

Zoning Board of Adjustment Roles and Responsibilities

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I. Role of the ZBA

A zoning ordinance is not valid unless the municipality has established a zoning board of adjustment (ZBA). RSA 673:1. The New Hampshire Supreme Court has described the ZBA as “an essential cog in the entire scheme of a zoning ordinance.” *Jaffrey v. Heffernan*, 104 N.H. 249 (1962). It serves as the “relief valve” that allows the zoning ordinance to avoid confiscatory application of the ordinance to individual parcels.

The ZBA is a quasi-judicial municipal board. It does not propose or adopt legislation, such as zoning and other land use ordinances; that is the role of the planning board. The ZBA is obligated to notify and hear the parties to, and those directly affected by, an appeal or application for relief from zoning regulation. RSA 676:5. The ZBA must decide cases only after considering evidence presented to it by the parties. *Sanborn v. Fellows*, 22 N.H. 473 (1851)(distinction between judicial and legislative bodies); *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984)(planning board review of subdivision and site plan applications is a quasi-judicial function).

The fact that the ZBA is a quasi-judicial board has implications for the legal remedy applied when a disqualified ZBA member improperly participates in a decision of the board. Conflict of interest and disqualification of ZBA members is beyond the scope of these materials; however, RSA 673:14 prohibits a board member from

participating in any case in which the board is to decide in a judicial capacity “if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.”

II. Authority of the ZBA

The zoning board of adjustment is granted authority by the state to carry out specific functions. A general rule of New Hampshire municipal law is that towns and cities, and their various boards and committees, have only those powers granted to them by the legislature. *Girard v. Town of Allenstown*, 121 NH 268 (1981). Therefore, the ZBA must confine its functions to those enumerated in various enabling statutes:

- RSA 674:33 gives the ZBA the power to:
 - Hear and decide appeals of administrative decisions;
 - Grant variances from the terms of the zoning ordinance; and
 - Make special exceptions as authorized by the zoning ordinance.

In addition to these three primary functions, which are covered in detail in Section III below:

- RSA 674:33-a authorizes the ZBA to grant equitable waivers of dimensional requirements, which provides for a process of legalizing existing violations of dimensional requirements.
- RSA 674:41 gives the ZBA authority to hear appeals of denials by the governing body of permits to erect buildings on roads that do not meet the requirements of that statute (Class VI or certain private roads).
- RSA 673:1 authorizes the municipality to designate the ZBA to act as the building code board of appeals, if no provision is made to establish a separate building code board of appeals. Note that this provisions applies to the municipality’s adopted building code, not the state building code found at RSA 155-A:1-:12.

III. Appeals of Administrative Decisions

RSA 674:33, I grants the ZBA authority to “[h]ear 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[.]”

It is said that every application to the ZBA is an appeal of an administrative decision, including variance and special exception applications, since the first step in the application process is usually an application for a building or zoning compliance permit. Such permit may be denied on the ground that the proposed construction requires a zoning variance or special exception.

The ZBA may reverse or affirm any administrative decision in whole or in part. It 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.” RSA 674:33, II.

A. Decision of Administrative Official

An administrative official is “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.” RSA 676:5, II(a)

A “decision of an administrative officer” includes “any decision involving construction, interpretation or application of the terms of the ordinance.” RSA 676:5, II(b). For example, if the board of selectmen or any administrative official denies a landowner’s request for a building permit because the proposed development does not comply with the terms of the zoning ordinance, the landowner has the right to appeal that decision to the ZBA.

Based on these definitions, it is clear that some zoning “enforcement” decisions can be appealed to the ZBA. However, the ZBA cannot hear appeals of the discretionary decisions made by administrative officials or boards to begin, or decide not to take, formal or informal enforcement proceedings. Appeals can be brought involving the

meaning or interpretation of the zoning ordinance or the application of its terms implicated in such enforcement proceedings. RSA 676:5, II (b).

B. Decision of the Planning Board

RSA 676:5, III permits appeals to the ZBA of planning board decisions made in the exercise of subdivision or site plan review that are based on an interpretation of the terms of the zoning ordinance. There is one exception to this provision. If the zoning ordinance contains an innovative land use control adopted under RSA 674:21 that delegates granting of permits or other administration to the planning board, the planning board's decision may be appealed only to the superior court under RSA 677:15, not to the ZBA.

C. Decision of the Historic District Commission

Decisions of the historic district commission are appealed to the ZBA as an appeal of an administrative decision. RSA 677:17. In towns without a zoning ordinance and, therefore, without a ZBA, appeals of historic district commission decisions follow the applicable procedures of RSA 677:1-:14.

