [145 N.H. at 731]

The court, therefore, adopted a less restrictive test. However, there is not a one-dimensional spectrum of variance cases so that an application that satisfies *Simplex* will automatically satisfy *Governor's Island*. There may be a rare case in which the applicant could satisfy the *Governor's Island* test but not the *Simplex* test.

This most likely would happen where there is clearly a “fair and substantial relationship... between the general purposes of the zoning ordinance and the specific restriction on the property” – and the variance therefore fails on the second prong of *Simplex* – but because of special conditions, the effect of the restriction on the property is to preclude any reasonable use. If such an application is judged solely on the *Simplex* standard, it fails, but the result would be to deprive the owner of any reasonable use of the land – an unconstitutional taking. Thus, there has to be a secondary “safety valve” since the alternative would be for a court to invalidate the zoning restriction altogether. Subparagraph (5) (B) provides relief for the applicant in that rare case.

“The Five Variance Criteria in the 21<sup>st</sup> Century,” NHMA Law Lecture #2, Fall 2009

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose? Once the purposes of the ordinance provision have been established, the property owner needs to establish that, because of the special conditions of the property, application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any “fair and substantial” way.<sup>10</sup>

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or “unnecessary” hardship.

And:

- (ii) The proposed use is a reasonable one. (the reasonable use test)

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<sup>10</sup> This is comparable to the standard suggested in *St. Onge v. Concord*, 95 N.H. 306, 308 [1949]: “It may, therefore, be stated that ‘unnecessary’ as used in this connection, means ‘not required to give full effect to [the] purpose of the ordinance.’”

The applicant must establish that, because of the special conditions of the property, the proposed use is reasonable. This is not exactly how the court stated this requirement in *Simplex*, where it said applicants must show that the zoning restriction “interferes with their reasonable use of the property, considering the unique setting of the property in its environment.”<sup>11</sup> That statement was not helpful, but the court clarified it in *Bonnita Rancourt & a. v. City of Manchester*<sup>12</sup> stating that “after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought ‘reasonable.’”<sup>13</sup>

The new law does not require - nor did *Rancourt* - an investigation of how severely the zoning restriction interferes with the owner’s use of the land. It merely requires a determination that, owing to special conditions of the property, the proposed use is reasonable (see the corresponding write-up on page II-16). This is necessarily a subjective judgment - as is almost everything having to do with variances - but presumably it includes an analysis of how the proposed use would affect neighboring properties and the municipality’s zoning goals generally. It clearly includes “whether the landowner’s proposed use would alter the essential character of the neighborhood.”<sup>14</sup>

The two paragraphs that follow are from *The Five Variance Criteria in the 21<sup>st</sup> Century*, New Hampshire Municipal Association Law Lecture #2, Fall 2009.

The second of the two parts of the hardship criteria in RSA 674:33, I(b)(5)(A)(ii) – “The proposed use is a reasonable one” – cannot be considered in isolation and must be read in conjunction with the introductory language in subparagraph A – “. . . owing to special conditions of the property that distinguish it from other properties in the area . . .” - so that the criterion as a whole is “. . . owing to special conditions of the property . . . the proposed use is a reasonable one.” In other words, the board needs to find that a use (or dimensional requirement) which otherwise must be considered unreasonable (because it violates the ordinance) is rendered reasonable by the special conditions of the property (or of its setting or environment, as *Simplex* says).

Board members should also be cognizant of the intent of Ch. Law 307 (2009) (the law that amended RSA 674:33) which was to eliminate the separate “use” and “area” variance standards of the *Boccia* decision and to deem that the unnecessary hardship standard is satisfied if the applicant meets the standards established in *Simplex* as those standards have been interpreted by subsequent decisions of the supreme court.

In the context of these sign variances, ([Harborside Associates, LP v. Parade Residence Hotel, LLC](#), 162 N.H. 508 [2011]) the court stated the test to mean, “...hardship exists when, owing to special conditions of the land, (1) there is no fair and substantial relationship between the general public purpose of the ordinance and the specific application of the ordinance to the property at issue, and (2) the use for which the variance is sought is “reasonable.” The court did not reach the second test for hardship set forth in the statute, since it determined the applicant had provided sufficient evidence to establish entitlement under the first test. We also learn that the size of a building may constitute the “special conditions” that form the basis for “unnecessary hardship.” [October 2012]<sup>15</sup>

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<sup>11</sup> 145 N.H. at 731-32.

<sup>12</sup> 149 N.H. 51, 54 [2003].

<sup>13</sup> Id. at 54.

<sup>14</sup> [John R. Harrington & a. v. Town of Warner](#), 152 N.H. 74, 81 (2005); see also [Farrar v. City of Keene](#), No. 2008-500, slip op. at 4 (N.H. May 7, 2009).

<sup>15</sup> NHMA Law Lecture #1 – Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32 [October 2012].

