

Zoning Board of Adjustment Roles and Responsibilities

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I. Role of the ZBA

When a municipality adopts a zoning ordinance, it also must establish a zoning board of adjustment (ZBA). Without a ZBA, the zoning ordinance is not valid. RSA 673:1. The ZBA is “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 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 notifies and hears the parties and those directly affected by the outcome of the case. 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 legislature to carry out specific functions. Since municipalities, and their various boards and committees, have only the powers granted to them by the legislature (see *Girard v. Town of Allenstown*, 121 NH 268 (1981)), the ZBA must confine its functions to those enumerated in various enabling statutes:

RSA 674:33 gives the ZBA the power to carry out its primary functions, which are:

- 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.

RSA 674:33-a authorizes the ZBA to grant equitable waivers of dimensional requirements, which provides a process for 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 provision applies to the municipality’s adopted building code, not the state building code found at RSA 155-A:1-:12.

III. Appeal 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[.]”

The ZBA may reverse or affirm any administrative decision, in whole or in part; or it may modify an order, requirement, decision or determination of the administrative official, thus exercising “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 zoning ordinance, the landowner has the right to appeal that decision to the ZBA.

The ZBA can hear appeals involving the meaning or interpretation of the zoning ordinance or the application of its terms implicated in enforcement proceedings. RSA 676:5, II (b). However, the ZBA cannot hear appeals of the discretionary decisions made by administrative officials to begin, or decide not to take, formal or informal enforcement proceedings involving violations of the zoning ordinance.

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 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 to grant or deny such permit 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.

IV. Variances: The Law Changes Again

A. What Is a Variance?

A variance is required when a proposed 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 an otherwise reasonable zoning regulation because of special conditions of the specific property. "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). A variance is "the safety valve of the zoning ordinance." *Gray Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 246 (1992) (Horton, J., dissenting).

Variances run with the land, meaning that once granted, a variance continues in effect even when the property changes ownership.

Before 2004, New Hampshire law did not recognize a distinction between a use and an area variance (see *Quimette 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).

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 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.

The Court’s *Boccia* decision was met with mixed reviews at best, and in 2009, the New Hampshire legislature statutorily overruled *Boccia* by amending RSA 674:33, I(b) to eliminate the distinction between use and area variances under the unnecessary hardship test. The new law takes effect on January 1, 2010 and, with some changes, it codifies the unnecessary hardship standard established by the Court in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001).

For an excellent historical discussion of the unnecessary hardship standard, see “The Five Variance Criteria in the 21st Century,” published as part of the Local Government Center’s 2009 Municipal Law Lecture Series. However, for the purposes of these materials, we will concentrate on the five criteria for granting a variance effective January 1, 2010. Until then, however, the *Boccia* test for unnecessary hardship should be applied to area variance cases.

B. The Five Variance Criteria

Effective January 1, 2010, under RSA 674:33, I(b), the ZBA is authorized to grant a variance from the terms of a zoning ordinance if:

- 1. The variance will not be contrary to the public interest;**
- 2. The spirit of the ordinance is observed;**
- 3. Substantial justice is done;**
- 4. The values of surrounding properties are not diminished; and**
- 5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

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

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

(ii) The proposed use is a reasonable one.

B. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

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

An applicant must provide the ZBA with evidence that all five variance criteria are met. The newly amended statute codifies the *Simplex* unnecessary hardship test and eliminates the *Boccia* unnecessary hardship test for area variances, but it does not change the other four variance criteria, except to codify the criterion related to surrounding property values, which has existed in case law since 1952.

Following is a discussion of the New Hampshire Supreme Court’s interpretations of the five variance criteria:

1. Public Interest and Spirit of the Ordinance

Discussion of these two criteria is combined here because the Supreme Court has held that the public interest and spirit of the ordinance criteria are related. *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009); *Chester Rod & Gun Club*, 152 N.H. 577 (2005).

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

Court said that the zoning ordinance itself is the declaration of public interest and that the ZBA should not have relied on the town meeting vote as an indication of the public interest. The 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).

The Court also 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 so, the variance must be denied.