III. The Evolving Law of Variances

A. What Is a Variance?

A variance is required when a proposed new use or structure does not comply with the zoning ordinance. The grant of a variance is, in essence, a decision by the ZBA to exempt a specific property from the requirements of a zoning regulation. Therefore, a grant of a variance creates a permitted nonconforming use.

The New Hampshire Supreme Court has said, "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, 644 (1980).

Before 2004, New Hampshire law did not recognize a distinction between a use variance and an area variance (see *Ouimette v. City of Somersworth*, 119 N.H. 292 (1979) in which the Court, in dicta, declined to adopt a "practical difficulties" test for

area variances). Then in 2004, the New Hampshire Supreme Court determined that distinct factors should be considered when applying the unnecessary hardship test to an area variance as opposed to a use variance. *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004).

As explained in *Boccia*, a use variance “allows the applicant to undertake a use which the zoning ordinance prohibits[.]” An example of a use variance is a hotel in a zoning district otherwise restricted to residential use.

An area variance, also referred to as a dimensional variance, “authorizes deviations from restrictions which relate to a permitted use,” according to *Boccia*. Area variances relate to physical or dimensional requirements, such as frontage, setbacks, height of buildings, extent of lot coverage and the like.

Justices Duggan and Dalianis explained the difference between use and area variances. Use variances, they wrote, “pose a greater threat to the integrity of the zoning scheme” than area variances. Use variances interfere with zoning’s traditional “segregation of land according to uses,” while area variances relax limits on a use that is permitted by the zoning ordinance. *Bacon v. Town of Enfield*, 150 N.H. 468 (2004)(Justices Duggan and Dalianis concurring).

Variances run with the land. Once granted, a variance continues in effect even when the land changes ownership.

B. The Five Criteria for Variance Approval

An applicant has the burden to prove that a variance meets five criteria based on the enabling statute, RSA 674:33, I(b), which authorizes the ZBA to grant 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.”

The New Hampshire Supreme Court’s decisions in *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001) and *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004) significantly altered the unnecessary hardship criterion applied to a variance request. In

an attempt to clarify the analysis of the five variance criteria, the Court in *Boccia* listed them as follows:

I. The variance will not be contrary to the public interest.

II. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

A. Applicant seeking use variance – *Simplex* analysis

1. The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.

2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.

3. The variance would not injure the public or private rights of others.

B. Applicant seeking area variance – *Boccia* analysis

1. An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.

2. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

III. The variance is consistent with the spirit of the ordinance.

IV. Substantial justice is done.

V. The value of surrounding properties will not be diminished.

1. Public Interest and Spirit of the Ordinance

The New Hampshire Supreme Court has said that the public interest and spirit of the ordinance criteria are related. *Chester Rod & Gun Club*, 152 N.H. 577 (2005). In *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007) the Court further explained these two criteria. The rules to be taken from these two cases are:

“To 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.”

Malachy Glen Associates centered on a proposed eight-unit storage facility, a conforming commercial project in a commercial area. The property owner applied for a variance from the 100-foot wetland buffer requirement, which was denied by the ZBA. The New Hampshire Supreme Court held that the storage facility did not alter the essential character of the locality, thus violating the buffer ordinance’s basic objectives, because the facility would be located in an area that already included a fire station, gas station and telephone company. In addition, the Court found that the storage facility would not hurt the public health, safety or welfare because the ZBA had granted a variance for access to the property that encroached closer to the wetlands than the storage facility would, and the ZBA had evidence of the plaintiff’s expert that the project would not hurt the wetlands.

In *Chester*, the ZBA denied a variance requested on behalf of the Chester Rod & Gun Club to construct a 150-foot telecommunications tower on the club’s property, which was in the residential district where telecommunications towers are not a permitted use. The ZBA found that the variance would be contrary to the public interest because the town meeting had previously approved a warrant article granting the selectmen authority to lease town land for a telecommunications tower. The Supreme Court explained:

“The first step in analyzing whether granting a variance would be contrary to the public interest ... is to examine the applicable zoning ordinance. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. Thus, to 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.” *Chester Rod & Gun Club*, 152 N.H. 577, 581 (2005).

Instead of relying on the town meeting vote as an indication of the public interest, the Court said, the ZBA should have examined whether granting the variance would “alter the essential character of the locality” or threaten the public health, safety or welfare. If the variance would alter the essential character of the locality, the variance must be denied, the Court said.

The Court examined the purpose of Chester’s residential district, which, according to the ordinance, is to “recognize the unique scenic, historic, rural and natural characteristics” of that part of town “while encouraging development ... in a manner which will protect these important characteristics.” Because the record was unclear whether the town’s telecommunications facilities district ordinance applied to the club’s variance request, the Court remanded the case to the ZBA for further deliberations utilizing the proper public interest analysis.

