The Board Of Adjustment In New Hampshire

A HANDBOOK FOR LOCAL OFFICIALS

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State of New Hampshire
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Office of Energy and Planning
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PREFACE TO THE BOARD OF ADJUSTMENT IN NEW HAMPSHIRE

The Office of Energy and Planning (OEP) provides assistance to New Hampshire municipalities in their planning efforts. As part of that assistance, the OEP staff responds to numerous requests for information and assistance from cities and towns concerned about zoning and the duties and responsibilities of the board of adjustment. This handbook is a guide for board members and others to the organization, powers, duties and procedures of the board of adjustment.

The Board of Adjustment in New Hampshire: A Handbook for Local Officials was first prepared by Robert C. Young, Planning Associate, under the auspices of the New Hampshire Planning and Development Commission in 1959. The handbook has been revised in 196l, 1964, 1969, 1972, and 1979. It was rewritten in 1985 Marcia O. Keller to reflect the 1983 recodification of New Hampshire's planning and land use regulations and interpretations of state laws as set forth in decisions by the New Hampshire Supreme Court. Additional revisions took place in 1988, 1993, 1994, 1997, 2001 and 2002 to reflect changes in state law and statutory interpretations. Christopher Northrop was responsible for this current revision.

This edition incorporates statutory changes enacted through the 2004 Legislative Session and additional Supreme Court decisions that further clarify the authority of zoning boards of adjustment. Special recognition and appreciation is given to attorneys Tim Bates, Ben Frost, Peter Loughlin and H. Bernard Waugh for their review of and comments on the 2002 edition and for the valued use of their materials listed in the bibliography.

This Handbook is presented as an explanation of the law and not the law itself. State statutes are presented in 10 pt. Arial font. Citations are given for New Hampshire Supreme Court decisions and direct quotes are in *italics*.

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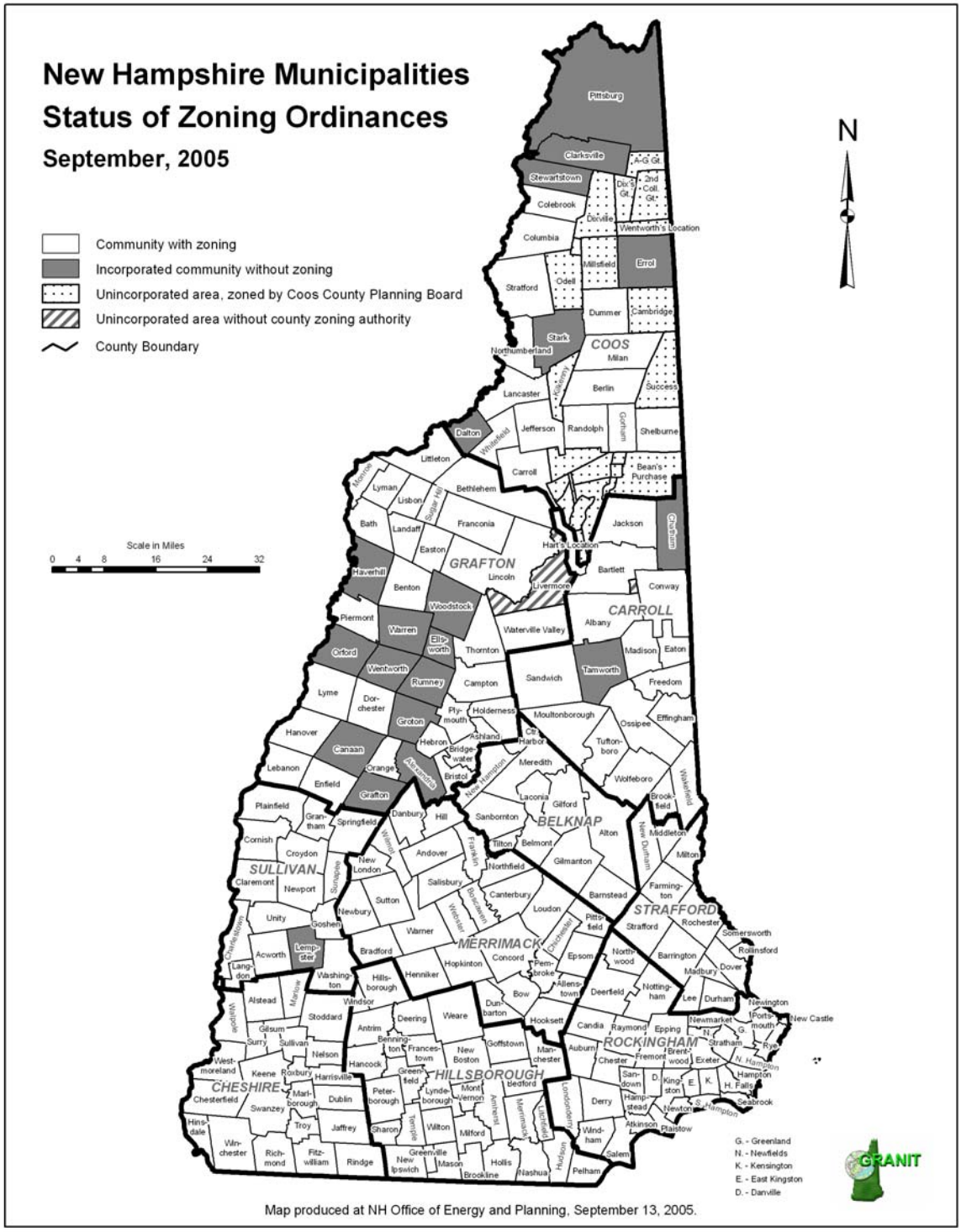
CAUTION

This handbook is designed to serve as an introduction to the organization, powers, duties and procedures of boards of adjustment in New Hampshire. The material included is as accurate and reliable as possible at this point in time.

However, given the unique nature of individual parcels of land across the state, and the wide variety of development proposals, this material should be taken as a guide. Obviously, all principles outlined herein may not be entirely applicable to every parcel or proposal in the state.

Accordingly, this guide should be used as a starting point for discussions regarding a particular parcel or proposal. Cases, treatises, statutes, court rulings and the like referred to in this guide should be checked to determine whether they have been reversed, distinguished, or amended, or whether they are even applicable to the unique parcel under consideration. It is also recommended that the board of adjustment seek legal counsel whenever there are any procedural or legal questions.


New Hampshire Municipalities
Status of Zoning Ordinances
September, 2005
Community with zoning
Incorporated community without zoning
Unincorporated area, zoned by Coos County Planning Board
Unincorporated area without county zoning authority
County Boundary
Scale in Miles
0 4 8 16 24 32
N
COOS
GRAFTON
CARROLL
BELKNAP
SULLIVAN
MERRIMACK
STRAFFORD
ROCKINGHAM
HILLSBOROUGH
CHESHIRE
G. - Greenland
N. - Newfields
K. - Kensington
E. - East Kingston
D. - Danville
GRANIT
Map produced at NH Office of Energy and Planning, September 13, 2005.

NEW HAMPSHIRE VILLAGE DISTRICTS WITH ZONING ORDINANCES

This list includes those identified as of January 2006 and does not represent a comprehensive review of all village districts in the state. As more village districts that have adopted zoning are identified, this list will be updated. For a current listing, please see the Reference Library on our website:
http://nh.gov/oep/resourcelibrary/referencelibrary/m/mlurdatabasereports/index.htm

MunicipalityName	City	RPC	County
Haverhill Corner Precinct	Haverhill	NCC	Grafton
Rye Beach Village District	Rye Beach	RPC	Rockingham
Little Boars Head	North Hampton	RPC	Rockingham
Seabrook Beach Village District	Seabrook	RPC	Rockingham
Hopkinton Village Precinct	Hopkinton	CNHRPC	Merrimack
New Hampton Village District	New Hampton	LRPC	Belknap
North Walpole Village District	Bellows Falls	SwRPC	Cheshire

INTRODUCTION

For many years, zoning boards of adjustment have played an important, but little noticed role, in the development of New Hampshire communities. Sometimes praised, sometimes criticized, they have continued to perform their principal role - reviewing applications for zoning variances, special exceptions, equitable waivers of dimensional requirements and hearing appeals from the decisions made by administrative officials - all without much fanfare. To a large extent, the success or failure of zoning administration rests on the proper exercise of judgment by members of the board of adjustment and the job is not an easy one!

The first rudimentary land use controls date back at least several thousand years, but the modern concept of zoning began early in the twentieth century. As our nation and its cities grew in size and complexity, it became apparent that haphazard growth and mixing of industry, commerce, and housing were resulting in a loss of land values. Several major cities began experimenting with ordinances that restricted the use of land by districts or zones; other cities were quick to follow. More recently, smaller cities and towns have enacted zoning ordinances and maps, recognizing that their health, safety and welfare depend on protection against ill considered and indiscriminate use of land.