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 be contrary to the public interest. *Gray v. Seidel*, 143 N.H. 327 (1999). Prior cases had supported the notion that granting the variance must benefit the public interest.

In *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007) the Supreme Court again considered the relatedness of the public interest and spirit of the ordinance criteria. The Court said that 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. The variance 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 also had granted a

variance for access to the property that encroached closer to the wetlands than the storage facility would. Also, the ZBA had evidence of the plaintiff's expert that damage to the wetlands would be avoided by the installation of a detention pond and other drainage measures.

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 for the proposed expansion without a variance. *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.

In *Bacon v. Town of Enfield*, 150 N.H. 468 (2004), the ZBA had denied a variance for a 4 by 5 ½-foot shed for a propane boiler to heat the house. One of the reasons the ZBA gave for denying the variance was because it violated the spirit of the zoning ordinance, which required structures to be set back 50 feet from the shore of Crystal Lake. The applicant's house, like many on Crystal Lake, was a grandfathered use within the 50-foot setback. The applicant's contractor had testified that installing the propane boiler in a newly constructed shed was the least expensive and most practical location for it, although other locations in the house or beyond the 50-foot setback were also feasible.

The purposes of the shoreline setback requirement were to prevent overcrowding of the shore front and protect water quality. Although one shed within the setback may not greatly affect the shorefront, the Court said, the cumulative effect of many such projects could be significant. "For this reason, uses that contribute to

shore front congestion and over-development could be inconsistent with the spirit of the ordinance.”

2. Substantial Justice

Substantial justice must be done by the grant of a variance. 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*, 155 N.H. 102 (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 whether substantial justice is done by granting a variance is “whether the proposed development was consistent with the area’s present use.” *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007), citing *Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986).

In *Malachy Glen Associates*, the eight-unit storage facility case, 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.”

In *Harrington v. Town of Warner*, 152 N.H. 74 (2005), the Court found that substantial justice would be done by granting a variance for a mobile home park expansion because the proposed use would provide affordable housing and would improve “a dilapidated area of town.”

3. Value of Surrounding Properties

An applicant must show that granting the variance will not diminish the value of surrounding properties. This criterion is added to RSA 674:33, II(b), but has been one of the five variance criteria since added by the Supreme Court in *Gelinas v. Portsmouth*, 97 N.H. 248 (1952).

Opponents may present evidence to the contrary. The parties may offer the testimony of property appraisers or other experts, but ZBA members can weigh the credibility of evidence presented, are not bound to accept the conclusions of experts and may consider the personal knowledge of ZBA members. *Nestor v. Town of Meredith*, 138 N.H. 632 (1994); *Daniels v. Town of Londonderry*, 157 N.H. 519 (2008).

In *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009), the Court found that the ZBA had “considered noise, traffic, aesthetics and intensity of use in considering what effect, if any, the variance would have on surrounding property values,” and that the record supported the ZBA’s finding that the use variance would not negatively impact the value of the surrounding properties.

4. Unnecessary Hardship

Historically, the unnecessary hardship requirement is the focus of most of the variance case law 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 newly amended RSA 674:33, II(b) eliminates the distinction between use variances and area variances established by the Court in *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004), the *Simplex* unnecessary hardship test now applies to both use and area variances.

The legislature’s codification of the *Simplex* test for unnecessary hardship means that the cases decided by the New Hampshire Supreme Court interpreting *Simplex* are still good law.

a. The *Simplex* Test

Under the *Simplex* unnecessary hardship test, 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.

In the newly amended statute, however, the third prong of the *Simplex* test has been eliminated because the cases after *Simplex* held that consideration of whether a variance would injure the public or private rights of others was “coextensive” with consideration of the public interest and spirit of the ordinance criteria. *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580 (2005); *Farrar v. City of Keene*, No. 2008-500, slip op. at 5 (N.H. May 7, 2009).

b. The New Statute

Under RSA 674:33, II(b), effective January 1, 2010, “ **...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.

