Basics for the ZBA in NH

May 2013 OEP Conference

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The Written Materials Cover:

- Who
- What
- Where
- When &
- How

  +
- What Next

Who

- Full Members
- Alternates
- Quorum

What

- What:
  - Appeals of Administrative Decisions
  - Special Exceptions
  - Variances
  - Equitable Waivers of Dimensional Criteria

Where

- Public vs. Non-Public
- Site Walk
  - By Board
  - Individual
  - 3rd Parties/Abutters

When

- That night;
- Continued to date certain;
- Never?

How

- Written
- Findings and Rulings
- Conditions

What Next

- Requests for Rehearing
- Appeals to Superior Court

Who

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  - Includes BOS and Planning Board rep's

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- Alternates
  - Per RSA 673:6, V may participate if Board's rules allow

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- Alternates
  - Per RSA 673:6, V may participate if Board's rules allow
- Quorum
  - Need 3 votes to approve
  - If less than full Board, give applicant the option to continue

Separation

- Checks & Balances

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- No Legislative Function

Separation

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- No Legislative Function
- Quasi-Judicial

What

- What:
  - Appeals of Administrative Decisions
  - Special Exceptions
  - Variances
  - Equitable Waivers of Dimensional Criteria

Appeals of Administrative Decisions

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  - hear appeals “taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer”

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  - concerning the Zoning Ordinance.

Appeals of Administrative Decisions

- RSA 676:5, II(a),
  - "administrative officer" = "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility."

Appeals of Administrative Decisions

- RSA 676:5, II(b)
  - "decision of the administrative officer" is further defined to include "any decision involving construction, interpretation or application of the terms of the [zoning] ordinance" but does <u>not</u> include "a discretionary decision to commence formal or informal enforcement proceedings".

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  - Sutton v. Town of Gilford, 160 N.H. 43 (2010) (challenges to building permit must first be made to ZBA).

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  - which are based upon the construction, interpretation or application of the zoning ordinance,
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  - a planning board decision regarding a zoning ordinance provision is ripe and appealable to the ZBA when such a decision is actually made. See, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) . The planning board need not complete its consideration of the planning issues involved in a site plan review for a zoning issue to be ripe and appealable to the ZBA. Id. at 510.

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  - Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006)(affirming dismissal of declaratory judgment action brought five months after planning board's site plan determination); and
  - McNamara v. Hersh, 157 N.H. 72 (2008) (affirming dismissal of declaratory judgment action brought eight months after ZBA denial of neighbor's appeal of administrative decision).

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  - Bartlett v. City of Manchester, __ N.H. __ (Docket # 2012-176; Issued February 25, 2013) ("contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance")

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  - Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633 (2006)(overturning prior Metzger standard of review and redefining the "rational basis test" to require that the legislation be only rationally related to a legitimate governmental interest without inquiry into whether the legislation unduly restricts individual rights or into whether there is a lesser restrictive means to accomplish that interest.);

Tim 6/2/2011
corrected the cite (page number was wrong)

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  - Taylor v. Town of Plaistow, 152 N.H. 142 (2005)(ordinance provision requiring 1000 feet between vehicular dealerships upheld).

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  - Sutton v. Town of Gilford, 160 N.H. 43 (2010)(representation by Town Planning Director concerning "non-merged" status of lots could not be justifiably relied upon); .

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  - But not required to do so.

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  - Variance seeks permission to do something that is NOT allowed by ZO
  - Spec. Exception seeks permission to do something that IS allowed by ZO if conditions met
  - ZO should provide checklist of conditions

Special Exceptions

- ZBA may not vary or waive any of the requirements set forth in the ordinance. See, Tidd v. Town of Alton, 148 N.H. 424 (2002); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988).

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- Applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002).

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- But 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).

Special Exceptions

- Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Vol. 15 Land Use Planning and Zoning (3rd Ed., 2000; Supp. 2011), Section 23.02, p. 288.

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- Finally, as with variances, special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958); see also, Loughlin, §23.05, p. 291;

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  - but see, Garrison v. Town of Henniker, 154 N.H. 26 (2006) (Supreme Court noted without comment the restriction on the variance that it would terminate if the applicant discontinued the proposed use).

Variances

New Criteria

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- Effective for all “applications and appeals for variances” filed on or after January 1, 2010

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- (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

New Criterion #5 A

- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

New Criterion #5 A

- (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:

New Criterion #5 A

- (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

New Criterion #5 A

- (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.

New Criterion # 5 B

- (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.

New Criterion # 5 B

- (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.

New Criteria

- Eliminates Boccia;

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- “Returns” to Simplex;

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- Now with Bartlett v. City of Manchester, may be asked to determine if variance even needed.