When New York City enacted the first comprehensive zoning ordinance and map in 1916, unusual features of the topography, odd shaped lots, and drainage conditions required that some flexibility be provided to ensure proper use and enjoyment of the property and to avoid charges of confiscation that could result from strict application of the ordinance. As states passed enabling legislation granting communities authority to zone, they also required that the local ordinance provide for a board of adjustment with defined powers and duties.

Because this legislation presented new concepts, questions of constitutionality were raised. The United States Supreme Court ruled that enactment and enforcement of zoning laws was a proper application of the police powers that reside in the individual states. Because municipalities are created by the state, the cities and towns have power to act only in accordance with state permitting legislation.

For this reason, the powers granted to a zoning board of adjustment must be consistent with enabling legislation. The New Hampshire Supreme Court has stated *"... the board of adjustment is an essential cog in the entire scheme of a zoning ordinance, and that lacking it, the ordinance before us is invalid as a zoning ordinance."* Jaffrey V. Heffernan l04 NH 249, (1962).

New Hampshire's planning enabling legislation, Revised Statutes Annotated (**RSA**) 672-677, and the local zoning ordinance and map provide the legal basis for the board of adjustment's work. Each board member should be completely familiar with them. While zoning ordinances can and should be tailored to the particular community, there is one thing they all require - the creation of a zoning board of adjustment. It has been said that the only reason zoning as a comprehensive land use planning technique has been upheld as constitutional in the courts is

due to the existence of the ZBA as a "constitutional safety valve." The ZBA provides the necessary flexibility to ensure that the ordinance was applied equitably to all property.

In addition to statutory law, there is also "case law," which is the interpretation courts have given to various statutes and ordinances when applied to specific cases. Case law further clarifies the provision contained in both state and local regulations.

Since zoning as applied today is relatively new and innovative ideas are continually coming into use, case law has not resolved all points of contention. Hard and fast rules that cover all situations are difficult to state, but broad principles can be presented.

This handbook is an administrative tool to acquaint board members and other interested persons with a discussion of the basic responsibilities of the board of adjustment and to suggest procedures by which the work of the board can be carried out in a fair and effective manner.

It is hoped that planning boards, which have the task of formulating the zoning ordinance and zoning map, will also find the handbook useful. The board of adjustment cannot carry out its duties if it must work with a zoning ordinance and map that is poorly prepared, contains questionable provisions, or fails to carry out its purpose in an explicit manner. A good zoning ordinance is an essential base for good zoning administration.

PART 1: ORGANIZATION

State law establishes certain requirements. These should be carefully followed by the municipality in establishing the board of adjustment and by the board in structuring its procedures. The remaining forms and suggestions are provided as guidelines only and should be adapted by each board to suit the local situation.

ESTABLISHING THE BOARD

RSA 673:1 Establishment of Local Land Use Boards.

IV. Every zoning ordinance adopted by a local legislative body shall include provisions for the establishment of a zoning board of adjustment.

BOARD MEMBERS AND ALTERNATE MEMBERS

RSA 673:3 Zoning Board of Adjustment and Building Code Board of Appeals.

I. The zoning board of adjustment shall consist of 5 members. The members of the board shall either be elected in the manner prescribed by RSA 669, or appointed in a manner prescribed by the local legislative body. Each member of the board shall be a resident of the municipality in order to be appointed or elected.

II. Zoning board of adjustment members who are elected shall be elected for the term provided under RSA 673:5, II. The terms of appointed members of zoning boards of adjustment in municipalities in office on the effective date of an affirmative decision to elect such board members shall not be affected by the decision. However, when the term of each member expires, each new member shall be elected at the next regular municipal election for the term provided under RSA 673:5, II.

III. A local legislative body which has provided for the election of zoning board of adjustment members may rescind that action, in which event members shall thereafter be appointed in a manner prescribed by the local legislative body. The elected board shall, however, continue in existence, and the elected members in office may continue to serve until their successors are appointed and qualified.

IV. The building code board of appeals shall consist of 3 or 5 members who shall be appointed in a manner prescribed by the local legislative body; provided, however, that an elected zoning board of adjustment may act as the building code board of appeals pursuant to RSA 673:1, V. Each member of the board shall be a resident of the municipality in order to be appointed.

In 1990, the Legislature provided optional election or appointment for boards of adjustment, which must be authorized by the local legislative body (council/town meeting). The transition from an appointed to an elected board takes place over time as the term of each appointed member expires. If the election option is rescinded, the elected board continues to serve until their successors are appointed and qualified.

RSA 673:5 Terms of Local Land Use Board Members.

II. The term of an elected or appointed local land use board member shall be 3 years. The initial terms of members first appointed or elected to any local land use board shall be staggered so that no more than 3 appointments or elections occur annually in the case of a 7 or 9 member board and no more than 2 appointments or elections occur annually in the case of a 5 member board, except when required to fill vacancies.

The term of board members is three years, although the initial terms are one, two and three years to stagger the terms. Subsequent appointment/election is for three years with one or two vacancies occurring each year.

As officers of the municipality, members of the zoning board of adjustment should take the oath of office required by RSA 42:1. The municipal records should clearly show dates of the appointment/election and expiration of the terms. Appointments made to fill vacancies on the board should be for the remainder of the terms in accordance with RSA 673:12**.**

RSA 673:3 requires local residency for membership on the board. Other qualifications could be set by the zoning ordinance. This is sometimes done in larger

municipalities where it is felt that a technical background is helpful in administering the ordinance. In many cases, however, setting qualifications for membership might prevent competent citizens from serving on the board.

In general, qualifications to serve on the board of adjustment are the same as those for any other position of trust in a municipality: time, an interest in serving, impartiality, and a willingness to understand the process.

RSA 673:6 Appointment, Number and Terms of Alternate Members.

I. (a) The local legislative body may provide for the appointment of not more than 5 alternate members to any appointed local land use board, who shall be appointed by the appointing authority. The terms of alternate members shall be 3 years.

II-a. An elected zoning board of adjustment may appoint 5 alternate members for a term of 3 years each, which shall be staggered in the same manner as elected members pursuant to RSA 673:5, II.

The appointment of alternates is strongly recommended to ensure a quorum in the event regular members are disqualified for a particular case or are otherwise unavailable to serve. Alternate members should be encouraged to attend board meetings on a regular basis to become familiar with board procedures. If your board has alternate members, it is strongly encouraged to verify the method in which those alternates were established. Has the legislative body (usually town meeting) actually authorized the appointment of alternates? Check the records to make sure. If you are relying on unauthorized alternates to fill in and make decisions, your decisions may not hold up in court!

Appointed or elected planning board members in towns may also serve on any other municipal board or commission, provided that such multiple membership does not result in 2 planning board members serving on the same board or commission. (RSA 673:7)

In cities, one appointed planning board member may also be a member of the zoning board of adjustment.

In counties with unincorporated towns or unorganized places, the county commissioners shall determine which members of the planning board, if any, may serve on other municipal boards.

RSA 673:11 Designation of Alternate Members.

Whenever a regular member of a local land use board is absent or whenever a regular member disqualifies himself or herself, the chairperson shall designate an alternate, if one is present, to act in the absent member's place; except that only the alternate designated for the city or town council, board of selectmen, or village district commission member shall serve in place of that member.

RSA 673:12 Filling Vacancies in Membership.

Vacancies in the membership of a local land use board occurring other than through the expiration of a term of office shall be filled as follows:

I. For an elected member, by appointment by the remaining board members until the next regular municipal election at which time a successor shall be elected to either fill the unexpired term or start a new term, as appropriate.

II. For an appointed, ex officio, or alternate member, by the original appointing or designating authority, for the unexpired term.

RSA 673:13 Removal of Members.

I. After public hearing, appointed members and alternate members of an appointed local land use board may be removed by the appointing authority upon written findings of inefficiency, neglect of duty, or malfeasance in office.

II. The board of selectmen may, for any cause enumerated in paragraph I, remove an elected member or alternate member after a public hearing.

III. The appointing authority or the planning board shall file with the city or town clerk, the village district clerk, or the clerk for the county commissioners, whichever is appropriate, a written statement of reasons for removal under this section.

IV. The council, selectmen, county commissioners with the approval of the county delegation, or district commissioners may for any cause enumerated in this section remove the members selected by them.

ORGANIZING THE BOARD

RSA 673:8 Organization.

Each local land use board shall elect its chairman from the appointed or elected members and may create other offices as it deems necessary.

RSA 673:9 Term of Chairman and Officers.