An applicant is not required to prove that his or her application for a variance will benefit the public, but must show only that granting the variance will not do harm. *Gray v. Seidel*, 143 N.H. 327 (1999). Prior cases had supported the notion that granting the variance must benefit the public interest.

In *Harrington v. Town of Warner*, 152 N.H. 74 (2005), the Court found that the applicant, who sought to expand a mobile home park, had shown that a variance was not contrary to the spirit of the ordinance because mobile home parks were a permitted use in the zoning district, the mobile home park already existed there, the variance would not change the use of the area and, if he could have subdivided the property, he would have had sufficient acreage without a variance for the proposed expansion. *Id.* at 84-85.

Harrington suggests, then, that when the proposed use of the property is a permitted use under the zoning ordinance, other factors affecting the “essential character of the locality” or threatening the public health, safety and welfare must be in evidence for the ZBA to find that the variance would be contrary to the spirit of the ordinance.

2. Unnecessary Hardship

The unnecessary hardship requirement is the focus of most of the variance cases and is the most difficult of the five variance criteria for the applicant to prove. *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001).

To prove unnecessary hardship prior to 2001, an applicant for a variance was required to show that the zoning regulation would deny him or her any reasonable use of the property in question. In *Simplex*, the New Hampshire Supreme Court said this prior standard was a “restrictive standard of what constitutes unnecessary hardship.” The Court established a new unnecessary hardship standard, which has come to be known as the *Simplex* test.

Because the Court later found a distinction between use variances and area variances (see *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004)), the *Simplex* unnecessary hardship test applies only to use variances, and the *Boccia* unnecessary hardship test applies only to area variances. However, the general analysis for both kinds of variances begins with the language of RSA 674:33,(b), which requires a finding that “special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship[.]” Whether the ZBA is considering a use variance or an area variance, the applicant should provide some evidence that there are special conditions of the property that make a literal enforcement of the regulation an unnecessary hardship.

It is not always easy to tell the difference between a use variance and an area variance. The answer as to which unnecessary hardship criterion to apply depends on the specific facts of each case.

The Court dealt with this issue in *Harrington v. Town of Warner*, 152 N.H. 74 (2005). The applicant owned a 46-acre parcel in a medium density residential zone in which manufactured housing parks were permitted. There were 33 mobile homes and 54 campground sites already on 26 acres of the property. The owner wanted to add 26 mobile home sites on the property’s remaining 20 acres.

Under the town’s zoning ordinance, a minimum of 10 acres was required for manufactured housing parks, and the number of sites was limited to 25. Town officials

were uncertain whether the ordinance limited the number of sites to 25 per 10 acres, or 25 regardless of the size of the parcel as long as the parcel was at least 10 acres.

Because the parcel lacked required road frontage, the property owner was unable to subdivide it, which would have given him two 10-acre parcels on which he could locate 25 mobile home sites each. Therefore, given the town's uncertainty over interpretation of the zoning ordinance, he applied for a variance. The ZBA granted the variance, but limited the number of additional sites to 25, to be developed at no more than five sites per year.

The abutters, the Harringtons, appealed, arguing, among other things, that the applicant failed to show unnecessary hardship. The ZBA had granted the variance before *Boccia* was decided and, therefore, applied the *Simplex* test. However, the case reached the Supreme Court after *Boccia*. Since the applicant sought a variance from the 25-site limitation per 10 acres, the Court began its analysis by first deciding whether the request was for a use or area variance. The Court said:

“A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits ... [while] [a]n area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such an area variance does not alter the character of the surrounding area as much as a use not permitted by the zoning ordinance.”

The Court also said:

“The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue.”

The Court determined that regardless of the size of a parcel, as long as it was a minimum of 10 acres, it was limited to 25 manufactured housing sites. “Thus, unlike an

area restriction, the limitation on the number of manufactured housing sites is not related to the acreage or other physical attributes of the property,” the Court wrote. “Rather, the restriction limits the intensity of the use in order to preserve the character of the area.”

In fact, the Court added, the town’s overall zoning scheme, with three residential districts, segregates land by types of uses as well as by intensity of use. For example, two-family dwellings were permitted in the village and medium density districts, but permitted only by special exception in the low-density district. “[G]iven the language and purpose of the zoning ordinance,” the Court concluded, “the provision limiting the number of sites to 25 lots is a use restriction.”

While unnecessary hardship for use variances and area variances is determined by distinct tests, it is possible that a single application may contain requests for both types of variances. If so, each variance request should be analyzed separately, applying the *Simplex* hardship test to the use variances sought and the *Boccia* hardship test to the area variances sought.

a. Use Variances and the *Simplex* Test

To meet the *Simplex* unnecessary hardship standard, an applicant for a use variance must prove:

- A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;
- No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- The variance would not injure the public or private rights of others.

i. Reasonable Use and Unique Setting

Since this three-prong test was enunciated in *Simplex*, several cases have been decided that interpret the requirements of the first prong.