In a case decided after *Rancourt*, the court adopted a more muddled approach, and one that is irreconcilable on its face with *Rancourt*, although it did not acknowledge the inconsistency. In *John R. Harrington & a. v. Town of Warner*, 152 N.H. 74 (2005), the court stated: "This [reasonable use] factor includes consideration of the landowner's ability to receive a reasonable return on his or her investment." Although "[r]easonable return is not maximum return," this factor requires more than a "mere inconvenience." This factor, however, does not require the landowner to show that he or she has been deprived of all beneficial use of the land. Rather, this factor should be applied consistently with our sound policy, enunciated in *Simplex*, of being "more considerate of the constitutional right to enjoy property." Nevertheless, "mere conclusory and lay opinion concerning the lack of reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence." *Id.* at 80-81 (emphasis in original) (citations omitted). Apparently, then, *Harrington* would require an applicant to prove that the zoning restriction causes some measurable decrease in the property's value. The amount of the required decrease is not quantified, but it is more than a "mere inconvenience" and less than a deprivation of all beneficial use of the land. The court in *Rancourt* had not considered at all the effect of the zoning restriction on the landowners' ability to receive a reasonable return on their investment. Rather, the court simply examined the proposed use of the property in light of its "special conditions" and determined that it was reasonable (see 149 N.H. at 54). Given that the variance in question merely allowed the owners to construct a two-horse barn on their residential property, (see *id.* at 52) it is unlikely that the denial of the variance would have affected the return on their investment in any material way. Thus, it seems that they would have failed the test announced in *Harrington*.

The new law adopts *Rancourt's* formulation over *Harrington's* because it is clearer and because, while *Harrington* is inconsistent with *Rancourt*, it did not expressly overrule *Rancourt*. Further, in the two cases in which the court actually purported to follow the *Harrington* approach - one of them being *Harrington* itself - it affirmed the grant of a variance even though there was, in fact, no "actual proof" about return on investment. In *Harrington*, the only evidence on this point was "[the land owner's] unsupported conclusion that without the variance, he might have to let the property 'go back to the previous owner'" (152 N.H. at 82). The supreme court acknowledged that this was inadequate but affirmed the finding of unnecessary hardship anyway, specifically on the ground that it found the proposed use "reasonable." (See *id.* at 82-83) That is exactly what the court had done in *Rancourt*. Similarly, in *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009), the court acknowledged that the applicant "submitted minimal evidence of a reasonable return of his investment in the property," (*slip op.* at 4) but still concluded that unnecessary hardship was established (see *id.* at 4-5).

In both *Harrington* and *Farrar*, the court stated that evidence of adverse effect on "reasonable return" is just one of three "nondispositive factors" and therefore, apparently, not an absolute requirement, even though it was explained in terms of the "actual proof" that is "required." (See *Harrington*, 152 N.H. at 80; *Farrar*, *slip op.* at 3, 4.) This seems to explain how the applicants got around this "requirement" in both cases. The second nondispositive factor, according to *Harrington*, is whether the property is "burdened by the zoning restriction in a manner that is distinct from other similarly situated property" (152 N.H. at 81). Of course, this factor is entirely dispositive if it is not satisfied - in the absence of special conditions, the inquiry ends. The third factor is "consideration of the surrounding environment." *Id.* "This includes evaluating whether the landowner's proposed use would alter the essential character of the neighborhood." *Id.* That certainly makes sense, but it seems to be an obvious element of any evaluation of the reasonableness of the use. Thus, in the end, it appears that *Harrington's* test comes down to this: there must be special conditions of the property and the proposed use should not alter the essential character of the neighborhood. Evidence of adverse effect on the owner's investment return is encouraged but not required. If this is different from the approach taken in *Rancourt*, the difference is minimal.

Taken from "The Five Variance Criteria in the 21<sup>st</sup> Century"  
New Hampshire Municipal Association Law Lecture #2, Fall 2009.

## “Use” and “Area” Variances and “Spot Zoning”

New Hampshire law no longer distinguishes between a “use” or “area” variance. New Hampshire law requires the existence of unnecessary hardship for the granting of any variance, whether it is for a use not allowed in a particular zone or a deviation from a dimensional requirement.

Municipalities are encouraged to review their variance application forms and make necessary changes to reflect the elimination of the distinction between use and area variances. See the suggested form in Appendix C.

Requests for variances are often the most difficult cases that zoning boards have to consider. Opposition of neighbors or the fact that no abutters appear at the hearing should not sway boards. The board must review each of the five variance criteria and grant the variance, *only* if they are all met. The board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea.

The granting of a variance should not be confused with “spot zoning,” defined by the New Hampshire Supreme Court as the singling out of a parcel of land by the legislative body through the zoning process for treatment unjustifiably differing from that of surrounding land, thereby creating an island having no relevant differences from its neighbors (*Bosse v. Portsmouth*, 107 N.H. 523, 226 A.2d 99 [1967]). Boards should not dismiss variance requests merely on the basis of a claim of improper spot zoning. On the contrary, although a variance which has been granted with no basis for treating the subject parcel in a manner different from surrounding property may create an effect similar to spot zoning, the grant of a variance is not spot zoning.