I. The term of every officer and chairman elected by a local land use board shall be one year. Both the chairman and officers shall be eligible for reelection.

RSA 673:10 Scheduling of Meetings.

I. Meetings of the heritage commission, historic district commission, the building code board of appeals, and the zoning board of adjustment shall be held at the call of the chairman and at such other times as the board may determine.

II. The planning board shall hold at least one regular meeting in each month.

III. A majority of the membership of a local land use board shall constitute the quorum necessary in order to transact business at any meeting of a local land use board.

The officers, selected by the board, must include a chairman to conduct meetings and hearings and be the official spokesperson for the board and may include a vice chairman to act in the absence of the chairman and a clerk to keep records, see that proper notice is given, and take care of other administrative details.

Most boards of adjustment find it convenient to establish a regular monthly meeting, which can then be modified, as needed, to accommodate the number of appeals to be heard. However, the ZBA is not required to meet regularly as is the Planning Board.

RULES OF PROCEDURE

RSA 676:1 Method of Adopting Rules of Procedure.

Every local land use board shall adopt rules of procedure concerning the method of conducting its business. Rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with city, town, or village district clerk or clerk for the county commissioners for public inspection.

State law does not specify the content of the rules of procedure to be adopted by a board of adjustment but does require that every board adopt such rules. Perhaps the most important rule, from the public's perspective, is the time period to be established for appeals of administrative decisions under RSA 676:5, I.

Under RSA 676:1, rules of procedure must be adopted by the board at a regular meeting and placed on file with the city, town or village district clerk for public review. The rules of procedure help to organize the work of the board and lets applicants and abutters know what to expect and how the hearing process will be conducted.

The board's rules of procedure should cover issues of internal organization and conduct of public business:

A. Authority
B. Officers
C. Members and Alternates
D. Meetings
   1. Schedule
   2. Quorum
   3. Disqualification
   4. Order of business
      a) Call to order by the chairman
      b) Roll call
      c) Minutes of previous meeting
      d) Unfinished business
      e) Public hearings
      f) New business
      g) Communications
      h) Other business
      i) Adjournment

E. Application/decision process
   l. Filing application
   2. Notification of public hearing
   3. Conducting the hearing
   4. Decision
F. Records
G. Amendments
H. Waivers
I. Joint Meetings and Hearings

(See Appendix A - Suggested Rules of Procedure for Local Board of Adjustment)

PART 2: POWERS AND DUTIES OF THE ZONING BOARD OF ADJUSTMENT

AUTHORITY TO REGULATE THE USE OF LAND

The following statutes outline the authority of towns to adopt a zoning ordinance and the extent to which a zoning ordinance may regulate the use of land.

RSA 674:16 Grant of Power.

I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:
(a) The height, number of stories and size of buildings and other structures;
(b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;
(c) The density of population in the municipality; and

(d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

RSA 674:17 Purposes of Zoning Ordinances.

I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:
(a) To lessen congestion in the streets;
(b) To secure safety from fires, panic and other dangers;
(c) To promote health and the general welfare;
(d) To provide adequate light and air;
(e) To prevent the overcrowding of land;
(f) To avoid undue concentration of population;
(g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;
(h) To assure proper use of natural resources and other public requirements;
(i) To encourage the preservation of agricultural lands and buildings.; and
(j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.
II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

RSA 674:18 Adoption of Zoning Ordinance.

The local legislative body may adopt a zoning ordinance under RSA 674:16 only after the planning board has adopted the mandatory sections of the master plan as described in RSA 674:2, I and II.

RSA 674:20 Districts.

In order to accomplish any or all of the purposes of a zoning ordinance enumerated under RSA 674:17, the local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 674:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Four groups are involved with the formulation and administration of a zoning ordinance and map: the planning board, the local legislative body, the administrative officer, and the board of adjustment.

l. **Planning Board** - primary responsibility for proposing the initial zoning ordinance and the zoning map, recommending amendments, holding public hearings on its own and petitioned amendments .

2. **Local Legislative Body** - city council or town meeting - adopts the original ordinance and approves any changes that are proposed.

3. **Administrative Officer** - local official , zoning administrator, building

inspector or board of selectmen who administers and enforces the ordinance and map as written.

4. **Board of Adjustment** - hears appeals from any order, requirement, decision or determination made by an administrative official and administers special provisions in the ordinance dealing with variances and special exceptions.

Each of these groups can act only within the authority granted it by the enabling legislation: RSA's 672 - 677. The planning board cannot adopt or enforce the zoning ordinance. The local legislative body must follow statutory procedures in enacting the ordinance. The administrative official must apply the ordinance as it is written and cannot waive any provisions. The board of adjustment may grant variances, where justified, but cannot amend the zoning ordinance and map. Zoning ordinances involve more unusual conditions and extenuating circumstances than other land use regulations. Boards of adjustment are established to provide for the satisfactory resolution of many of these situations without burdening the courts.

The board of adjustment has the authority to act in four separate and distinct categories, which will be discussed separately:

- Appeal from Administrative Decision;
- Approval of Special Exception
- Grant of Variance; and
- Grants of Equitable Waivers of Dimensional Requirement

It should be noted that the board of adjustment does not have authority over decisions of the board of selectmen or enforcement official on whether or not to enforce the ordinance. The board does have the authority to hear administrative appeals if it is alleged that there was an error in any order, requirement, decision or determination made by the official. The board of adjustment also has the authority to hear administrative appeals of decisions made by the planning board which are based on their interpretation of the zoning ordinance. Don't confuse your role as a zoning board member with that of the planning board. The intent is not to interfere with the planning board's authority over subdivision and site plan review, but to allow for review of zoning matters by the ZBA. (See Dube v. Town of Hudson, 140 N.H. 135, 663 A.2d 626 [1995])

APPEAL FROM ADMINISTRATIVE DECISION

RSA 674:33 Powers of Zoning Board of Adjustment

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.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or 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.

(Also see RSA 676:5, Appeals to Board of Adjustment, on page 26.)

The board of adjustment decides cases where a claim is made that the administrative officer has incorrectly interpreted the terms of the ordinance such

as a district boundary or the exact meaning of an article or term. Most zoning ordinances contain terms that may be confusing and are, therefore, open to interpretation. An ordinance may fail to define what is meant by such requirements as "distance from road." Does this mean distance from the pavement, shoulder, side ditch, or right of way? An honest difference of opinion may easily occur as to the exact meaning when applied to specific circumstances.

In another situation, a person may, rightly or wrongly, question the administrator's reasons for withholding a permit. Because the board of adjustment has the power to referee such cases, every person is afforded a timely hearing and decision without the expense of going to court. Again, it is important for the ZBA to establish in their rules a reasonable time that an appeal of an administrative decision may be taken, as required by RSA 676:5, I.

Although this is a relatively simple power there are several pitfalls to be avoided.

In determining the intent and meaning of a provision of the ordinance and map, the board is restricted to a fairly literal interpretation. The intent of the law is an important consideration, but must be spelled out in terms specific enough to be understood. The board of adjustment cannot make its determination on the strength of a statement of purpose alone when that statement is not backed by concisely phrased provisions. *"The construction of the terms of a zoning ordinance is a question of law....The proper inquiry is the ascertainment of the intent of the enacting body.... Where the ordinance defines the term in issue, the definition will govern."* (citations omitted) Trottier v. City of Lebanon 117 NH 148, 1977. When an appeal is made to a board of adjustment under this provision, the board must apply the strict letter of the law in exactly the same way that a building inspector must. It cannot alter the ordinance and map or waive any restrictions under the guise of interpreting the law. The petitioner may, of course, ask for a variance after the board of adjustment has defined the law, but this must be done by filing an application for a variance and considered by the board based on the standards required for a variance. Sometimes, two forms of relief are requested (e.g. an appeal of an administrative decision of interpretation of the ordinance and a variance request that is based on the outcome of the interpretation of the ordinance) and can both be decided as part of a single application, depending on local rules of procedure. There are no specific criteria for an administrative appeal as with a variance or special exception.

Decisions made by the administrative officer involving what the ordinance says and means are appealable. This includes situations such as a decision by the board of selectmen to issue (or deny) a building permit because of their belief that the proposed use is permitted (or not) in a particular zone. The same applies to decisions by the planning board or any other "administrative officer" regarding the terms of the ordinance. This does not mean, however, that decisions to enforce (or not enforce) the ordinance are also appealable to the board of adjustment. These decisions are discretionary and are not reviewable under RSA 676:5, II(b) or any other statute.

SPECIAL EXCEPTIONS

RSA 674:33 Powers of Zoning Board of Adjustment

IV. A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.

Under this authority, the board of adjustment has the power to grant those exceptions which are clearly specified in the zoning ordinance. The legislative body, in enacting the ordinance, established what can be granted as an exception and the conditions which must be met before the board of adjustment may grant it.