In *Rancourt v. City of Manchester*, 149 N.H. 51 (2003) the Court held that a zoning ordinance precluding horses from the R-1A district (a low-density residential

zone) “interfered with the [owners’] reasonable proposed use of their property, considering its unique setting.”

Abutters argued there were no “special conditions” warranting the approval of the variance. The Court said: “In the first prong of the *Simplex* test, ‘special conditions’ are referred to as the property’s ‘unique setting ... in its environment.” The Court said the factors that are the “special conditions” making it reasonable for the owner to have a barn and two horses on their residential lot “considering its unique setting” were the following:

- The owner’s three-acre lot is larger than most surrounding lots.
- The lot is uniquely configured in that the rear portion of the lot, which is where the barn was to be built, is larger than the front of the lot.
- There is a “thick, wooded buffer” around the paddock area.
- The area where the horses were to be kept is 1½ acres, which is more land than the zoning ordinance requires for keeping two livestock animals in other zoning districts in the city.

The first prong of the *Simplex* test was again at issue in *Garrison v. Town of Henniker*, 153 N.H. ____ (2006). Green Mountain Explosives (GME) applied for use variances to construct and operate an explosives storage and blending facility, a commercial use, in a residential zone. GME planned to lease a 1,617-acre parcel that comprised 18 separate lots. The explosives facility would be centrally located on 20 acres of the larger parcel; the remaining acreage would act as a buffer zone around the facility as required by federal Bureau of Alcohol, Tobacco and Firearms (ATF) regulations.

The ZBA granted the variances, and Garrison and other abutting landowners appealed. The superior court reversed the ZBA’s decision because the evidence before the ZBA failed to demonstrate unnecessary hardship. The superior court found that the zoning regulations did not interfere with the reasonable use of the property and that there was no evidence that the property “is different from other property zoned rural residential.” The superior court stated, “While its size may make it uniquely appropriate

for GME’s business, that does not make it unique for zoning purposes.” GME appealed to the Supreme Court, which upheld the lower court’s decision.

Lest ZBA members think they are the only ones whose variance decisions are overturned by the courts, the facts in *Community Resources for Justice, Inc. v. City of Manchester*, No. 2006-609, (decided January 24, 2007), indicate that judges also have trouble applying the unnecessary hardship test. CRJ applied for a use variance to operate a halfway house, under contract with the Federal Bureau of Prisons, in the city’s central business district in a building that housed commercial and residential uses. The city’s building commissioner had determined that a halfway house was a correctional facility and, under the city’s zoning ordinance, correctional facilities are not permitted in any of the city’s zoning districts.

The ZBA denied the variance, finding that CRJ had not satisfied the unnecessary hardship standard. CRJ appealed, and the superior court reversed the ZBA decision, finding that CRJ had satisfied the *Simplex* unnecessary hardship requirements, including that the zoning restriction unduly burdened CRJ’s reasonable use of the property. But the Supreme Court reversed the superior court, explaining that there was no evidence that CRJ’s property was burdened by the zoning restriction “in a manner that was distinct from similarly situated property. Nor does the evidence reasonably support the trial court’s conclusion that the hardship resulted from special conditions of the land, rather than the area in general.” CRJ offered as evidence of special conditions that the property was located near public transportation and treatment facilities and other city services that halfway house residents might need. But the Court said, “[T]here was no evidence in the certified record that demonstrated how the size and layout of this specific building made the property particularly appropriate for the proposed use.”

ii. The Other Two Prongs of *Simplex*

As the New Hampshire Supreme Court has said, the first prong of the *Simplex* test “is the critical inquiry for determining whether unnecessary hardship has been established.” *Harrington v. Town of Warner*, 152 N.H. 74, 80 (2005). So it may not be surprising that since *Simplex*, the unnecessary hardship cases have all hinged on the first prong of the three-prong test. The cases interpret issues related to reasonable use of

the property and the need to show evidence of special conditions unique to the specific property as compared to other properties under the same zoning restrictions. But there are two other prongs of the unnecessary hardship test that the applicant also must prove.

The issues considered under the first prong often overlap with issues considered under the second and third prongs. It is unclear whether the second and third prongs just haven't been at issue in the cases that have been litigated, or whether the Court has focused so much on the first prong that the other two prongs have been overlooked. At the very least, the Court seems to be continuing to work its way through the consequences of its post-*Simplex* overhaul of the unnecessary hardship analysis.

