

Roles and Responsibilities of the ZBA

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There is a huge amount to learn:

- Why does the ZBA exist?
- When is ZBA relief not required?
- Jurisdiction and Authority.
- Relationship to others.

Why is a ZBA established?

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA.
- Failure to include provision for a ZBA will render a zoning ordinance invalid.
 - Jaffrey v. Heffernan, 104 NH 249 (1962)

A constitutional “safety valve”

- The federal and state constitutions both prohibit the taking of private property for public use without just compensation.
 - US Constitution, 5th amendment
 - NH Constitution, Part 1, Articles 2 & 12

A constitutional “safety valve”

- The ZBA process prevents the ordinance from unconstitutionally taking the economic value of land (**“inverse condemnation”**).
 - On its face, by providing a mechanism for review and exception.
 - As applied, through its special exception, variance and equitable waiver powers.

The ZBA Has No Legislative Powers

- The ZBA takes local land use documents as they exist, and does not change them.
 - Master Plan
 - Zoning ordinance
 - Subdivision & Site Review regulations
 - Created by planning board, citizen petition, or governing body, and adopted by town meeting or the city or town council.

The ZBA Has No Executive Powers

- Day to day decisions implementing the ordinance are not made by the ZBA:
 - Building Inspector or the Governing Body:
 - Building permits
 - Interpretation of ordinances
 - Building code decisions
 - Class VI Road Policy (with Planning Board)
 - Licensing of a junkyard location

The ZBA is a Quasi-Judicial Body

- In the public meeting, the ZBA collects **evidence**, finds the facts, and applies legal tests to determine if relief from the ordinance should be granted.
 - It **interprets** the ordinance and has the final say on the *meaning* of the language.
 - It **perfects** the ordinance as it **overrules or modifies** decisions of administrative officials.

Adjudication

- The burden of proof is upon the **applicant**.
- The only board where a minimum of 3 “Yes” votes required to act, rather than a majority.
 - See RSA 674:33, III.
- Decisions are based solely on the **evidence**.
 - Not on the presence or absence of opposition
- Decisions must be in writing.
 - RSA 676:3.

Jurisdiction

- RSA 674:33:
 - Administrative appeal
 - Variances, and special exceptions
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:34: Building Code Appeals
- RSA 674:41: Class VI or private road building permit
- RSA 236:118: Junkyard certificate of location approval

When is ZBA Relief Not Needed?

- **Non-conforming uses or structures** that predate the passage of the ordinance.
 - “Grandfathering”
 - Does not permit the enlargement of use or structure, or change to another non-conforming use.
- **Governmental uses** that do not conform to the ordinance, subject to RSA 674:54.

When is ZBA Relief Not Needed?

- **Preemption** by a federal or state law that expressly or impliedly allows the use regardless of the local ordinance.
- State law preempts local ability to control the right to boat on public waters.
 - Lakeside Lodge Inc. v. Town of New London, 960 A.2d 1268 (NH 2008)

Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- “*Dimensional*” only, not “*use*” violations
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

Equitable Waiver, Elements

- Violation not discovered until after substantial completion
- A “good faith error”, by owner or building official, not ignorance, or misrepresentation
- Does not create or result in a “public or private nuisance”
- Cost of correction outweighs public benefit, and thus unfair.

Equitable Waiver, Cases

- Not available for a ***conveyancing error*** by owner (easement of 35' to shoreline created when 100' required by ordinance).
 - Taylor v. Town of Wakefield, 10/31/2008
- Not available for a ***use restriction*** imposed by a wetland protection overlay district (New garage structure improperly allowed since all building prohibited in overlay area).
 - Schroeder v. Town of Windham, 12/18/2008

Administrative Appeals

- To resolve claims of ***error*** in the decisions of:
 - “Administrative Officials” RSA 676:5, II (b)
 - Building Inspector or zoning official
 - Board of Selectmen
 - Planning Board, RSA 676:5, III
 - Historic District Commission, RSA 677:17

Administrative Appeals

- Administrative Officials, exception:
 - Cannot review “discretionary” acts, including refusal to take enforcement action
- Planning Board or HDC, exception:
 - Cannot review decisions involving “innovative land use control” issues, RSA 674:21.

Special Exceptions, RSA 674:33, IV

- A use that is ***permitted*** by the ordinance, subject to additional criteria or standards contained in the ordinance.
- Burden placed on the applicant to show that all of the additional criteria are met.
- Runs with the land, not the owner.
- Lower standard than for a variance.

Special Exception Conditions

- May be imposed to prevent expansion or change of allowed structure or use.
 - Rye v. Ciborowski, 111 NH 77 (1971)
- Specific language in conditions assists in later enforcement actions.
 - Bennett v. Town of Hampstead, 953 A.2d 388 (NH 2008)

What is a Variance?