"If the conditions for a special exception are not met the board cannot allow it; however, if the conditions are met, the board must grant the special exception." Shell Oil v. Manchester l0l NH 76, (1957).

Unless a particular use for which an application is submitted is stated in the ordinance as being explicitly allowed by special exception, the board of adjustment is powerless to grant a special exception for that use. If this fact can be kept in mind, there should be no confusion between the meaning of "special exception" and "variance." A **special exception** is a use of land or buildings that is permitted, subject to specific conditions that are set forth in the ordinance. A **variance** is a waiver or relaxation of particular requirements of an ordinance when strict enforcement would cause undue hardship because of circumstances unique to the property.

A **variance** is permission granted to use a specific piece of property in a more flexible manner than allowed by the ordinance; a **special exception** is a specific, permitted land use that is allowed when clearly defined criteria and conditions contained in the ordinance are met. Providing for special exceptions makes it possible to allow uses where they are reasonable in a uniform and controlled manner, but to prohibit them where the specified conditions cannot be met. Requirements, in this sense, are measurable qualifications that are the same at all times and places and can be expressed in specific terms.

The practical application of a special exception may be illustrated by a hypothetical case of a rural town that has no industrial zone, but wants to allow industries to locate in a particular district under certain circumstances. One condition, which must be stated in the ordinance, might be that the proposed industry would not create a hazardous traffic condition. Whether or not the traffic conditions generated by a particular industry would be hazardous, would depend on the type of operation proposed, the road in question, the set-back of buildings on nearby lots, the location of intersections, school crossings, parks and homes, and off-street parking provisions.

It would not be possible to set uniform requirements in the ordinance, such as the number of persons who may be employed, that would prevent traffic hazards in all cases and yet not be needlessly restrictive in a specific case. By referring the matter to the board of adjustment, it is possible to consider each case on its own merits and still remain within the intent and purpose of the ordinance. *"There must...be sufficient evidence before the board to support a favorable finding on each of the statutory requirements for a special exception."* Barrington East Cluster Unit I Owner's

Association v. Barrington l2l NH 627, (1981).

Special exceptions are sometimes used to control the location of specific commercial or industrial uses, such as public utilities, gas stations, and parking lots, which may appropriately be located in residential districts. Schools, hospitals, nursing homes, and other establishments with similar locational problems often require approval as special exceptions subject to conditions spelled out in the zoning ordinance.

The granting of a special exception does not alter the zoning ordinance, but applies only to the particular project under consideration. An application for an additional, similar use on the same parcel would have to be considered separately by the board and approved or denied based on the application and the conditions required.

The board of adjustment cannot legally approve a special exception for a prohibited use if the ordinance does not identify that use. Also, the board cannot legally approve a special exception if the stipulated conditions do not exist or cannot be met. On the other hand, if the special exception is listed in the ordinance and the conditions are met, the board cannot legally refuse to grant the special exception even though it may feel that the standards are not adequate to protect the neighborhood. Three questions must be answered to decide whether or not a special exception can be legally granted:

(1) Is the use one that is ordinarily prohibited in the district?

(2) Is the use specifically allowed as a special exception under the terms of the ordinance?

(3) Are the conditions specified in the ordinance for granting the exception met in the particular case?

In Sklar Realty Inc. v. Merrimack and Agway, Inc. 125 NH 32l, (1984), the Supreme Court added a new dimension to the validity of a special exception in certain circumstances. If conditions imposed by a planning board under site review authority substantially alter a plan for which a special exception has been granted, the board of adjustment must review its original approval. The Court stated, *"We hold it was error to conclude that the special exception necessarily survived the change in...plans. The* (planning) *board may not enter a further order favorable...(to the applicant) unless the ZBA reaffirms its own order after a consideration of the second plan."*

Language counts when reviewing a special exception. In Cormier v. Town of Danville ZBA, 142 N.H. 775, (May 14, 1998), the ordinance allows excavations provided they are compatible with, and not injurious to either: natural features or historic landmarks or other historic structures. The board denied a special exception finding that the use would be detrimental to the historic and natural character of Tuckertown Road. The decision was appealed and upheld by the superior court. The supreme court reversed the ZBA, finding that there was nothing in the record to support the ZBA's conclusion that the proposal would have an adverse impact on the road. The court reminded the board that "the law demands that findings be more specific than a mere recitation of conclusions." Board members should be sure that factual conclusions like "adverse impact" are supported by factual findings contained in the record, whether from testimony, evidence, or board member's personal knowledge of the area. If you determine that there WILL be something (adverse impact, detrimental effect, etc.), you should next ask yourself, and make sure the record reflects, WHY you came to

that conclusion, i.e., "We find that there will be an adverse impact because of x,y,z."[1]

VARIANCES

RSA 674:33 Powers of Zoning Board of Adjustment

I. (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.

A variance is a relaxation or a waiver of any provision of the ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate the ordinance and may be granted by the board of adjustment on appeal. *"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 l20 NH 64l, (1980).

The local ordinance cannot limit or increase the powers of the board to grant variances under this authority, but this power must be exercised within bounds. In several decisions from 1952 to the present, the Supreme Court has declared that each of the following conditions must be found in order for a variance to be legally granted:
(1) no decrease in value of surrounding properties would be suffered;
(2) granting the variance would not be contrary to the public interest;
(3) denial of the variance would result in unnecessary hardship to the owner seeking it;
(4) by granting the variance substantial justice would be done; and
(5) the use must not be contrary to the spirit and intent of the ordinance. (See Gelinas v. Portsmouth 97 NH 248, [1952])

Although the Supreme Court has recently stated that RSA 674:33, I(b) should not be read to imply that higher standards than are required by the statute, the Court's opinion in Gelinas did add the criterion relating to negative impacts on neighboring property values. Despite this seeming contradiction, the five Gelinas criteria, not the four in the statute, remain the standard for deciding variance requests.

Terms such as spirit, hardship, and injustice cannot be measured as specific quantities. Each case must be considered separately and the decision based on the judgment of the members of the board. Court decisions through the years, however, have shaped the meanings of these terms as they apply to zoning law. The discussion that follows represents a consensus of opinions on the terms. Although every judge in every jurisdiction might not agree with them completely, a board of adjustment can consider them to be acceptable guidelines.

THE FIVE VARIANCE CRITERIA

1. NO DECREASE IN VALUE OF SURROUNDING PROPERTIES WOULD BE SUFFERED.

Perhaps Attorney Tim Bates says it best in the OEP training video, Zoning and the ZBA: *"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on*

[1] - 1998 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 30, 1998

many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur. The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values."[2]

Also, in Nestor v. Town of Meredith ZBA, 138 NH 632, (1994), the court stated that resolution of conflicts is a function of the ZBA.

2. *GRANTING THE VARIANCE MUST NOT BE CONTRARY TO THE PUBLIC INTEREST.*

In the case of Gray v. Seidel 143 N.H. 327 (February 8, 1999) the NH Supreme Court reaffirmed the variance standard in RSA 674:33, I(b) (1996), which states that the board has the power to "[a]uthorize . . . [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." (Emphasis added) The court clarified that RSA 674:33, I (b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., "will not be contrary") to the public interest if granted.

"COMMENT - Proving a Negative: The applicant still has the burden of persuasion on all 5 variance criteria. But my advice to ZBA members is not to be procedural sticklers when it comes to the "public interest" criterion. If an applicant makes even a conclusory statement like: "As you can see, there's no adverse effect on the public interest," that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it.

To put it another way, if the applicant satisfies the other 4 criteria, a denial based solely on the "public interest" criterion is in my view unlikely to be upheld in court unless your decision identifies some specific way in which the proposed variance is contrary to that interest."[3]

3. *DENIAL OF THE VARIANCE WOULD RESULT IN UNNECESSARY HARDSHIP TO THE OWNER SEEKING IT.*

The term "hardship" has caused more problems for boards of adjustment than anything else connected with zoning, possibly because the term is so general and has so many applications outside of zoning law. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in

[2] - *Zoning and the ZBA*, OSP video script (Tim Bates), pg. 3

[3] - 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Chief Legal Counsel, NHMA, October 1999

question makes it different from others can unnecessary hardship be claimed. The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a ZBA. Even in the same town, different results may be reached with just slightly different fact patterns. *"This does not mean that either finding or decision is wrong per se, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme."* Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548, (1994)

On January 29, 2001, the NH Supreme court issued an opinion in Simplex Technologies, Inc. v. Town of Newington, which dramatically changed the standard for granting zoning variances. The court refined the long-held standard for unnecessary hardship and established 3 conditions, which must be used by boards of adjustment when determining if a hardship exists. (See Appendix F for background information about this significant court decision.)