The second prong requires the zoning regulation to bear a "fair and substantial relationship" to the purpose of the ordinance. This is language drawn from the middle-tier constitutional analysis, but it isn't altogether clear yet how to apply it in the practical situation of a use variance application. Under this step in the analysis, the ZBA must consider the reasons for the zoning regulation at issue – the purposes the ordinance was designed to serve – and ask whether those purposes are fairly and substantially served by the regulation when it is applied to the parcel in question. Recall that the purpose of the zoning regulations is also analyzed under the first prong of the *Simplex* test when evidence of the variance's impact on the character of the locality is considered.

The third prong in the *Simplex* unnecessary hardship test is whether the use variance would injure the public or private rights of others. In *Chester Rod & Gun Club*, the case about the telecommunications tower, the Court said this prong of the unnecessary hardship test is "coextensive" with the requirement that the variance not be contrary to the public interest. This seems to mean that the same factors considered under the public interest criterion are to be considered when analyzing the third prong of the *Simplex* test. (The dictionary definition of "coextensive" is: "having the same spatial or temporal scope or boundaries.")

In *Chester*, the ZBA determined that granting the variance for a telecommunications tower on the club's property would injure public rights established

by the town meeting vote to authorize the selectmen to lease town land for a telecommunications tower. The Court said the ZBA had improperly relied upon the town meeting vote as an indication of public interest (therefore, public rights) and, instead, should have examined whether granting the variance would alter the essential character of the locality (also considered under the first prong of the unnecessary hardship test) or threaten the public health, safety or welfare.

Further interpretation by the Court is needed to determine what factors should be considered under the third prong of the *Simplex* test, but it seems reasonable that the ZBA should consider whether the variance would result in a public or private nuisance.

b. Area Variances and the *Boccia* Test

A case came before the New Hampshire Supreme Court in 2004 that it characterized as “a paradigm of the problem faced by zoning boards and courts when they attempt to apply the *Simplex* standard to area variances.” The applicant proposed a 100-room hotel on a seven-acre site in a zoning district in which hotels were a permitted use. The applicant requested six variances from front, rear and side setback requirements. The Court explained the problem thusly:

“Because *Simplex* was decided primarily in the context of a use variance, it established a test which is geared toward determining whether the use for which the applicants seek a variance is reasonable considering the property’s unique setting in its environment. ... The question remains, however, whether this *Simplex* test governs the unnecessary hardship prong when seeking an area variance. We do not believe it does.”

The Court added, “[D]istinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met.” The Court, therefore, established the two-prong unnecessary hardship test for area variances.

- An area variance is needed to enable the applicant’s proposed use of the property given the special conditions of the property

- The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance

i. Special Conditions of the Property

“Special conditions,” as we know from the use variance cases, requires that the applicant demonstrate that the property is unique in its surroundings. *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting *Garrison v. Town of Henniker*, 153 N.H. ____ (2006). The special conditions requirement applies to both use and area variances.

In addition, in area variance cases, the proposed project “is presumed to be reasonable if it is a permitted use under the town’s applicable zoning ordinance ... If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.” *Vigeant v. Town of Hudson*, 151 N.H. 747, 752-53 (2005).

When analyzing “special conditions,” the Court has said, “Satisfaction of the requirement that the circumstances which result in unnecessary hardship be peculiar to the applicant’s property is most clearly established where the hardship relates to the physical characteristics of the land.” *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting 3 K. Young, *Anderson’s American Law of Zoning*, § 20.36, at 535 (4th ed. 1996).

In *Malachy*, the case about the eight-unit storage facility (a permitted use) and 100-foot wetland buffer, the special conditions of the property were that nearly 65 percent of it is made up of wetlands or the 100-foot buffer, and the configuration of the wetlands further reduced the property’s buildable area.

Whether the issue is a use variance or an area variance, “special conditions” of the property must exist to prove unnecessary hardship. In the context of a use variance, under the first prong of the *Simplex* test, “the unique setting of the property in its environment” means its “special conditions.” In the context of an area variance, the “special conditions” of the property require an area variance to enable the applicant’s proposed permitted use of the property. Therefore, for area variances, it is the applicant’s proposal that must be considered (in other words, the applicant’s 100-room

hotel, not the abutter's suggested 60-room hotel; or the applicant's five-unit multifamily building, not the ZBA's preferred two units).

Even though a permitted use is presumed to be a reasonable use of the property in the context of an area variance, for neither a use variance nor an area variance is it enough for the applicant to show simply that the use of the property is reasonable. The applicant has the burden of proving there are special conditions of the property that make the variance necessary.

ii. Other Reasonably Feasible Method

Under the second prong of the unnecessary hardship area variance test, "[T]he ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), citing *Vigeant v. Town of Hudson*, 151 N.H. , 747, 753 (2005) ("In the context of an area variance ... the question [of] whether the property can be used differently from what the applicant has proposed is not material.").

