

VARIANCE TESTS, May 2009

Portion of RSA 673:33, Current Law:

I. The zoning board of adjustment shall have the power to:

(a) Hear 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; and

(b) Authorize upon appeal in specific cases such 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.

Elements of a Variance Under Current Law

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

i. 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.

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

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

B. Applicant seeking area variance – Boccia analysis

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

ii. 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.

HB 446 – AS AMENDED BY THE HOUSE, 2009 Session

1 Powers of Zoning Board of Adjustment; Variance. RSA 674:33, I(b) is repealed and reenacted to read as follows:

(b) Authorize, upon appeal in specific cases, a variance from the terms of the 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. For purposes of this paragraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area, either

(i) there is no reasonable and economically viable use that can be made of the property that would be in strict compliance with the ordinance; or

(ii) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of the ordinance to the property, and the proposed use is otherwise a reasonable one.

This definition of “unnecessary hardship” shall apply whether the provision of the ordinance from which a variance sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

2 Effective Date. This act shall take effect January 1, 2010.