On May 25, 2004, the NH Supreme Court issued an opinion in Boccia v. City of Portsmouth, which further refined variance law to distinguish between use and area (dimensional) variances. In *Boccia*, the Court concluded that it must distinguish between use variances and dimensional variances, observing that the hardship criteria of *Simplex* could only logically be applied to uses of land. (See Appendix G for background information about this significant court decision.)

When faced with a variance application, the ZBA must first determine if it is a "use" or "area" variance. If it is a "use" variance, the *Simplex* analysis applies. If it is an "area" variance, the *Boccia* analysis applies.

Simplex Analysis

"Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* in order to demonstrate unnecessary hardship, a landowner can now establish unnecessary hardship by satisfying the following three conditions:

(1) The zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.

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

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this

particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

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

This is perhaps similar to a "no harm - no foul" standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance*?

[*Comment: A nuisance arises from use of property, either actively or passively, in an unreasonable manner. *Shea v. Portsmouth*, 98 N.H. 22 (1953). A nuisance can be either public or private. A private nuisance is defined as an activity which results in an unreasonable interference with the use and enjoyment of another's property, *Urie v. Laconia Paper Co.*, 107 N.H. 131 (1966); while a public nuisance is an unreasonable interference with a right common to the general public. A public nuisance is behavior which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. Conduct which unreasonably interferes with the rights of others may be both a public and private nuisance. *Robie v. Lillis*, 112 N.H. 492 (1972). In order for a nuisance to exist, the interference complained of must be substantial, that is, the harm alleged must be in excess of the customary interference a land user suffers in an organized society, however, not every intentional and substantial invasion of a person's interest in the use and enjoyment of land is actionable. Id. at 496.]

This requirement, to some degree, overlaps with the requirement that the granting of a variance not result in a diminution of value of surrounding properties.

All three conditions must be satisfied for unnecessary hardship to exist under this standard."[4]

Boccia Analysis

An applicant seeking an area variance can demonstrate unnecessary hardship by establishing that:

(1) Special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and

(2) The applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.

In applying the first prong, the owner does not need to establish that without the variance the property would be valueless—rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In the *Boccia* case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what

[4] - The New Unnecessary Hardship Test [Post Simplex] - from *Summary of Impact of Simplex V. Newington* prepared for the Office of State Planning Seminary, May 12, 2001, Atty. Peter J. Loughlin

is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined.

4. BY GRANTING THE VARIANCE SUBSTANTIAL JUSTICE WOULD BE DONE.

It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

5. THE USE MUST NOT BE CONTRARY TO THE SPIRIT AND INTENT OF THE ORDINANCE.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, RSA 674:16-20. In general, the provisions must promote the *"health, safety, or general welfare of the community."* They do this by lessening congestion in the streets, securing safety from fires, panic and other dangers, and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. "This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based."[5]

For instance, a zoning ordinance might control building heights specifically to protect adjoining property from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent, if the ordinance clearly states that this is the sole purpose for the building height limitation. On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property, the granting of the variance might be improper.

As another example, consider the question of frontage requirements. Most zoning ordinances specify a minimum frontage for building lots to prevent overcrowding of the land. If a lot had ample width at the building line but narrowed to below minimum requirements where it fronted the public street, a variance might be considered without violating the spirit and intent of the ordinance, because to do so would not result in overcrowding. There are many other variations of lot shapes and sizes that might qualify for a variance; the principles remain the same. The courts have emphasized in numerous decisions that the characteristics of the particular parcel of land determine whether or not a hardship exists.

However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits

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[5] - *Zoning and the ZBA*, OSP video script (Tim Bates), pg. 4

industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. **The board cannot change the ordinance.**

In Bacon v. Town of Enfield, No. 2002-591, (N.H. Jan. 20, 2004), the ZBA denied a variance for a small propane boiler shed attached to the outside of a lakefront house because (1) it did not satisfy the *Simplex* "hardship" standard; (2) it would violate the spirit of the ordinance; and (3) it would not be in the public interest. The Supreme Court noted that there were three grounds for the Superior Court's decision, and explained, "In order to affirm the trial court's decision, we need only find that the Court did not err in its review concerning at least one of these factors."

Focusing on the "spirit of the ordinance" factor, the Court concluded, "While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and over development could be inconsistent with the spirit of the ordinance."

The new variance criteria can be summarized as follows:

I. The value of surrounding properties will not be diminished.
II. The variance will not be contrary to the public interest.
III. 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 (dimensional) 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.
IV. Substantial justice is done.
V. The variance is consistent with the spirit of the ordinance.

WHAT SHOULD MUNICIPALITIES DO FOLLOWING THE SIMPLEX AND BOCCIA DECISIONS?

A. Change Variance Application: If your variance application discusses the unnecessary hardship under the old standard, it should be revised to reflect the new standards differentiating between use and area variances.

B. Seek Guidance: If a variance application raises serious questions about the purpose or application of the Zoning Ordinance as applied to a particular piece

of property, you may want to seek assistance from Town Counsel or, more importantly, the municipal or regional planning office.

C. Master Plan: Since the tests now focuses on the impact of the application on the ordinance, it is even more important to consider the relationship between the Zoning Ordinance and the Master Plan.

D. Making Findings: The change in the zoning requirement makes it even more important that boards make accurate findings of fact in regards to all the tests for a variance.

E. Keep Ordinance Current: The new standards established by *Simplex* and *Boccia* for determining unnecessary hardship puts an even greater premium on keeping zoning ordinances current.[6]

"Use" and "Area" Variances

New Hampshire law now distinguishes between a "use" or "area" variance. When looking at such distinctions, a "use" variance is one which permits a use of land for a purpose that is not allowed by the zoning ordinance such as a commercial use in a residential zone or a multi-family use in an area that only permits single family dwellings. An "area" variance (also called a "dimensional variance"), on the other hand, is one which involves physical aspects of the development such as building height, setback or size; the number of parking spaces required; frontage or lot size; etc.

New Hampshire law requires the existence of unnecessary hardship for the granting of any variance albeit use or area.

Requests for use variances are often the most difficult cases that zoning boards have to consider. Boards should not be swayed by opposition of neighbors or the fact that no abutters appear at the hearing. The board must review each variance criterion and grant the variance, only if they are all met. The board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea.

The granting of a "use" variance should not be confused with "spot zoning", defined by the New Hampshire Supreme Court as the singling out of a parcel of land by the legislative body through the zoning process for treatment unjustifiably differing from that of surrounding land, thereby creating an island having no relevant differences from its neighbors. Bosse v Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967). Boards should not dismiss use variance requests merely on the basis of a claim of improper spot zoning. On the contrary, although a use variance which has been granted with no basis for treating the subject parcel in a manner different from surrounding property may create an effect similar to spot zoning, the grant of a variance is not spot zoning.

All requests for variances should be reviewed very carefully but especially those requests for use variances. Denial of a proper variance request may result in a taking or loss of legitimate property rights of a landowner while the granting of an improper use variance may alter the character of a neighborhood forever beginning a domino effect as adjacent, affected properties seek similar requests

[6] - "What Should Municipalities Do?" from *Summary of Impact of Simplex V. Newington* prepared for the Office of State Planning Seminary, May 12, 2001, Atty. Peter J. Loughlin

due to the now changed character of the area.

Spot zoning occurs when an area is unjustly singled out for treatment different from that of similar surrounding land. The mere fact that an area is small and is zoned at the request of a single owner does not make it spot zoning. Persons challenging a rezoning have the burden before the Trial Court to demonstrate that the change is unreasonable or unlawful. The zoning amendment, which merely extends a pre-existing agricultural land boundary and does not create a new incongruous district is not spot zoning. The Court also noted that the zoning amendment was supported by a majority of the public and would protect the health and welfare of area residents. (See Miller v. Town of Tilton 139 N.H. 429, 655 A.2d 409 [1995])

Granting Variances for the Disabled

CHAPTER 218 (SB 415) 1998 authorizes zoning boards of adjustment to grant variances to zoning ordinances for a person or persons having a recognized physical disability, which may be granted for as long as the particular person has a need to use the premises.

This bill amends RSA 674:33 by adding a new paragraph, V, that states
"Notwithstanding subparagraph I(b), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:
(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises."

EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

RSA 674:33-a Equitable Waiver of Dimensional Requirement

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:
(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An

equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

This provision was approved by the legislature to address the situations where a good faith error was made in the siting of a building or other dimensional layout issue. In the past when it was discovered that a building had been improperly sited and slightly encroached into the setback area, the only relief available was to seek a variance. Often, these variances were granted because there was no reasonable alternative for the landowner and no particular harm was being done. But in most cases, there would be a serious question as to whether the requirements for a variance could be met.