Since the amended statute did not overrule existing case law interpreting the *Simplex* test, a review of the key cases remains helpful in understanding how to apply the amended statutory unnecessary hardship criterion.

c. Reasonable Use and Special Conditions

Rancourt v. City of Manchester, 149 N.H. 51 (2003) was the first opinion issued by the Court that interpreted the *Simplex* test. 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." **Note that the newly amended statute requires an applicant's proposed use to be a reasonable one in order for the ZBA to grant a variance. It also continues to require "special conditions of the property that distinguish it from other properties in the area."**

In *Rancourt*, 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 Court's holding in *Vigeant v. Town of Hudson*, 151 N.H. 747, 752-53 (2005) is still useful in understanding the reasonable use requirement, although it was an area variance case. The Court held that a 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."

Garrison v. Town of Henniker, 154 N.H. 26 (2006) dealt with the issue of uniqueness. 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. The Court said "the burden must arise from the property and not from the individual plight of the landowner" and that the applicant's evidence failed to show there were special conditions of the property that distinguished it from other property in the same zoning district.

"Special conditions" requires that a variance applicant demonstrate that the property is unique in its surroundings. *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007), quoting *Garrison v. Town of Henniker*, 154 N.H. 26 (2006).

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*, (155 N.H. 102 (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 was made up of wetlands or the 100-foot buffer, and the configuration of the wetlands further reduced the property's buildable area.

d. Fair and Substantial Relationship

Most of the unnecessary hardship case law since *Simplex* has focused on the issues of special conditions, uniqueness and reasonableness. There is no case law based on the second prong of *Simplex* – that an applicant for a variance establish that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on a property. The newly adopted language of the statute is a bit easier to understand:

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.

Under this step, the ZBA must consider the reasons for the zoning regulation – the purposes the ordinance was designed to serve – and ask whether those purposes are fairly and substantially served by applying the regulation to the parcel in question. This analysis is made easier for the ZBA if drafters of zoning ordinances, usually the planning board, include clearly expressed purpose statements in the ordinances.

Note that the purpose of the zoning regulation is also analyzed under the public interest and spirit of the ordinance criteria, where impact on the character of the locality is considered.

e. A New Old Standard – *Governor's Island*

RSA 674:33, II(b) provides that if a variance application does not meet the *Simplex* unnecessary hardship test, unnecessary hardship may be established **“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.”**

This is the unnecessary hardship test articulated by the Court in *Governor's Island Club v. Town of Gilford*, 124 N.H. 126 (1986). In that case, the Court held, “For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land.”

This is the unnecessary hardship test that was found wanting 15 years later when the Supreme Court issued its new *Simplex* test. In *Simplex*, the Court said the *Governor's Island* standard did not properly balance a municipality's right to regulate land use with the individual's constitutionally guaranteed property rights. The Court said the *Governor's Island* unnecessary hardship test – without a variance there was no reasonable use of the property that did not violate the zoning ordinance – was too onerous.

According to the drafters of the bill that amended RSA 674:33, II(b), it is possible that a variance applicant will be able to satisfy the *Governor's Island* unnecessary hardship test, but not the *Simplex* test. In that case, denying a variance when an applicant can make no reasonable use of the property under the current zoning ordinance would constitute an unconstitutional taking of property. See “The Five Variance Criteria in the 21st Century,” published by the Local Government Center as part of its 2009 Municipal Law Lecture Series, p. 43.

RSA 674:33, II(b) (5)(B) clearly states that the *Governor's Island* test may be applied only if the applicant is unable to establish unnecessary hardship under paragraph (5)(A) of the statute – the *Simplex* test – and must still establish that there are “special conditions of the property that distinguish it from other properties in the area,” that “the property cannot be reasonably used in strict conformance with the ordinance” and that “a variance is therefore necessary to enable a reasonable use of [the property].”

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).

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.

V. 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. “A special exception is a use permitted upon certain conditions as set forth in a town’s zoning ordinance.” *McKibbin v. City of Lebanon*, 149 N.H. 59, 61 (2003).

While a variance exempts the property from the strict application of the zoning regulation, a special exception 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.

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.”

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).

VI. 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.

VII. 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.