The ZBA in NH

OEP Conference – May 2, 2015

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- More extensive materials on Who, Where, When and How questions not addressed today.

What

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

Appeals of Administrative Decisions

- RSA 674:33, I(a) and RSA 676:5
  - 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”
  - 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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  - "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 not include "a discretionary decision to commence formal or informal enforcement proceedings".
  - Sutton v. Town of Gilford, 160 N.H. 43 (2010) (challenges to building permit must first be made to ZBA).

Appeals of Administrative Decisions

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  - which are based upon the construction, interpretation or application of the zoning ordinance,
  - unless the ordinance provisions in question concern innovative land use controls adopted under RSA 674:21 and those provisions delegate their administration to the Pl Bd.
  - 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.

Appeals of Administrative Decisions

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- Effective August 31, 2013, RSA 677:15 was significantly amended (see p. 6)
- This means that the appeal to the ZBA should come first; and if a “dual track” appeal is brought to the Superior Court before the ZBA proceedings have concluded, then the Superior Court matter will be abated.

Appeals of Administrative Decisions

- definition of “a reasonable time” should be contained in the ZBA’s Rules of Procedure and should be referenced in any decision of an administrative officer to provide fair notice to the potential appellant.
- As short as 14 days. See, Daniel v. Town of Henniker Zoning Board of Adjustment, 134 N.H. 174 (1991); see also, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (ordinance definition of 15 days sufficient).

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- In the absence of such definition, however, the Superior Court will determine whether the time taken by the appellant is reasonable.
  - Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998) (appeal brought within 55 days was held to be outside a reasonable time);
  - 47 Residents of Deering, NH v. Town of Deering et al., 151 N.H. 795 (2005)(provision of zoning ordinance authorized ZBA to waive deadline for administrative appeal);
  - 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).

Appeals of Administrative Decisions

- Applicant may be given “second bite” when developer comes in to amend previously approved application.
  - Harborside v. City of Portsmouth, 163 N.H. 439 (2012)(ZBA’s decision to uphold Planning Board’s amendment of site plan which allowed change of use within approved space from retail to conference center after parking regulations had been modified reversed on appeal.)

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- Applicant may be given "second bite" when developer comes in to amend previously approved application.
  - Harborside v. City of Portsmouth, 163 N.H. 439 (2012)(ZBA's decision to uphold Planning Board's amendment of site plan which allowed change of use within approved space from retail to conference center after parking regulations had been modified reversed on appeal.)
- Also, ZBA has authority to determine that unappealed CEO's decision that variance is needed was error.
  - Bartlett v. City of Manchester, 164 N.H. 634 (2013) ("contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance")

Appeals of Administrative Decisions

- RSA 676:6, an appeal to ZBA stays the action being appealed,
  - unless, upon certification of the administrative officer, the action concerns “imminent peril to life, health, safety, property, or the environment”.

Appeals of Administrative Decisions

- may include constitutional challenges against ZO provisions
  - See, Carlson's Chrysler v. City of Concord, 156 N.H. 938 (2007)(provisions of sign ordinance against auto dealer's moving, electronic sign found to be constitutional);
  - Community Resources for Justice, Inc. v. City of Manchester, 157 N.H. 152 (2008) (ban on private correctional facilities in all districts violated State constitutional rights to equal protection; intermediate scrutiny requires the government to prove that the challenged legislation be substantially related to an important governmental objective);
  - 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.); and
  - Taylor v. Town of Plaistow, 152 N.H. 142 (2005)(ordinance provision requiring 1000 feet between vehicular dealerships upheld).

Appeals of Administrative Decisions

- may involve claims of municipal estoppel
  - law in state of flux
  - Thomas v. Town of Hooksett, 153 N.H. 717 (2006)(finding of municipal estoppel reversed where reliance on prior statements of Code Enforcement Officer and Planning Board Chairman which were contrary to express statutory terms was not reasonable);
  - Cardinal Development Corporation v. Town of Winchester ZBA, 157 N.H. 710 (2008)(ZBA not estopped to deny motion for rehearing as untimely filed where ZBA Clerk did not have authority to accept after hours fax on 30 day nor could applicant's attorney reasonably rely that she had such authority);
  - 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); .

Appeals of Administrative Decisions

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- the applicable statutes do not confer jurisdiction upon ZBA to grant relief under the equitable doctrine of municipal estoppel.

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- Assertion of a municipal estoppel claim for the first time in the trial court is not barred by the exhaustion of administrative remedies doctrine
- the applicable statutes do not confer jurisdiction upon ZBA to grant relief under the equitable doctrine of municipal estoppel.
- also noting that although prior cases including Thomas v. Town of Hooksett involved municipal estoppel claims that were initially asserted at the ZBA, the Court did not address whether the ZBA had jurisdiction to decide those claims.

Appeals of Administrative Decisions

- De Novo Review
  - Ouellette v. Town of Kingston, 157 N.H. 604 (2008) (ZBA allowed to conduct *de novo* review under RSA 674:33 of Historic District Commission denial of certificate for supermarket).
  - But not required to do so.

Special Exceptions

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  - 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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- 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).