Variances

- Five key cases:
  - Harborside v. Parade
  - Simplex v. Town of Newington
  - Rancourt v. City of Manchester
  - Malachy Glen v. Town of Chichester
  - Farrar v. City of Keene

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

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  - "similar to but not identical with" Simplex and Governor's Island

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  - determine whether variance would "unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."

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  - determine whether variance would "unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."
- "Mere conflict with the terms of the ordinance is insufficient."

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  - (2) whether the variance would “threaten public health, safety or welfare.”

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- T. Ct. rev’d on these two criteria

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- T. Ct. erred in focusing on "only apparent benefit to public would be ability to identify [Parade's] property from far away"
- ZBA correctly focused on whether public stood to gain from denial

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- On substantial justice criterion, Sup. Ct. restated position from Malachy Glen, Harrington and Daniels:
- "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."
- T. Ct. erred in focusing on "only apparent benefit to public would be ability to identify [Parade's] property from far away"
- ZBA correctly focused on whether public stood to gain from denial
- Since record supported ZBA's factual findings, T. Ct. was rev'd on this criterion; but Sup. Ct. rem'd parapet sign variances back to T. Ct. to "consider unnecessary hardship criteria in first instance."

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- “Because a sign variance is at issue, we find no error in examining whether the building upon which the sign is proposed to be installed has ‘special conditions’.”

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- "Because a sign variance is at issue, we find no error in examining whether the building upon which the sign is proposed to be installed has 'special conditions'."
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- "Because a sign variance is at issue, we find no error in examining whether the building upon which the sign is proposed to be installed has 'special conditions'."
- Ct. rejected Harborside's argument of no unnecessary hardship since Parade could operate with smaller sign:
  - "Parade merely had to show that its proposed signs were a 'reasonable use'….Parade did not have to demonstrate that its proposed signs were 'necessary' to its hotel operations."

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- Ct. rejected Harborside's argument that Parade could not meet public interest, spirit of ord. or substantial justice criteria because it could have achieved "same results" by installing smaller signs:

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- Ct. rejected Harborside's argument that Parade could not meet public interest, spirit of ord. or substantial justice criteria because it could have achieved "same results" by installing smaller signs:
  - "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia.

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  - Variance for marquee sign upheld

Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001)

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- tension between zoning ordinances and property rights

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- Rev & Remand to apply new standard

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- must show that the use is 'reasonable,' considering the property's unique setting in its environment
- unique, country setting; larger than surrounding lots; uniquely configured with more space at the rear; thick wooded buffer at paddock; proposed 1 ½ acres of stabling area was more than required to keep two animals in other zones

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- Consideration of economic viability of scaled down version is not proper analysis under 'substantial justice' factor

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Variances

- Appendix A as Hand-out on New Criteria
- Status of “Use” and “Area Variances”
  - Although eliminated by statute, it appears the New Hampshire Supreme Court still finds the “use” and “area” variance distinction to be useful in certain contexts. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011) (Sup. Ct., disagreeing with petitioners’ argument that they were entitled to expand an office use based on expansion of non-conforming use doctrine, reasoned that because use was permitted per special exception and variance granted was “area” not a “use” variance, expansion of non-conforming uses doctrine does not apply).

Disability Variances

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  - Requires that the v. "shall be in harmony with the general purpose and intent" of the ordinance. RSA 674:33, V(a).
  - ZBA is allowed to include a finding that the v. shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

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  - but not use restrictions – see, Schroeder v. Windham, 158 N.H. 187 (2008)

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  - that the violation was not noticed or discovered by any owner, agent or municipal representative, until after the violating structure had been substantially complete, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. RSA 674:33-a, I(a);

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  - that the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith on the part of the owner or its agents, but was instead caused by either a good faith error in measurement or calculation made by the owner or its agent, or by an error of ordinance interpretation or applicability by a municipal official in the process of issuing a permit over which he has authority. RSA 674:33-a, I(b);

Equitable Waivers of Dimensional Requirements

- that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and

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- that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and
- that due to the degree of construction or investment made in ignorance of the violation, the cost of correction so far outweighs any public benefit to be gained such that it would be inequitable to require a correction. RSA 674:33-a, I(d).

Equitable Waivers of Dimensional Requirements

- If the violation has existed for more than 10 years and that no enforcement action, including written notice of violation, has commenced during such time by the municipality or any person directly affected, then Owner can gain a waiver even without satisfying the first and second criteria. RSA 674:33-a, II.

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- Property shall not be deemed a “non-conforming use” once the waiver is granted
- Waiver shall not exempt future use, construction, reconstruction, or additions from full compliance with the ordinance. RSA 674:33-a, IV.
- Does not to alter the principle of an owner’s constructive knowledge of all applicable requirements, nor does it impose any duty on municipal officials to guarantee the correctness of plans reviewed or property inspected by them. Id.