All requests for variances should be reviewed very carefully. Denial of a proper variance request may result in a taking or loss of legitimate property rights of a landowner while the granting of an improper variance may alter the character of a neighborhood, forever beginning a domino effect as adjacent, affected properties seek similar requests due to the now changed character of the area.

Spot zoning occurs when an area is unjustly singled out for treatment different from that of similar surrounding land. The mere fact that an area is small and is zoned at the request of a single owner does not make it spot zoning. Persons challenging a rezoning have the burden before the trial court to demonstrate that the change is unreasonable or unlawful. The zoning amendment, which merely extends a pre-existing agricultural land boundary and does not create a new incongruous district, is not spot zoning. The court also noted that the zoning amendment was supported by a majority of the public and would protect the health and welfare of area residents. (See *Miller v. Town of Tilton*, 139 N.H. 429, 655 A.2d 409 [1995].)

## Granting Variances for the Disabled

[Ch. Law 218, SB415](#) [1998] authorizes zoning boards of adjustment to grant variances to zoning ordinances for a person or persons having a recognized physical disability, which may be granted for as long as the particular person has a need to use the premises.

This bill amends [RSA 674:33](#) by adding a new paragraph, V, that states:

- V. Notwithstanding subparagraph I(b), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

- (a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.
- (b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

## EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

### [RSA 674:33-a Equitable Waiver of Dimensional Requirement](#)

- I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:
  - (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
  - (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
  - (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
  - (d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.
- IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

This provision was approved by the legislature to address the situations where a good faith error was made in the siting of a building or other dimensional layout issue. In the past, when it was discovered that a building had been improperly sited and slightly encroached into the setback area, the only relief available was to seek a variance. Often, these variances were granted because there was no reasonable alternative for the landowner and no particular harm was being done. But in most cases, there would be a serious question as to whether the requirements for a variance could be met.

The legislature addressed this problem by creating the equitable waiver provision of [RSA 674:33-a](#). When a lot or structure is discovered to be in violation of a physical layout or dimensional requirement, the zoning board of adjustment may grant a waiver only if each of the four findings as outlined in the statute are made: (a) lack of discovery; (b) good faith error in measurement or calculation; (c) no diminution in value of surrounding property; and (d) the cost of correcting the mistake outweighs any public benefit.

In lieu of the zoning board of adjustment finding that the violation was not discovered in a timely manner and that the mistake was made in good faith, the owner can meet the first two parts of the four-part test by demonstrating that the violation has existed for ten or more years and that no enforcement action was commenced against the violation during that time by the municipality or by any person directly affected.

Equitable waivers may be granted only from physical layout, mathematical, or dimensional requirements and may not be granted from use restrictions. Once a waiver is granted, the property is not considered to be a nonconforming use and the waiver does not exempt future use, construction, reconstruction or additions on the property from full compliance with the ordinance. The fact that a waiver is available under certain circumstances does not alter the principle that owners of land should understand all land use requirements. In addition, the statute does not impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or compliance of property inspected by them.

The application and hearing procedures for equitable waivers are governed by [RSA 676:5-7](#). Rehearings and appeals are governed by [RSA 677:2-14](#). The burden of proof rests with the property owner seeking an equitable waiver.

For an additional explanation of this power of the zoning board of adjustment, readers are encouraged to review the article in *Town and City Counsel* contained in the December 1996 edition of the New Hampshire Municipal Association magazine, *New Hampshire Town and City* by H. Bernard Waugh, Jr., Esq.

## **EXPANSION OF NONCONFORMING USES**

### [RSA 674:19 Applicability of Zoning Ordinance](#)

A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.

A nonconforming use is one that was lawfully established before the passage of the provision in the zoning ordinance that now does not permit that use in that particular place. Nonconforming uses enjoy constitutional protections under state law which allows them to expand to a certain degree. Therefore, in a particular case, a nonconforming use may have the right to expand in a way that would otherwise require a variance.

Much has been written about this topic and it has been the subject matter of many NH Municipal Association law lectures, most recently as Law Lecture #1 in the Fall of 2015 – “Grandfathering: The Law of Non-Conforming Uses & Vested Rights” by H. Bernard Waugh, Jr., Esq., Gardner Fulton & Waugh, PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh, PLLC. Earlier lectures include “Vested Property Rights and Changes in Use,” John J. Ratigan, Esq., Douglass P. Hill, Esq., Clay Mitchell, Esq., NH Municipal Association Lecture #3, Fall 1997, and “GRANDFATHERED! The Law of Nonconforming Uses and Vested Rights” by H. Bernard Waugh, Jr., Esq., NH Municipal Association Legal Counsel, Fall 1994. Attorney Waugh also presented these materials at the Fall 2009 OEP Planning and Zoning Conference, [GRANDFATHERED – The Law of Nonconforming Uses and Vested Rights \(2009 Ed.\)](#).