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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).
- 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).

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), Section 23.02, p. 365.
- 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. 369;

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- 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. 369;
  - 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).

Special Exceptions

- Eff. Sept. 22, 2013, RSA 674:33, IV was amended
  - Sp. Exceptions “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

Special Exceptions

- Eff. Sept. 22, 2013, RSA 674:33, IV was amended
  - Sp. Exceptions "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."
    - A similar provision was inserted concerning variances. See, RSA 674:33, I-a.

Special Exceptions

- Eff. Sept. 22, 2013, “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.” RSA 674:33, VII.

Variances

“New” Criteria

- Result of 2009 SB 147
- Effective January 1, 2010
- Purpose was to do away with the Boccia distinction between “use” and “area” variances for unnecessary hardship

“New” Criteria #1 - 4

- (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.
- (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
- (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;
- “Returns” to Simplex;
- “Revives” Governor’s Island

New Criteria

- Eliminates Boccia;
- “Returns” to Simplex;
- “Revives” Governor’s Island
- Now with Bartlett v. City of Manchester, 164 N.H.634 (2013) may be asked to determine if variance even needed.

Variances

- Three key cases:
  - Harborside v. Parade
  - 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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- ZBA made specific findings in support
- T.Ct. affirmed one and reversed the other
- Sup. Ct. upheld ZBA on both using the "new" criteria
  - "similar to but not identical with" Simplex and Governor's Island

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

- On public interest/spirit of the ordinance criteria, Court cited Farrar and Chester Rod & Gun Club
  - these two criteria are considered together
  - 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."

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

- The Court noted that it has “recognized two methods for ascertaining” whether such a violation occurs:
  - (1) whether the variance would “alter the essential character of the neighborhood” or

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

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

- T. Ct. erred by focusing on whether allowing the signs would “serve the public interest”
- Sup. Ct. considered record to support ZBA’s factual findings
- T. Ct. rev’d on these two criteria

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

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- 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."

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

- On marquee sign, Sup. Ct. noted ZBA used only 1st of new statutory definitions for Unnecessary Hardship
- Agreed with ZBA that “special condition” of property was its sheer mass and its occupancy by hotel

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- On marquee sign, Sup. Ct. noted ZBA used only 1st of new statutory definitions for Unnecessary Hardship
- Agreed with ZBA that "special condition" of property was its sheer mass and its occupancy by hotel
- The Court rejected Harborside's argument that size is not relevant based on the concurrence in Bacon v. Enfield
  - Concurrence does not have precedential value
  - Parade is not claiming that signs are unique but that hotel/conference center property is

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

- "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:
  - "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia.

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

- Finally, Ct. rejected Harborside's argument of no evidence on no diminution of surrounding property values other than statement of Parade's attorney
  - "it is for ZBA…to resolve conflicts in evidence and assess credibility of offers of proof" and
  - ZBA was "entitled to rely on its own knowledge, experience and observations."
  - Variance for marquee sign upheld

Malachy Glen Associates, Inc. v. Town of Chichester,

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- ZBA denied v's from buffer setbacks for previously approved storage units (but granted for driveway crossing); T.Ct. rev'd
- Remand when ZBA has not addressed factual issues; Render when "reasonable fact finder" could only reach one result
- Chester case - contrary to public interest is "related to" consistent with spirit of ord. & to be contrary …v must unduly, and in marked degree conflict with zoning objectives
- uncontroverted evidence of surrounding uses & protections to wetlands

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- Reducing the project by 50% would result in financial hardship and no reasonable trier of fact could have found otherwise
- Consideration of economic viability of scaled down version is not proper analysis under 'substantial justice' factor

Farrar v. City of Keene, 158 N.H. 684 (2009)

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- T. Ct. found no conflict w/ chair, aff'd area but rev'd use v based on lack of evid of 2nd & 3rd prongs of Simplex hardship
- Harrington v. Warner, for "non-dispositive factors": interference with reasonable use, hardship caused by unique setting of property, and whether essential character of neighborhood would be altered
- Size of lot, size of house, allowed uses, adjacent historic homes now offices with higher traffic volume

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- Size of lot, size of house, allowed uses, adjacent historic homes now offices with higher traffic volume
- ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, zoning restriction still interferes with [applicant]'s reasonable use of property as his residence
- 3rd prong – that v would not injure public/private rights - is coextensive with 1st & 3rd criteria for use v – namely that v not contrary to public interest and v is consistent with spirit of ord.
- Substantial justice = "any loss to the individual that is not outweighed by a gain to the general public is an injustice."

Variances

- Appendix A as Hand-out on New Criteria

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

- RSA 674:33, V authorizes variances <u>without</u> a finding of unnecessary hardship "when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises".
  - 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).

Equitable Waivers of Dimensional Requirements

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- RSA 674:33-a, ZBA can grant equitable waivers from
- physical layout, mathematical or dimensional requirements imposed by ZO
  - 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 official, 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

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
- 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.

Equitable Waivers of Dimensional Requirements

- 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.

Equitable Waivers of Dimensional Requirements

- 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.

Questions

Thank you!

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