Where

Public v. Non-Public

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Public v. Non-Public

- ZBA must hold the public hearing within 30 days of receipt of notice to appeal. RSA 676:7, II.
  - Applicant is not entitled to the relief sought merely because this time requirement is not met by the board. Barry v. Amherst, 121 N.H. 335 (1981)(finding that the legislature did not provide that such failure would constitute approval).

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  - To discuss pending litigation
  - NOT to discuss a pending application

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- No discussions by email

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- Limit discussions – otherwise notes must be kept and minutes generated

When

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  - If possible but not necessary

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- If continued, set to date certain in public meeting

When

- Never?

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  - charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the “bureaucratic maze” of regulations, ordinances and hearings, while not expressly advising them. See, Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 (1992); compare with, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (no constitutional duty to take initiative to educate abutters about project and permit/appeal process).

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- Never?
  - NO, must make a decision
  - charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the “bureaucratic maze” of regulations, ordinances and hearings, while not expressly advising them. See, Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 (1992); compare with, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (no constitutional duty to take initiative to educate abutters about project and permit/appeal process).
  - Mandamus

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  - but see, The Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009)(Fisher could not be used as a "sword" to argue that a second variance application would be futile – especially where the ZBA invited the second application);
  - Brandt Development Company of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553 (2011) (variance denied under "old" variance criteria – especially prior to Simplex, then "significant change of circumstance" may have occurred as matter of law requiring new application to be considered under current variance criteria

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  - the written decision of approval must include “a detailed description of all conditions necessary to obtain a final approval”; and when a plat is to be recorded that “the final written decision, including all conditions of approval, shall be recorded with or on the plat.” RSA 676:3, III

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  - "Although disclosure of specific findings of fact by board of adjustment may often facilitate judicial review, absence of findings, at least where there is no request therefore, is not in and of itself error. Id., *again citing*, Pappas.

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- Garrison v. Henniker, 154 N.H. 26 (2006)

What Next

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  - but see, Colla v. Town of Hanover, 153 N.H. 206 (2006)(rev'g disml of Superior Ct appeal where rq/reh listing such grounds as "decision is unreasonable", "decision denies const. rights to equal protection and due process", "decision is contrary to Boccia", and "decision is contrary to ZO" deemed sufficient).

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  - But if 30th day is Sat., Sun. or legal holiday, deadline is next business day. Trefethen v. Town of Derry, __ N.H. __ (Docket No. 2012-394; Issued April 12, 2013)

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- The purpose is to afford ZBA opportunity to correct its own mistakes; and a board is entitled to reconsider its prior ruling and upon reconsideration make the same decision for the same or different reasons. See, Fisher v. Town of Boscawen, 121 N.H. 438 (1981)(decided under former statute).

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  - After reh and new order citing new grounds for denial, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon
  - Superior Ct may consider an issue not first set forth in rq/reh under "good cause" exception in RSA 677:3, I. Id.

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  - Cf. , DHB v. Town of Pembroke, 152 N.H. 314 (2005)(diff. betw. public hearing and public meeting).
- If no action within the 30 day period and applicant does not request extension of time, it may be assumed that the motion has been denied and that applicant should proceed to Superior Court. Id., *citing*, Lawlor v. Salem, 116 N.H. 61 (1976)(ordinance provided that if rq/reh not acted upon within 10 days it was automatically considered denied).

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    - Interests of justice

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  - use of “includes” implies list is not exhaustive, NHSC has determined does not include all possible municipal boards. Hooksett Conservation Comm’n v. Hooksett ZBA, 149 N.H. 63 (2003)

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  - Competitor 3+ miles away did not qualify. Hannaford Brothers Company v. Town of Bedford, __ N.H. __ (Docket No. 2011-611; Issued April 25, 2013)

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  - Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, __ N.H. __ (Docket No. 2012-490; Issued April 12, 2013)(issues raised by successful party before ZBA can be basis for affirmance of decision by Court.)

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  - Town of Bartlett Board of Selectmen v. Town of Bartlett ZBA, __ N.H. __ (Docket No. 2012-490; Issued April 12, 2013)(issues raised by successful party before ZBA can be basis for affirmance of decision by Court.)
- RSA 677:6, BOP upon the party seeking to set aside the ZBA's order or decision

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- "In close cases, where some evidence in the record supports ZBA's decision, Superior Ct. must afford deference to the ZBA." Farrar v. Keene, 158 N.H. 684 (2009)

Appeals to Superior Court

- Orders of Notice
  - (a) date for Appearance;
  - (b) date for Answer and Certified Record must be filed; and
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  - not only underlying application and any documents received into evidence by the ZBA, but also all notices, minutes of meetings, decisions and rq/reh

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    - usually include requirement of showing of irreparable harm

Appeals to Superior Court

- Hearing on Merits
  - Offers of Proof
  - Certified Record
  - Seldom live testimony

Questions

Thank you!

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