*“Despite the fact that nonconforming uses violate the letter and the spirit of zoning laws, they have evolved for the purpose of protecting property rights that antedated the existence of an ordinance from what might be an unconstitutional taking.” (Surry v Starkey, 115 N.H. 31 [1975], citing Powell, Real Property, Sec. 869; Rathkopf, Law of Zoning and Planning, 58-1; Anderson, American Law of Zoning, Sec. 6.01.)*

*“In this State, the common-law rule is that an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.” (Henry & Murphy, Inc. v. Town of Allenstown, 120 N.H. 910 [1980])*

*“The State Constitution provides that all persons have the right of acquiring, possessing and protecting property. N.H. Const. Pt. I, arts. 2, 12. These provisions also apply to nonconforming uses... As a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use.” (Loundsbury v. City of Keene, 122 N.H. 1006 [1982])<sup>16</sup> (citations omitted)*

The question of expansions and changes in a nonconforming use may reach the zoning board of adjustment by one of several routes. An owner may assume he’s “grandfathered” for a particular use and just begins expanding the use. A concerned abutter may disagree and complain to the zoning administrator who in turn must decide if the expansion is allowed or not. The owner or abutter can then appeal that administrative decision to the zoning board of adjustment who would have to decide if the expanded use were grandfathered or not.

Alternatively, the owner might apply for a building permit and the administrative officer (building inspector, zoning administrator, board of selectmen) would make the initial decision regarding the grandfathered status and either issue or deny the permit. That decision would be appealable as before.

Another possibility would be if the owner makes an application to the planning board claiming that some aspect of the application is “grandfathered” from zoning. The planning board can decide just on that issue which can be appealed to the ZBA under RSA 676:5, II.

A fourth way this issue might come before the board is if an application for a special exception or variance is submitted. In this case, the board should exercise caution. Absent a specific provision in the ordinance allowing expansions of nonconforming uses by special exception, a landowner cannot use a nonconforming use as a basis for a special exception. Both nonconforming uses and variances are legally similar, namely that they are both constitutional protections of property rights. If someone has a legal right to expand a nonconforming use, then a variance is not needed. If, on the other hand, a use is not grandfathered, a variance would be required to allow its expansion.

What a landowner cannot do is “bootstrap” his way toward a variance by claiming that the nonconforming status of the property somehow constitutes a “hardship.” If a landowner wishes to expand or change a nonconforming use he must EITHER:

- Argue that the expansion is a “natural” expansion which doesn’t change the nature of the use, is merely a different manner of utilizing the same use, doesn’t make the property proportionately less adequate, and doesn’t have a substantially different impact on the neighborhood; or

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<sup>16</sup> “GRANDFATHERED! The Law of Nonconforming Uses and Vested Rights,” H. Bernard Waugh, Jr., Esq., New Hampshire Municipal Association, Municipal Law Lecture Series, Lecture #3, Fall 1994, pg. 2.

- Apply for a variance and satisfy all five of the normal variance criteria.

In short, if an owner can't do what he wants to do within the confines of the allowable evolution, then he must qualify for a variance the same way as if there were no nonconforming use.

A legal test for expansion of nonconforming uses has been established by the New Hampshire Supreme Court from cases such as [\*New London Land Use Association v. New London Zoning Board of Adjustment & a\*](#), 130 N.H. 510 (1988). In reviewing whether a particular activity is protected as within the existing nonconforming use, the following factors, or tests, must be considered:

- To what extent does the challenged activity reflect the nature and purpose of the existing nonconforming use. (i.e., does the proposed change arise “naturally” through evolution, such as new and better technology, or changes in society.)
- Is the challenged activity merely a different manner of utilizing the same use or does it constitute a use different in character, nature and kind from the nonconforming use?
- Does the challenged activity have a substantially different impact on the neighborhood?
- Enlargement or expansion of a nonconforming use may not be substantial and may not render the property proportionally less adequate.

Enlargement or expansion of a nonconforming use may not be substantial and may not render the property proportionally less adequate. (See *New London Land Use Assoc. v. New London Zoning Board*, 130 N.H. 510 [1988].)

In order to be allowable as a “natural expansion,” expansion of a nonconforming use must not be such as to constitute an entirely new use. Factors to be considered are the nature and purpose of the prevailing nonconforming use, the nature and kind of the proposed change in use, and whether the change in use will have a substantially different effect on the neighborhood. (See *Devaney v. Windham*, 132 N.H. 302 [1989].)

Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid. (See *Granite State Minerals v. Portsmouth*, 134 N.H. 408 [1991].)

Where the permit sought by a landowner would result only in internal changes in a pre-existing structure and where there would be no substantial change in the use's effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use. The granting of a sign permit which only resulted in lettering change and the relocation of a coffee counter within the store were not an improper expansion of a nonconforming use. (See *Ray's State Line Market, Inc. v. Town of Pelham*, 140 N.H. 139, 665 A.2d 1068 [1995].)