The legislature addressed this problem by creating the equitable waiver provision of RSA 674:33-a. When a lot or structure is discovered to be in violation of a physical layout or dimensional requirement the ZBA may grant a waiver only if each of the four findings as outlined in the statute are made: a) lack of discovery; b) honest mistake; c) no diminution in value or surrounding property; and d) the cost of correcting the mistake outweighs any public benefit.

In lieu of the ZBA finding that the violation was not discovered in a timely manner and that the mistake was made in good faith, the owner can meet the first two parts of the four-part test by demonstrating that the violation has existed for ten or more years and that no enforcement action was commenced against the violation during that time by the municipality or by any person directly affected.

Equitable waivers may be granted only from physical layout, mathematical or dimensional requirements and may not be granted from use restrictions. Once a waiver is granted, the property is not considered to be a nonconforming use and the waiver does not exempt future use, construction, reconstruction or additions on the property from full compliance with the ordinance. The fact that a waiver is available under certain circumstances does not alter the principle that owners of land should understand all land use requirements. In addition, the statute does not impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or compliance of property inspected by them.

The application and hearing procedures for equitable waivers are governed by RSA 676:5-7. Rehearings and appeals are governed by RSA 677:2-14. The burden of proof rests with the property owner seeking an equitable waiver.

For an additional explanation of this power of the ZBA, readers are encouraged to review the article in *Town and City Counsel* contained in the December 1996 edition of the New Hampshire Municipal Association magazine, *New Hampshire Town and City* by Atty. H. Bernard Waugh, Jr.

EXPANSION OF NONCONFORMING USES

RSA 674:19 Applicability of Zoning Ordinance.

A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply 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.

"A nonconforming use is one that was lawfully established before the passage of the provision in the zoning ordinance that now does not permit that use in that particular place. Nonconforming uses enjoy constitutional protections under state law which allow them to expand to a certain degree. Therefore, in a particular case a nonconforming use may have the right to expand in a way that would otherwise require a variance. For a more detailed discussion of this topic, you are well advised to consult 1994 lecture materials prepared by H. Bernard Waugh, Jr., Esquire, NHMA Legal Council, entitled, 'GRANDFATHERED! The Law of Nonconforming Uses and Vested Rights'."[7]

(Also see "Vested Property Rights and Changes in Use", John J. Ratigan, Esq., Douglass P. Hill, Esq., Clay Mitchell, Esq., NHMA lecture #3, Fall 1997)

"*Despite the fact that nonconforming uses violate the letter and the spirit of zoning laws, they have evolved for the purpose of protecting property rights that antedated the existence of an ordinance from what might be an unconstitutional taking.*" (Surry v Starkey, 115 N.H. 31 (1975), citing Powell, Real Property, Sec. 869; Rathkopf, Law of Zoning and Planning, 58-1; Anderson, American Law of Zoning, Sec. 6.01)

"*In this State, the common-law rule is that an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.*" (Henry & Murphy, Inc. V. Town of Allenstown, 120 N.H. 910 (1980).

"*The State Constitution provides that all persons have the right of acquiring, possessing and protecting property. N.H. Const. Pt. I, arts. 2, 12. These provisions also apply to nonconforming uses . . . As a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use.*" (Loundsbury v. City of Keene, 122 N.H. 1006 (1982), citations omitted.)[8]

The question of expansions and changes in a nonconforming use may reach the ZBA by one of several routes. An owner may assume he's "grandfathered" for a particular use and just begins expanding the use. A concerned abutter may disagree and complain to the zoning administrator who in turn must decide if the expansion is allowed or not. The owner or abutter can then appeal that administrative decision to the ZBA who would have to decide if the expanded use were grandfathered or not.

Alternatively, the owner might apply for a building permit and the administrative officer (building inspector, zoning administrator, board of selectmen) would make the initial decision regarding the grandfathered status and either issue or deny the permit. That decision would be appealable as before.

A third way this issue might come before the board is if an application for a special exception or variance is submitted.

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[7] - *The Pit & The Pendulum*, Atty.'s Bates and Mitchell, New Hampshire Municipal Association, Municipal Law Lecture Series, lecture #3, 1995, pg. 14

[8] - *Grandfathered! The Law of Nonconforming Uses and Vested Rights*, H. Bernard Waugh, Jr., Esq., New Hampshire Municipal Association, Municipal Law Lecture Series, lecture #3, Fall 1994, pg. 2

In this case, the board should exercise caution. Absent a specific provision in the ordinance allowing expansions of nonconforming uses by special exception, a landowner cannot use a nonconforming use as a basis for a special exception. Both nonconforming uses and variances are legally similar, namely that they are both constitutional protections of property rights. If someone has a legal right to expand a nonconforming use then a variance is not needed. If, on the other hand, a use is not grandfathered, a variance would be required to allow its expansion.

What a landowner cannot do is "bootstrap" his way toward a variance by claiming that the nonconforming status of the property somehow constitutes a "hardship". If a landowner wishes to expand or change a nonconforming use he must EITHER:

- argue that the expansion is a "natural" expansion which doesn't change the nature of the use, doesn't make the property proportionately less adequate, and doesn't have a substantially different impact on the neighborhood; or
- can apply for a variance and satisfy all five of the normal variance criteria.

In short, if an owner can't do what he wants to do within the confines of the allowable evolution, then he must qualify for a variance the same way as if there were no nonconforming use.

A legal test for expansion of nonconforming uses has been established by the NH Supreme Court from cases such as New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988). In reviewing whether a particular activity is protected as within the existing nonconforming use, the following factors, or tests, must be considered:

- to what extent does the challenged activity reflect the nature and purpose of the existing nonconforming use;
- is the challenged activity merely a different manner of utilizing the same use or does it constitute a use different in character, nature and kind from the nonconforming use; and
- does the challenged activity have a substantially different impact on the neighborhood.

Enlargement or expansion of a nonconforming use may not be substantial and may not render the property proportionally less adequate. (See New London Land Use Assoc. v. New London, 130 NH 510 [1988])

In order to be allowable as a "natural expansion," expansion of a nonconforming use must not be such as to constitute an entirely new use. Factors to be considered are the nature and purpose of the prevailing nonconforming use, the nature and kind of the proposed change in use, and whether the change in use will have a substantially different effect on the neighborhood. (See Devaney v. Windham, 132 NH 302 [1989])

Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid. (See

Granite State Minerals v. Portsmouth, 134 NH 408 [1991])

Where the permit sought by a landowner would result only in internal changes in a pre-existing structure and where there would be no substantial change in the use's effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use. The granting of a sign permit which only resulted in lettering change and the relocation of a coffee counter within the store were not an improper expansion of a nonconforming use. (See Ray's State Line Market, Inc. v. Town of Pelham 140 N.H. 139, 665 A.2d 1068 [1995])

In Conforti v. City of Manchester, 141 N.H. 78 (May 29, 1996) the Supreme Court found that the staging of live rock concerts in the Empire Theater originally built as a movie house in 1912 was not a lawful expansion of a nonconforming use. If the new activity fails any one of the three New London tests it is unlawful at common law. The court pointed out that whether the new use is a substantial change in the nature or purpose of the nonconforming use depends on the facts and circumstances of the individual case.[9]

The ZBA does have the authority to attach conditions to the continued enjoyment of a nonconforming use as illustrated by Peabody v. Town of Windham, 142 NH 488 (December 29, 1997). In this case, a nonconforming well drilling business was purchased and the new owners began to operate a construction business and move in paving equipment until the building inspector halted the use. The owners appealed the administrative decision and the board found that the construction business was within the scope of the original nonconforming use but not a paving business. The owner appealed and after a rehearing the board reaffirmed its earlier decision but this time with some specific limiting conditions. Again, the owner appealed and the lower court overruled the board's decision and conditions. The town then appealed to the supreme court who reversed the lower court stating in part "as a general matter of law the ZBA also has the power to attach conditions to appeals from decisions of administrative officers involving nonconforming uses, provided the conditions are reasonable and lawful."[10]

In Hurley, et al v. Hollis, 143 N.H. 567 (May 25, 1999) the court held that the amendment to the local regulation allowing an expansion of a nonconforming use by special exception was merely codifying existing case law, not allowing greater expansion rights. Towns may if they wish broaden expansion rights for nonconforming uses. In this case the town may have intended to do just that but the court found otherwise. Towns need not enact anything to review and even allow some degree of change and "natural expansion" of a nonconforming use.[11] Municipalities are cautioned to proceed very carefully at their own peril least the floodgates be opened for unwanted expansions unless such ordinances are crafted very carefully.