In addition, "The applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use." *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting *Boccia v. City of Portsmouth*, 151 N.H. 85, 93 (2004).

Also considered is "whether an area variance is required to avoid an undue financial burden of the landowner, which includes examination of the relative expense of alternative methods." *Malachy Glen Associates*, citing *Boccia*, 151 N.H. at 93.

"If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost-prohibitive. Under this factor, the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner." *Malachy Glen Associates*, quoting *Boccia*, 151 N.H. at 93 ("[T]his factor examines whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances.")

In *Malachy Glen Associates*, the trial court found that in order to comply with the zoning ordinance, the applicant would have to “reduce its project by more than 50%” and that this “would result in financial hardship.” Since the 50 percent reduction was “the only alternative to the project given the configuration of the property,” the Court concluded, “the record was sufficient for the trial court to find, as a matter of law, that there was no other reasonably feasible method of effectuating the proposed use without obtaining an area variance.”

3. Substantial Justice

A “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.” *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), quoting 15 P. Loughlin, *New Hampshire Practice, Land Use Planning and Zoning* § 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, *The Board of Adjustment in New Hampshire, A Handbook for Local Officials* (1997)).

Also determinative of this factor is “whether the proposed development was consistent with the area’s present use.” *Malachy Glen Associates, Inc. v. Town of Chichester*, (No. 2004-886, 2006-111, March 20, 2007), citing *Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986).

In *Malachy Glen Associates*, the ZBA found that the applicant failed to meet the substantial justice factor because, as the trial court stated, “there was no evidence that scaling the project down would make it economically unviable.” However, the Supreme Court said, “[T]his is not the proper analysis under the ‘substantial justice’ factor.” The Court noted that the record provided evidence that “the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district. Accordingly, the trial court did not err in finding the plaintiff had established this factor.

4. Value of Surrounding Properties

Testimony or evidence should be presented to the board by the applicant to show that granting the variance will not result in reduction of the value of surrounding properties. Abutters and other interested parties may present evidence to the contrary.

One side or another may present the testimony of property appraisers or other experts. Board members can give whatever weight they determine proper to this evidence and are not bound to accept the conclusions of experts. Members may also consider their own personal knowledge regarding traffic conditions and other relevant information. *Vannah v. Bedford*, 111 N.H. 105.

C. Exception for Disability

RSA 674:33, V gives the ZBA authority to grant a variance without applying the five variance criteria in situations “when reasonable accommodations are necessary to allow a person or persons with recognized physical disability to reside in or regularly use the premises[.]” Such a variance must be “in harmony with the general purpose and intent of the zoning ordinance.” Further, the statute allows the ZBA to limit the term of the variance to “only so long as the particular person has continuing need to use the premises.”

D. Conditional Approval of Variance Request

It is within the authority of the ZBA to condition approval of a variance request by requiring the applicant to meet certain conditions. *Healey v. Town of New Durham ZBA*, 140 N.H. 232 (1995). This authority is found in RSA 674:33, II, which enables the ZBA to “make such order or decision as ought to be made” in approving variances. Conditions must be reasonable, however, and will generally be upheld unless they are unreasonable or beyond the ZBA’s authority. *Vlahos Realty Co., Inc. v. Little Boar’s Head District*, 101 N.H. 460 (1957). Conditions should be in writing and in detail to avoid future enforcement problems.

Conditions placed on a use as a result of approval of a variance request cannot be changed unless the ZBA grants a new variance or amends the conditions of an existing variance. *Pope v. Little Boar’s Head District*, 145 N.H. 531 (2000).

It is often recommended that the ZBA consider attaching a time limit condition to the grant of a variance so that the variance will expire if substantial development of the use granted by the variance has not begun in a reasonable time – for example, 12 months. The New Hampshire Supreme Court has upheld the authority of the ZBA to condition the use of the variance on a specific time period, noting that use of the

variance within that time period may result in vesting. *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21 (1972).

The Court has held that the ZBA has jurisdiction over a request from a property owner to modify conditions attached to the grant of a variance. *Old Street Barn, LLC. v. Town of Peterborough*, 147 N.H. 254 (2001). The Court pointed out that RSA 674:33 grants the ZBA authority to modify administrative decisions upon appeal.

E. When Is a Variance Not Required?

1. Preexisting Nonconforming Uses

The zoning ordinance does not apply to a structure or use lawfully established prior to enactment of the zoning regulation that prohibits that structure or use. See RSA 674:19. These structures or uses are referred to as preexisting nonconforming uses or structures. They are “grandfathered” from the terms of the zoning ordinance. They are similar to variances in that they are land uses that are exempt from the terms of the zoning ordinance, but they do not require variances in order to continue as they exist at the time the ordinance is enacted. For example, in *Morgenstern v. Town of Rye*, 147 N.H.558 (2002), the Court held that a variance is not required to build on a substandard lot when the property owner acquired a vested right to build from the prior owner.