In [\*Conforti v. City of Manchester\*](#), 141 N.H. 78 [May 29, 1996] the supreme court found that the staging of live rock concerts in the Empire Theater originally built as a movie house in 1912 was not a lawful expansion of a nonconforming use. If the new activity fails any one of the three *New London* tests it is unlawful at common law. The court pointed out that whether the new use is a substantial change in the nature or purpose of the nonconforming use depends on the facts and circumstances of the individual case.<sup>17</sup>

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<sup>17</sup> 1997 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 31, 1997.

The zoning board of adjustment does have the authority to attach conditions to the continued enjoyment of a nonconforming use as illustrated by *Peabody v. Town of Windham*, 142 N.H. 488 [December 29, 1997]. In this case, a nonconforming well drilling business was purchased and the new owners began to operate a construction business and move in paving equipment until the building inspector halted the use. The owners appealed the administrative decision and the board found that the construction business was within the scope of the original nonconforming use but not a paving business. The owner appealed and after a rehearing the board reaffirmed its earlier decision but this time with some specific limiting conditions. Again, the owner appealed and the lower court overruled the board's decision and conditions. The town then appealed to the supreme court who reversed the lower court stating in part "as a general matter of law the ZBA also has the power to attach conditions to appeals from decisions of administrative officers involving nonconforming uses, provided the conditions are reasonable and lawful."<sup>18</sup>

In *Hurley, et al v. Hollis*, 143 N.H. 567 [May 25, 1999] the court held that the amendment to the local regulation allowing an expansion of a nonconforming use by special exception was merely codifying existing case law, not allowing greater expansion rights. Towns may, if they wish, broaden expansion rights for nonconforming uses. In this case the town may have intended to do just that but the court found otherwise.

Towns need not enact anything to review and even allow some degree of change and "natural expansion" of a nonconforming use.<sup>19</sup> Municipalities are cautioned to proceed very carefully at their own peril lest the floodgates be opened for unwanted expansions, unless such ordinances are crafted very carefully.

#### **ABANDONMENT OF NONCONFORMING USES**

In *Pike Industries, Inc. v. Brian Woodward*, No. 2009-126 [May 7, 2010] the court determined that the subjective intent of the landowner is not relevant when the zoning ordinance defines abandonment of a nonconforming use as discontinuance for more than a year. There is no abandonment when a business owner keeps his facility ready to produce and deliver a product, even if such products are not actually produced.

Beginning prior to 1960, Pike Industries had operated an asphalt batching plant in the Town of Madbury as a nonconforming use in its zoning district. Between October of 2005 and August of 2007, no asphalt was actually produced at the facility, but the company did take steps to maintain and repair equipment, solicit bids for work and train personnel to operate the facility. In April of 2007, Pike sought permission from the planning board to alter the use of the site from asphalt batching to concrete batching. Abutters objected, arguing that the asphalt batching had been abandoned, the use could not be restarted and, further, that the concrete batching use was an impermissible change of use. The planning board rejected these arguments, and the abutters appealed to the zoning board of adjustment.

The ZBA found that the failure to actually produce asphalt for a period in excess of one year constituted an abandonment of the use under the terms of the zoning ordinance, and that it need not consider the intent of the landowner in making this determination. Pike appealed to the superior court, which reversed the ZBA decision on abandonment and remanded the matter to the ZBA for a consideration of the intent of the landowner. The abutters appealed to the supreme court.

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<sup>18</sup> 1998 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

<sup>19</sup> 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

In two previous cases, the court set forth two different rules regarding abandonment of a nonconforming use. In *Lawlor v. Salem*, 116 N.H. 61 [1976], the court held that the right to a nonconforming use could be lost by abandoning the use, and that the subjective intent of the landowner was a factor in the determination of whether abandonment had occurred in fact. However, in *McKenzie v. Eaton Zoning Board of Adjustment*, 154 N.H. 773 [2007], the court found that a municipality may lawfully draft its ordinance to define “abandonment of a nonconforming use” without regard to the intent of a landowner to abandon that use.

Here, the town had drafted its ordinance to define abandonment as discontinuance for more than one year, without regard to the intent of the landowner. The court applied the rules from *McKenzie*, and ruled that intent was irrelevant. It also found that when a business maintains a site in a state of readiness to continue the nonconforming use, there is no abandonment even if no product is actually created at the site. “We agree with the trial court’s analogy of the asphalt plant to a store. A store owner must set up a store front, stock the store with merchandise, maintain a staff, pay utilities, and advertise its services. Even with all of the preparations, however, the store owner cannot guarantee that customers will purchase merchandise.” Therefore, the original determination of the planning board was reinstated, and Pike Industries may either resume the asphalt batching use or seek a new site review approval to alter the use to a concrete batching plant.<sup>20</sup>

### **Zoning Ordinance “Use It or Lose It” Clauses<sup>21</sup>**

Some ordinances get around having to prove the intent to abandon and the overt act, by setting a time deadline for any nonconforming use to be restored. A typical provision might say that any nonconforming use which is discontinued may be resumed within 2 years, but no later.