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[9] - 1997 Land Use Case Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 31, 1997

[10] - 1998 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 30, 1998

[11] - 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Chief Legal Counsel, NHMA, October 1999

OTHER RESPONSIBILITIES

In addition to the four major categories of actions, boards of adjustment have several other responsibilities that are noted but not discussed in detail.

RSA 36:54-58 Review of Developments of Regional Impact. This subdivision of the statutes is traditionally thought of as applying to planning boards when in fact it applies to "any proposal before a local land use board." [RSA 36:54] Zoning boards should be familiar with these laws and establish a practice of making a determination of the potential for regional impact for all cases that come before them.

RSA 155-E:1, III allows the ZBA to be the "regulator" for local earth excavations when so designated. In addition, towns that have commercial sand and gravel resources on unimproved land and do not provide an opportunity for excavation of these resources through zoning or other ordinances or in municipalities whose zoning ordinance does not address excavation, sand and gravel removal is considered a use allowed by special exception (RSA 155-E:4, III).

RSA 236:115, requires the ZBA to issue a certificate of approval which must accompany an application for a local junkyard license.

RSA 424:7 has been repealed (HB 482, Ch. 0040, 2001). See RSA 424:6-a which states: The provisions of title LXIV shall apply to procedures for adoption of local airport zoning regulations, the administration and enforcement of the requirements of local airport zoning regulations, and procedures for rehearing and appeal from any action taken by a local land use board, building inspector, or the local legislative body with respect to airport zoning regulations.

RSA 673:1, V provides that the board of adjustment may be designated to serve as the building code board of appeals rather than establishing a separate board of appeals when a building code is adopted.

RSA 673:3, IV provides that an elected zoning board of adjustment may act as the building code board of appeals pursuant to RSA 673:1,V.

In a community which has adopted the "official map" statute, RSA 674:13 authorizes a ZBA to grant a building permit for a structure in a mapped-street location shown on the official map specifying its location, height and other details and RSA 674:14, authorizes the governing body to appoint a board of appeals in towns where there is no zoning ordinance or zoning board of adjustment. The official map (showing the layout of future roads) should not be confused with the zoning map, which delineates zoning districts. Note that very few communities in NH have a true "official map."

RSA 674:27 authorizes the ZBA to grant a special exception under interim zoning for business, commercial and industrial ventures.

RSA 674:41, II authorizes appeals of administrative decisions relative to permits to build on class VI roads or other unapproved private roads. If a permit to build on a class VI road is denied, an appeal of this administrative decision can be taken to the board of adjustment. In considering this type of appeal, the ZBA has the authority to grant the permit subject to any reasonable conditions. The statute lists standards that must be met before the permit may be granted. To allow the building, the board must find all of the following:

1. That the enforcement of RSA 674:41's minimum frontage requirements would "entail practical difficulty or unnecessary hardship," and
2. That the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets, and
3. That the erection of the building will not tend to distort the official map or increase the difficulty of carrying out the master plan, and
4. That erection of the building will not cause hardship to future purchasers or undue financial impact on the municipality.[12]

RSA 677:17 empowers the board of adjustment, in municipalities that have enacted a zoning ordinance, to hear appeals from decisions of the historic district commission and provisions of the district regulations. Applicable provisions of RSA 677:l-l4 govern where there is no zoning ordinance.

"The ZBA's greatest fact-finding challenge comes when it hears an appeal to a decision of the HDC. Under RSA 677:17, all appeals of HDC decisions are heard by the ZBA as administrative appeals. Unlike other administrative appeals, though, when hearing an appeal to an HDC decision, the ZBA is considering the historic district ordinance, not the zoning ordinance, and this is conducted as a de novo review. In essence, it is as if the HDC did not make a decision, and the ZBA is compelled to hear the entire case from its beginning to its end."[13]

[12] - *A Hard Road to Travel - NHMA's Handbook on New Hampshire Law of Local Highways, Streets and Trails*, H. Bernard Waugh, Jr., New Hampshire Municipal Association, Fall 1990 (pg. 118)

[13] - NHMA Municipal Law Lecture #3, Fall 1999, #3 "Getting the Facts Straight", Benjamin Frost, Esq. and Clayton Mitchell, Esq.

PART 3: PROCEDURES

Certain steps **must** be carried out to satisfy legal requirements for hearings and making decisions. Other steps **may** be required by the board to facilitate its business, but only those based on sound reasons should be added to the legal requirements. Administrative difficulties result from attempts to cover every possible action with a standardized procedure.

Any situation that is brought before a zoning board of adjustment goes through six steps: application, notification, public hearing, findings of facts, statement of reasons, and decision. Each step should be treated uniformly in every case the board handles. If the board mechanically and religiously sticks to this six-part routine time after time, no matter what kind of application is before the board, the board will be doing the town, the applicants and the abutters a good service.

APPLICATION

RSA 676:5 Appeals to Board of Adjustment.

I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

II. For the purposes of this section:
(a) The "administrative officer" means 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.
(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

III. If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

The board can make its work easier and help the applicant understand the process by providing forms to be filled out for an appeal. (See Appendix C.) The form and the board's rules of procedure should specify the *"reasonable"* period of time within which an administrative appeal must be brought. **THIS IS A CRUCIAL ELEMENT, ONE THAT IS OFTEN OVERLOOKED BY ZONING BOARDS OF ADJUSTMENT THAT CAN LEAD TO SIGNIFICANT PROBLEMS IF NOT ADDRESSED**. If a reasonable time limit is not adopted, the town could find itself in expensive litigation about whether or not an application was or was not filed within a reasonable time period. To remove any doubt, a limit should be established. In *The Pit & The Pendulum A guide to the Basic Workings of the Zoning Board of Adjustment* (Municipal Law Lecture #3, Fall, 1995), attorneys Bates and Mitchell suggest any time between 14 and 30 days as a sensible choice. However, in Dumais v. Somersworth (101 N.H. 111, 134 A.2d 700 [1957]), the court found that an appeal

was timely filed even though it was not filed within ten days of the issuance of the permit (as required by the Somersworth ordinance) since the appeal was filed as soon as the abutter learned of it.

A case in point is Tausanovitch v. Town of Lyme, 143 N.H. 144 (November 9, 1998), where the town of Lyme had not adopted a specific time frame for appeals, rather they allowed them to be taken within a "reasonable" period of time which the court found had not happened. It is likely this could have been avoided had the board adopted a specific period of time within which appeals could be taken. This may not completely eliminate the need for litigation (e., g., someone is away for the winter only to come home to discover a building permit had been issued because they see the new building being built) but it will help clarify whether a filing was done within a "reasonable" period of time.[14]

The forms should ask for the particulars of the case, such as the location and description of the property, the permit sought, the type of appeal and any information required for the public notice. Copies of any previous applications concerning the property should also be requested. Information contained in subdivision or site plan review applications could be very helpful to the board. The form does not need to provide support for the request, but should state the legal grounds on which the appeal is based.

The chairman, clerk, town planner or whomever reviews applications submitted to the board should consider whether or not the application has potential for **regional impact**. However, only the board makes the final determination concerning the potential for regional impact. This determination can be made at a regularly scheduled monthly meeting as an agenda item or the board could hold a special meeting solely to determine whether or not the application has potential for regional impact. If potential regional impact is determined, the board must follow the statutory notice procedures of RSA 36:57 as well as their local rules of procedure and the normal notice requirements of RSA 676:7.

When the application is accepted, the case should be given a number that will identify it in all subsequent actions.

It is a principle of law that all administrative remedies must be exhausted before an appeal can be taken to a court. Although the board of adjustment occupies a position somewhere between an administrative body and a judicial body, it is good practice to require every applicant for a building permit to go to the zoning administrator (building/zoning inspector) first. This should be done even if it appears that the application will be denied. It is also advisable to do when the application is for a special exception - an area in which the board of adjustment has original jurisdiction. *By requiring everyone to go to the zoning administrator first, the board can be certain that the proposed action is not ordinarily permitted, and the official can inform the applicant of his rights to appeal, the grounds for appeal, and the procedure to follow.* The board of adjustment could provide a statement on the appeal process for the administrator to give the applicant when a permit is denied.

The case must be heard whether or not the board believes the grounds for an appeal

[14] - 1999 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 22, 1999

are sufficiently supported. If the application is not fully or correctly made out, the board can return it to the applicant. Presumably, if an applicant is seeking an action beyond the scope and authority of the board of adjustment, the application form could not be completed and there would not be a case for the board to hear. The board should note in its records the date of, and reasons for, returning an application.