According to RSA 674:19, the zoning ordinance applies 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.” However, some expansion of preexisting nonconforming uses is permitted without requiring a variance as long as four criteria established by the New Hampshire Supreme Court are met. They are:

- The expansion is a “natural activity, closely related to the manner in which the piece of property is used” when the ordinance was enacted (the same use modernized through new technology).
- The proposed use is simply a different manner of utilizing the same use, not a use that is different in character, nature or kind.
- The proposed use does not have a substantially different effect on the neighborhood.

- If the nonconformity is of a dimensional requirement, the expansion or change does not render the property proportionally less adequate in relation to the dimensional requirement (setback, frontage, etc.).

See *Hurley v. Hollis*, 143 NH 567 (1999) and *New London Land Use Assn. v. New London ZBA*, 130 NH 510, 516 (1988). A full discussion of nonconforming uses and vested rights is beyond the scope of these materials, but for more information on this topic see 2002 Municipal Law Lecture # 3 *Grandfathered: Nonconforming Uses and Vested Rights* by H. Bernard Waugh, Esq., available from the Local Government Center (New Hampshire Municipal Association) at 1-800-852-3358 or www.nhlgc.org.

2. Governmental Uses Not Subject to Zoning Ordinances

When there is no statute to the contrary, the state and its political subdivisions – which include towns, cities, village districts, school districts and counties – are not subject to local zoning regulations when the land use involves a governmental function, such as a fire station, school, highway or similar governmental use. *McGrath v. City of Manchester*, 113 N.H. 355 (1973). Therefore, the state and its political subdivisions are not required to obtain a variance, when private property owners would be, in order to develop land to carry out their public health, safety and welfare functions.

These governmental entities must comply with RSA 674:54, however, which requires them to give written notice to the governing body of the municipality of any governmental use of property that constitutes “a substantial change in use or a substantial new use.” Under the statute, the municipality, usually the planning board, may hold a public hearing on the proposed governmental use and may issue nonbinding written comments on “the conformity or nonconformity of the proposal with normally applicable land use regulations[.]”

3. Preemption by State or Federal Regulation

State law preempts local regulation when the state has enacted a comprehensive regulatory scheme that would conflict with or be frustrated by local regulation. See, for example, *North Country Environmental Services, Inc. v. Town of Bethlehem*, 150 N.H.606 (2004). Preemption can occur in the land use area in the operation of solid waste facilities, siting of snowmobile trails on private property,

development of community living facilities for developmentally disabled persons, location of hazardous waste sites, location of public utility structures and electricity transmission lines, crushing of stone, pesticide use and other situations.

When state law is comprehensive, sometimes it expressly permits additional municipal regulation. For example, several preemption cases have held that a local zoning ordinance was preempted, however the municipality retained site plan review authority. Also, federal law may preempt local regulation. See *Koor Communication, Inc. v. City of Lebanon*, 148 N.H. 618 (2002). Preemption issues should be discussed with the municipality's regular attorney.

IV. Special Exceptions

RSA 674:33, IV authorizes the ZBA to grant special exceptions in accordance with general and specific rules contained in the zoning ordinance. In other words, the ZBA has the power to grant a special exception only if the zoning ordinance provides for special exceptions for specified uses that meet criteria enumerated in the ordinance. A zoning ordinance is not required to include provisions for special exceptions, but if it does, the special exception provisions should clearly express land uses that require a special exception and the specific criteria the applicant must meet in order to be granted a special exception.

Applicants and new ZBA members – and judges, for that matter – often find the difference between a special exception and a variance confusing. A variance exempts the property from the strict application of the zoning regulation. A special exception, on the other hand, is a permitted use under the zoning ordinance, as long as certain standards or criteria enumerated in the ordinance are met. The idea is to allow certain uses that may be desirable, although incompatible with other permitted uses in the district, such as funeral homes, gas stations and convenience stores in residential zones, for example. By evaluating the application for a special exception based on the criteria required in the ordinance, the ZBA can determine whether the proposed plan can be implemented without the detrimental effects the ordinance seeks to avoid. The special

exception cannot be granted to allow a use that is otherwise not permitted by the zoning ordinance.

It is said that the ZBA has “original jurisdiction” over a request for a special exception, in contrast to variance applications and administrative decision appeals, which both come to the ZBA on appeal of a decision made by an administrative official or board.