How valid are these clauses? In *McKenzie*, the NH Supreme Court made it clear that these clauses must be presumed valid by a zoning board. The case involved a shed which was “grandfathered” from a lakeshore setback, and which had been destroyed by wind. The ordinance said destroyed structures must be built back within one year or lose their nonconforming status. The ZBA, based on advice from Yours Truly and a prior version of this lecture, held that the 1-year clause didn’t apply because the owner hadn’t intended to “abandon” the right to build the shed back (under *Lawlor*). But the Court held that the ordinance applied, rather than the *Lawlor* case. Justice Duggan, in a concurring opinion, suggested that the result might have been different if the owner had specifically raised a constitutional “takings” claim.

In light of *McKenzie*, here is my (corrected) advice on how to handle these clauses:

- (a) If the owner doesn’t raise any constitutional “taking” claim, the ‘use-it-or-lose-it’ clause should be applied strictly and literally. (And any claim that isn’t raised before the Board itself usually can’t be raised later in court - see [RSA 677:3, I.](#))
- (b) If a constitutional “taking” claim is raised, the common law of abandonment (under *Lawlor*) should be applied. But still the failure to resume the use within the stated period should still be presumed to incorporate an intent to abandon, in the absence of contrary evidence. After all, every citizen is presumed to have notice of the ‘use-it-or-lose-it’ period in the ordinance (again, “ignorance of the law is no excuse”).

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<sup>20</sup> *New Hampshire Town and City*, NHMA, July/August 2010.

<sup>21</sup> *Grandfathering: The Law of Non-Conforming Uses & Vested Rights* by Bernie Waugh, Esq., Gardner Fulton & Waugh, PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh, PLLC, NHMA Law Lecture #1, Fall 2015.

- (c) The only kind of case where the failure to have an intent to abandon might be decisive - despite a ‘use-it-or-lose-it’ clause - is where the failure to resume the use (or structure) during the period was due to circumstances truly beyond the control of the owner (for example, a red tape delay in obtaining a State permit) and again, only if the owner explicitly raises a constitutional claim and the Board states in its decision that it is based on constitutional law (a decision you’ll probably want to consult the Board’s attorney about).

Be careful when applying “use-it-or-lose-it” clauses. In *Pike Industries, Inc.*, the Madbury ZBA held that an asphalt plant had lost its nonconforming status under a 1-year clause because no asphalt had been produced for a year. But the Court said the Board’s outlook was too narrow. The evidence showed that Pike spent \$24,000 during that year to keep its plant ready to produce asphalt if any were ordered. Thus the business had not been discontinued. The Court said “a store owner cannot guarantee that customers will purchase merchandise.”

## **THE ZBA ACTING AS THE BUILDING CODE BOARD OF APPEALS**

### **State and Local Building Codes**

If a municipality adopts a building code, they must provide for the position of a building inspector and establish a building code board of appeals (BCBA). The BCBA could be the zoning board of adjustment or the board of selectmen if there is no ZBA.

#### [RSA 673:1 Establishment of Local Land Use Boards](#)

- V. Every building code adopted by a local legislative body shall include provisions for the establishment of the position of a building inspector, who shall issue building permits, and for the establishment of a building code board of appeals. If no provision is made to establish a separate building code board of appeals, the ordinance shall designate the zoning board of adjustment to act as the building code board of appeals. If there is no zoning board of adjustment, the board of selectmen shall serve as the building code board of appeals.

#### [RSA 673:3 Zoning Board of Adjustment and Building Code Board of Appeals](#)

- IV. The building code board of appeals shall consist of 3 or 5 members who shall be appointed in a manner prescribed by the local legislative body; provided, however, that an elected zoning board of adjustment may act as the building code board of appeals pursuant to RSA 673:1, V. Each member of the board shall be a resident of the municipality in order to be appointed.

Ideally there will be a separate BCBA; however, if the building code does not designate a separate BCBA and the code designates the ZBA by default to fill that role, it becomes another duty of the board of adjustment.

Any person aggrieved by a decision of the building inspector dealing with the building code may appeal to the BCBA. If the ZBA is the BCBA, then they assume these statutory powers. The statute gives little guidance or standards to help the board consider an application but does allow the board to “vary” how any provision is applied to a particular case when, in their opinion, the enforcement of the specific provision would do “manifest injustice and would be contrary to the spirit and purpose of the building code and the public interest.”

It is recommended that if the ZBA is faced with an appeal of a decision of the building inspector relative to the building code, they handle the appeal as they would an appeal from an administrative decision. The plaintiff should complete the appeal from an administrative decision application form and include a copy of the written decision of the building inspector citing the exact portions of the

building code that are in question and how the project does, or does not, comply with the building code.