- A variance serves to exempt a property and its use from the application of the zoning ordinance;
- Cannot be granted unless **all five** elements are met;
- The relief “**runs with the land**”, not specific to the applicant.

Disability Exception

- A variance may be granted for reasonable accommodations necessary for a physically disabled person to use a property.
- The “hardship” element does not apply
- The variance may be limited to a person, and does **not** run with the land.
 - RSA 674:33, V

The Five Elements

- No diminution in the value of surrounding properties
- Not contrary to the public interest;
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship;
- Spirit of the ordinance will be observed;
- Substantial justice will be done

1. Public Interest

- Granting the variance will not do harm, meaning:
 - The use can't alter the essential character of the neighborhood; or
 - Threaten the public safety, health or welfare;
 - Applicant not required to show a public benefit.
 - Chester Rod & Gun Club v. Chester 152 NH 577 (2005)
 - Malachy Glen Associates Inc. v. Chichester, 155 N.H. 102 (2007)

2. Spirit of the Ordinance

- How would this variance affect the ability to meet the purposes and goals of ordinance.
- Expanding a building to allow a heating system on one structure will not greatly affect a shoreland area, but adding more space on all similarly situated structures would be significant.
 - Bacon v. Enfield, 150 NH 468 (2004)

3. Value Not Diminished

- Expert opinion not required.
- Board members can accept or reject what they hear from the experts, and to consider their own knowledge and experience in the area.
 - Vannah v. Bedford, 111 NH 105 (1971)
- But, if expert evidence not contested, can't be ignored.
 - Malachy Glen Associates Inc. v. Chichester, 155 N.H. 102 (2007)

4. Substantial Justice

- Will denial of relief cause a loss to the applicant that outweighs the gain to the public?
- An aspect of the constitutional requirement not to take property without just compensation.

5. Unnecessary Hardship

- Former test: some aspect of the land itself means that literal enforcement of the ordinance would deny the owner all reasonable use of the property.
 - Grey Rocks Land Trust v. Hebron (1992)
- So difficult to obtain that ordinances came close to an unconstitutional taking of property rights without compensation.

Simplex v. Newington, 2001-2004

- The old rule was abandoned, and became:
 - 1. Zoning restriction as applied interferes with reasonable use of the property
 - 2. No fair and substantial relationship between restriction and purpose of ordinance
 - 3. Variance would not injure the public or private rights of others

Boccia v. Portsmouth, 2004

- Court recognizes a distinction between limits on use of property, and restrictions arising out of area or dimensional standards
- Simplex remains the rule for **use** variances
- A new test is created for **area/dimensional** variances

The Boccia “Area Variance” Test

- An area variance is needed to enable the use given the special conditions of the property.
- The benefit sought by applicant cannot be achieved by some other method reasonably feasible, other than the area variance.

Stay Tuned, “Hardship”, HB 446

- Handout
- Does this standard mean the end of *Boccia*?
- Does this standard mean the end of the use/area distinction?
- Will the focus now turn to the meaning of “special conditions”?

And we return to “Special Conditions”

- While we focus on “hardship”, all 5 tests must be met before a variance may be granted, RSA 674:33, I (b).
- Even if the proposed use seems reasonable to applicant, there must be some special condition in the land that sets it apart from other land in the zone to support a variance.
 - See Garrison v. Henniker, 154 N.H. 26 (2006).

Relationship to Other Boards

- Applicant may request the ZBA to hold joint meetings with any other land use board on a pending matter.
 - RSA 676:2
- May notify the Planning Board of ordinance language that is unclear or difficult to apply in practice.
 - RSA 675:3, public hearings on ordinance changes.
- Relationship with the “Administrative Officials”

Relationship to the Public

- Duties to Applicants and Abutters:
 - Procedural due process, notice and the opportunity to be heard
 - Decide the matter on the evidence
- Developing a Record for Court review:
 - Take care to follow procedural requirements
 - Make detailed written findings of fact and rulings on legal questions, RSA 676:3

Duty to the Public

- Municipalities have a constitutional obligation to provide assistance to all citizens.
 - Richmond Co. v. City of Concord, 149 NH 312 (2003)
- The test is “reasonable” obligation, not a duty to educate or inform beyond notices legally required.
 - Kelsey v. Town of Hanover, 956 A.2d 297 (NH 2008)

Conclusion

- Your service on this Board will be challenging, and at times difficult, but ultimately rewarding.
- All members need to remain current with state law, and changes in local ordinances
- Your role is to dispense justice, which means to be fair to all who come before you.