As already noted, a special exception must be expressly allowed by the zoning ordinance. Land uses covered by special exception are not uses permitted as a matter of right. The burden is on the applicant to show the ZBA, by presenting evidence, that he or she meets all of the standards for the special exception listed in the ordinance. The ZBA cannot grant or deny the special exception simply because it likes or dislikes either the proposed use or the applicant. If the applicant shows that the proposal meets all of the criteria listed in the ordinance, the ZBA must grant the special exception. The converse is also true. If the applicant is not able to prove that all the special exception requirements are met, the ZBA must deny the application. *Tidd v. Town of Alton*, 148 N.H. 424 (2002). In *Tidd* the Court said, “In considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth within the applicable zoning ordinance.”

Like a variance, a special exception runs with the land. It cannot be limited to the owner of the property. However, the zoning ordinance can provide that the special exception granted must be acted upon within a certain period of time, or that, under certain circumstances, it will be lost by abandonment.

Since a special exception doesn’t expire upon a change in land ownership, the ZBA should condition the approval of the special exception upon the specific development plan described in the application. The landowner only has a right to the special exception granted, not some vague or general use or expansion of use. The ZBA should be specific and clear in its notice of decision as to exactly what conditions, if any, it attaches to the grant of a special exception.

Just as the ZBA has authority to condition a grant of a variance, the ZBA’s authority to conditionally approve a special exception has been upheld when the zoning

ordinance specifically grants such authority. *Nestor v. Town of Meredith ZBA*, 138 N.H. 632 (1994).

V. Equitable Waivers of Dimensional Requirements

Existing violations of dimensional requirements can be legalized by the ZBA under the provisions of RSA 674:33-a., which allow for the granting of equitable waivers for “honest mistakes” made in the physical layout of a lot or the siting of buildings. The waiver can be granted only for dimensional violations, not for use violations. Dimensional requirements are setbacks, frontage or other physical or mathematical requirements. The violations must exist. A landowner cannot apply for an equitable waiver to violate dimensional requirements in the future. However, a landowner can apply to the ZBA for an area (dimensional) variance under the criteria established in *Boccia v. City of Portsmouth*, as outlined above in the section on variances.

To obtain an equitable waiver of dimensional requirements, an applicant must meet four criteria. The burden of proof is on the applicant to show he or she meets the criteria. The four criteria are:

- The violation was not discovered by the owner, former owner, owner’s agent or municipal official until after the structure was substantially completed.
- The violation was not due to ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith, but was a good faith error in measurement or an error in ordinance interpretation by a municipal official in issuing a permit.
- The violation is not a public or private nuisance, does not diminish the value of property in the area or affect the future uses of other property.
- The cost of correction so far outweighs the public benefit gained by compliance with the dimensional requirements that it would be unfair to require correction.

If the violation has existed for 10 years or more and the municipality has taken no enforcement action in that time, the applicant for an equitable waiver is required to prove the first two criteria listed (not discovered and ignorance of the law).

The grant of an equitable waiver is not viewed as a nonconforming use, and it does not exempt future construction or use from compliance with the zoning ordinance.

VI. Other Powers

A. Building on Class VI and (Some) Private Roads

RSA 674:41 provides for an appeal to the ZBA when the board of selectmen denies a request to erect a building on a lot that does not have frontage on a road that is:

- Class V or better, or
- Shown on a plat approved by the planning board, or
- Accepted by the legislative body, or
- Class VI or a private road for which the governing body has authorized the issuance of building permits.

The criteria used by the ZBA in determining whether to grant an appeal are described in the statute:

“Whenever enforcement [of the statute] would entail practical difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets[.]”

Although these criteria are vague, the unnecessary hardship analysis is not based on the same unnecessary hardship criteria required to determine whether or not to grant a variance. RSA 674:41 is a complicated statute, and applying its various provisions usually requires consultation with legal counsel. Further consideration of this statute is beyond the scope of these materials, but for more information, see the Local Government Center’s 2006 Municipal Law Lecture Series, *Road Access and the Municipal Planning Process* by Susan Slack, Esq. and Gary Bernier, Esq., available at www.nhlgc.org.

B. Building Code Appeals

The ZBA may be designated by the legislative body (town meeting) to hear appeals from provisions of the local building code, unless the code establishes a separate building code board of appeals. If the ZBA is so designated, its authority regarding appeals dealing with the local building code is found in RSA 674:34, which provides for the ZBA to hear appeals from decisions of the building inspector. The ZBA has the power “to vary the application of any provision of the building code to any

particular case when, in its opinion, the enforcement of the building code would do manifest injustice and would be contrary to the spirit and purpose of the building code and the public interest.”

Note that these provisions apply to the municipality’s adopted building code, not the state building code found at RSA 155-A:1 through :12.