#### [RSA 674:34 Powers of Building Code Board of Appeals](#)

The building code board of appeals shall hear and decide appeals of orders, decisions, or determinations made by the building official or fire official relative to the application and interpretation of the state building code or state fire code as defined in RSA 155-A:1. An application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of the state building code or the state fire code.

The state building code (SBC) is a collection of nationally recognized codes adopted by reference.

#### [RSA 155-A:1 Definitions](#)

IV. "New Hampshire building code" or "state building code" means the adoption by reference of the International Building Code 2009, the International Existing Building Code 2009, the International Plumbing Code 2009, the International Mechanical Code 2009, the International Energy Conservation Code 2009, and the International Residential Code 2009, as published by the International Code Council, and the National Electrical Code 2014, as amended by the state building code review board and ratified by the legislature in accordance with RSA 155-A:10. The provisions of any other national code or model code referred to within a code listed in this definition shall not be included in the state building code unless specifically included in the codes listed in this definition.

The local building inspector or the State Fire Marshal's office may enforce the state building code.

#### [RSA 155-A:7 Enforcement Authority](#)

I. The local enforcement agency appointed pursuant to RSA 674:51 or RSA 47:22 shall have the authority to enforce the provisions of the state building code and the local fire chief shall have the authority to enforce the provisions of the state fire code, provided that where there is no local enforcement agency or contract with a qualified third party pursuant to RSA 155-A:2, VI, the state fire marshal or the state fire marshal's designee may enforce the provisions of the state building code and the state fire code, subject to the review provisions in RSA 155-A:10, upon written request of the municipality.

#### [RSA 674:51 Power to Amend State Building Code and Establish Enforcement Procedures](#)

The state building code established in RSA 155-A shall be effective in all towns and cities in the state and shall be enforced as provided in RSA 155-A:7. In addition, towns and cities shall have the following authority:

- I. The local legislative body may enact as an ordinance or adopt, pursuant to the procedures of RSA 675:2-4, additional provisions of the state building code for the construction, remodeling, and maintenance of all buildings and structures in the municipality, provided that such additional regulations are not less stringent than the requirements of the state building code. The local legislative body may also enact a process for the enforcement of the state building code and any additional regulations thereto, and the provisions of a nationally recognized code that are not included in and are not inconsistent with the state building code. Any local enforcement process adopted prior to the effective date of this paragraph shall remain in effect unless it conflicts with the state building code or is amended or repealed by the municipality.
- II. Any such ordinance adopted under paragraph I by a local legislative body shall be submitted to the state building code review board for informational purposes.
- III. The local ordinance or amendment adopted according to the provisions of paragraph I shall include, at a minimum, the following provisions:
  - (a) The date of first enactment of any building code regulations in the municipality and of each subsequent amendment thereto.

- (b) Provision for the establishment of a building code board of appeals as provided in RSA 673:1, V; 673:3, IV; and 673:5.
- (c) Provision for the establishment of the position of building inspector as provided in RSA 673:1, V. The building inspector shall have the authority to issue building permits as provided in RSA 676:11-13 and any certificates of occupancy as enacted pursuant to paragraph III, and to perform inspections as may be necessary to assure compliance with the local building code.
- (d) A schedule of fees, or a provision authorizing the governing body to establish fees, to be charged for building permits, inspections, and for any certificate of occupancy enacted pursuant to paragraph III.

IV. The regulations adopted pursuant to paragraph I may include a requirement for a certificate of occupancy to be issued prior to the use or occupancy of any building or structure that is erected or remodeled, or undergoes a change or expansion of use, subsequent to the effective date of such requirement.

A municipality may adopt additional codes from the International Code Council, which are not included in the SBC.

#### [RSA 674:51-a Local Adoption of Building Codes by Reference](#)

In addition to the local powers under RSA 674:51 a municipality may adopt by reference any of the codes promulgated by the International Code Conference which are not included in the state building code under RSA 155-A.

For more information about the relationship between the State Building Code and the State Fire Code, see the 2015 NHMA Law Lecture #3 - [Implementing & Enforcing the State Building Code & the State Fire Code](#) by Audrey Cline, Building Inspector/Code Enforcement Officer, Town of Stratham; Carrie Rouleau-Cote, Building Inspector, Town of Auburn; and Stephen C. Buckley, Esq., Legal Services Counsel, New Hampshire Municipal Association.

#### **OTHER RESPONSIBILITIES**

In addition to the four major categories of actions, zoning boards of adjustment have several other responsibilities that are noted here but not discussed in detail.

#### **Developments of Regional Impact**

[RSA 36:54-58 Review of Developments of Regional Impact](#). This subdivision of the statutes is traditionally thought of as applying to planning boards when in fact it applies to “any proposal before a local land use board.” (RSA 36:54) Zoning boards should be familiar with these laws and establish a practice of making a determination of the potential for regional impact for all cases that come before them.

#### **Earth Excavation**

[RSA 155-E:1, III](#) allows the zoning board of adjustment to be the “regulator” for local earth excavations when so designated. In addition, towns that have commercial sand and gravel resources on unimproved land and do not provide an opportunity for excavation of these resources through zoning or other ordinances, or in municipalities whose zoning ordinance does not address excavation, sand and gravel removal is considered a use allowed by special exception ([RSA 155-E:4, III](#)).

#### **Junkyard Licensing**

[RSA 236:115](#) requires the zoning board of adjustment to issue a certificate of approval which must accompany an application for a local junkyard license.

## **Airport Zoning**

### **[RSA 424:6-a Application of Zoning and Planning Laws](#)**

The provisions of title LXIV shall apply to procedures for adoption of local airport zoning regulations, the administration and enforcement of the requirements of local airport zoning regulations, and procedures for rehearing and appeal from any action taken by a local land use board, building inspector, or the local legislative body with respect to airport zoning regulations.

### **“Official Map”**

In a community which has adopted the “official map” statute, [RSA 674:13](#) authorizes a zoning board of adjustment to grant a building permit for a structure in a mapped-street location shown on the official map specifying its location, height and other details; and [RSA 674:14](#) authorizes the governing body to appoint a board of appeals in towns where there is no zoning ordinance or zoning board of adjustment. The official map (showing the layout of future roads) should not be confused with the zoning map, which delineates zoning districts. Note that very few communities in New Hampshire have a true “official map.”

## **Interim Zoning**

[RSA 674:27](#) authorizes the ZBA to grant a special exception under interim zoning for business, commercial, and industrial ventures.

## **Building on Class VI and Unapproved Private Roads**

[RSA 674:41, II](#) authorizes appeals of administrative decisions relative to permits to build on class VI roads or other unapproved private roads. If a permit to build on a class VI road is denied, an appeal of this administrative decision can be taken to the board of adjustment. In considering this type of appeal, the ZBA has the authority to grant the permit subject to any reasonable conditions.

The statute lists standards that must be met before the permit may be granted. To allow the building, the board must find all of the following:

1. That the enforcement of RSA 674:41’s minimum frontage requirements would “entail practical difficulty or unnecessary hardship;” and
2. That the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets; and
3. That the erection of the building will not tend to distort the official map or increase the difficulty of carrying out the master plan; and
4. That erection of the building will not cause hardship to future purchasers or undue financial impact on the municipality.<sup>22</sup>

## **Historic District Commission Appeals**

[RSA 677:17](#) empowers the board of adjustment, in municipalities that have enacted a zoning ordinance, to hear appeals from decisions of the historic district commission and provisions of the district regulations. Applicable provisions of [RSA 677:1-14](#) govern where there is no zoning ordinance.

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<sup>22</sup> A Hard Road to Travel – NHMA’s Handbook on New Hampshire Law of Local Highways, Streets and Trails, H. Bernard Waugh, Jr., Esq., New Hampshire Municipal Association, Fall 1990, pg. 118.

## Appeals of Decisions of the Governing Body Relating to the Restoration of Involuntarily Merged Lots

RSA 674:39-aa, II empowers the board of adjustment to hear appeals of decision of the governing body relating to the restoration of involuntarily merged lots. These appeals should be handled in the same fashion as would any appeal of an administrative decision under RSA 676:5.

## Waivers for Agricultural Uses of Land

Under the provisions of RSA 674:32-c, II, an applicant can seek a waiver from the zoning board of adjustment, building code board of appeals (if the municipality has one), or “other applicable land use board” – which would include the planning board – if the applicant can show that compliance with the requirements effectively prohibit an agricultural use allowed under this subdivision of Chapter 674, or that the requirements are otherwise unreasonable in the context of the agricultural use.

## WHAT THE BOARD SHOULD NOT DO

### Informal Advice and Advisory Opinions

The board should never issue advisory opinions or render informal advice regarding any particular development proposal. The board only acts when there is a formal application for a variance, special exception, appeal of an administrative decision or application for an equitable waiver, or if being asked to act on any other statutory responsibility. In contrast to the planning board, there is no preliminary review process as outlined in RSA 676:4, II for the zoning board of adjustment.

***“The ZBA’s greatest fact-finding challenge comes when it hears an appeal to a decision of the historic district commission. Under RSA 677:17, all appeals of HDC decisions are heard by the ZBA as administrative appeals. Unlike other administrative appeals, though, when hearing an appeal to an HDC decision, the ZBA is considering the historic district ordinance, not the zoning ordinance, and this is conducted as a de novo review. In essence, it is as if the HDC did not make a decision, and the ZBA is compelled to hear the entire case from its beginning to its end.”***

NHMA Municipal Law Lecture #3, Fall 1999, “Getting the Facts Straight”  
Benjamin Frost, Esq. and Clayton Mitchell, Esq.