Subsequent Applications

When an application is submitted, the files should be reviewed to determine if a previous application was denied for the same situation. If so, the board should determine if circumstances have changed sufficiently to warrant acceptance of a reapplication.

"When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan." Fisher v. Dover 120 NH 187, (1980)

Plot Plan Recommended

A plot plan is recommended as part of the board of adjustment application. Since a similar plan is usually necessary for a building permit application, the plan can serve both purposes. Lack of a plot plan could result in delay or misunderstanding of the written records.

Zoning ordinances, subdivision regulations, and building codes may require that a plot plan be prepared by a licensed engineer or land surveyor (RSA 310-A). Judgment should be used in applying this requirement - it may not be necessary in simple situations.

Board members should be familiar with the parcel under discussion and the basic characteristics of the area. Often this is most readily accomplished by scheduling an on-site visit. If such a visit is attended by a quorum of the board, it must be noticed as a public meeting, and the public has a right to attend.

It is seldom necessary for an engineer or land surveyor to appear as a witness in a zoning appeal; the completed plot plan is usually sufficient to show the situation. Local police, fire, or highway officials could be asked to testify, especially if their knowledge has a bearing on conditions for a special exception.

A plot plan for purposes of either a building permit or a complex zoning appeal might contain the following features:

a. Be up-to-date and dated.
b. Drawn to scale, with drawing number and north arrow.
c. Signature and name of preparer and official seal of licensed engineer or surveyor, as necessary.
d. The lot dimensions and bearings and any bounding streets and their right-of-way widths or half sections.
e. Location and dimensions of existing or required service areas, buffer zones, landscaped areas, recreation areas, safety zones, signs, rights-of-ways, streams, drainage, easements, and any other requirements.

f. All existing buildings or other structures with their dimensions and encroachments.
g. All proposed buildings, structures or additions with dimensions and encroachments indicating "proposed" on the plan.
h. "Zoning envelope" made from setbacks required by zoning ordinance. Indicate zone classification, all setback dimensions, including front yard for corner lots if a choice is allowed. Indicate any zone change lines.
i. Computed lot and building areas and percentages of lot occupancy.
j. Elevations, curb heights and contours, if required or relevant.
k. Location and numbering of parking spaces and lanes with their dimensions. Indicate how required parking spaces are computed.
l. Dimensions and directions of traffic lanes and exits and entrances.
m. Any required loading and unloading and trash storage areas.

The plot plan provides a visual presentation of the applicant's intentions and can help to alleviate the concerns of abutters and other interested parties. The plot plan should be retained on file for later reference. The use of photos is highly recommended and useful for the records of the zoning board of adjustment.

Effect of the Appeal

RSA 676:6 Effect of Appeal to Board.

The effect of an appeal to the board shall be to maintain the status quo. An appeal of the issuance of any permit or certificate shall be deemed to suspend such permit or certificate, and no construction, alteration, or change of use which is contingent upon it shall be commenced. An appeal of any order or other enforcement action shall stay all proceedings under the action appealed from unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such officer, that, by reason of facts stated in the certificate, a stay would, in the officer's opinion, cause imminent peril to life, health, safety, property, or the environment. In such case, the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by the superior court on notice to the officer from whom the appeal is taken and cause shown.

Except in extreme cases, any construction under way or any change in use of the property should be stopped until the appeal process has been completed. If a stay in construction would cause imminent danger, a restraining order, as allowed in RSA 676:6 above, would be required to stop the work.

NOTIFICATION

A public hearing is required before the board of adjustment can take action on any application, whether it deals with an administrative interpretation of the ordinance or a request for a variance, a special exception or an equitable waiver of dimensional requirements. This provides an opportunity for anyone with a direct interest in the application to hear the facts in the case and offer comments for the board's consideration.

RSA 676:7 Public Hearing; Notice.

I. Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows:
(a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by certified mail stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal. The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board may hear such other persons as it deems appropriate.
(b) A public notice of the hearing shall be placed in a newspaper of general circulation in the area not less than 5 days before the date fixed for the hearing of the appeal.

II. The public hearing shall be held within 30 days of the receipt of the notice of appeal.

III. Any party may appear in person or by the party's agent or attorney at the hearing of an appeal.

IV. The cost of notice, whether mailed, posted, or published, shall be paid in advance by the applicant. Failure to pay such costs shall constitute valid grounds for the board to terminate further consideration and to deny the appeal without public hearing.

The board of adjustment must provide personal notice to the applicant, holders of conservation, preservation, or agricultural preservation restrictions and every abutter, as defined in RSA 672:3 or as defined in local regulations if more inclusive that the statute, of the time and place of the hearing. The notice must be sent, by certified mail, not less than five days before the date set for the hearing.

It is important to note that every zoning board of adjustment must act in full compliance with RSA 91-A, Access To Public Records and Meetings (the Right To Know Law). In addition to statutory requirements, notice must be given 24 hours in advance of all meetings of the ZBA either by posting the notice in two public places or by publishing it in a newspaper readily available in the community. The calculation of the 24 hour time period does not include Holidays or Sundays. It is recommended that the board post notice of all public hearings in two public places along with the other legal notice requirements of RSA 676:7.

672:3 Abutter.

"Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356-B:3, XXIII. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

In addition to the direct notification, the public must be informed of the application by placing a notice in a newspaper that is circulated locally. To meet the five day requirement, newspaper deadlines, especially for weekly publications, must be taken into consideration when the board sets its filing requirements. The applicant must pay all costs involved in the required notices in advance.

The board may choose to notify other municipal boards or departments with an interest in the particular case. An optional procedure to provide additional public information is to post a notice in a convenient place in the community. The board should specify the filing requirements, the newspaper that will be used, and a location for public posting, if any, in its rules of procedures.

A record should be kept of how and when the notices were sent and be an official part of the proceedings. A copy of the dated newspaper with the legal advertisement and copies of the personal notices with certified mail receipts should be filed as part of the board's records. If the notice is posted, dates and places should be indicated on a copy of the public notice and placed in the file. Statements on how notice was given can then be read into the minutes of the public hearing.

The effectiveness of the public notice rests on two factors - how the notice is given and the information provided by the notice. The board of adjustment should use good judgment in choosing the newspaper and posting location. "Shoppers" and other advertising mailers are not considered adequate for these purposes, since inclusion of the notice cannot always be guaranteed nor can the delivery be assured. The information should be sufficient to alert everyone to the exact nature of the appeal. Courts have ruled that it is not enough simply to state that an appeal is being made concerning a particular property. The notice should state the action the petitioner wishes to take and the type of appeal being made.

The statutes require the hearing to be held within 30 days of receipt of the notice of appeal, but does not set a time limit for the board's decision to be made. It should be noted, however, that the board's failure to hold a hearing within 30 days does not constitute approval of an application.

"The legislature has not seen fit to provide that a zoning board's failure to comply with RSA 31:71 II (Supp. 1979) [current RSA 676:7,II.] will constitute approval of an application for a variance submitted to it. The express language of RSA 36:23 (Supp. 1979) [current RSA 676:4,I(c)] demonstrates that the legislature knew how to provide for automatic approval when that was its intention. The absence of such a provision in RSA 31:71 II (Supp. 1979) is a strong indication that the legislature did not intend the same result, and we will not judicially supply this omission in the absence of a legislative intent to do so. This omission, of course, means that zoning boards may lack adequate incentive to comply with the time requirement contained in RSA 31:71 II (Supp. 1979), but this is a legislative and not a judicial problem." Barry v. Town of Amherst 121 NH 335, (1981)

PUBLIC HEARING

The function and procedures of a hearing before the board of adjustment lie somewhere between a public hearing and a court session. The nature of local and state government in New Hampshire provides an opportunity for most residents to attend a public hearing; not as many have had reason to attend a court session.

It is perhaps unnecessary to point out that the public hearing is an extremely important activity of the board of adjustment. To a great extent how the hearing is conducted and how the individual members conduct themselves at the hearing will determine the public's opinion of the board and its work.

The hearing provides an opportunity for anyone concerned with the case to present evidence. While the points raised may be opinion rather than fact, they should relate to the grounds the board must consider in making its decision. The affect a proposal may have on surrounding property is one factor and abutters' opinions do have a bearing on this aspect. The board can avoid much criticism, however, by making it clear that this is not the only factor - especially when the facts of a case lead to a decision that is contrary to prevailing sentiment.

While the public hearing is not a completely open forum, neither is it a court, and no attempt should be made to make it so. The board is acting in a quasi-judicial capacity; therefore, it is not called on to follow court procedures. A hearing before an administrative body must be fair in all aspects and not a mere formality that

precedes a predetermined result. The board has much more leeway than a court of law. It can, and should, hear and weigh any pertinent facts and not attempt to bar evidence on technicalities. Proper procedures should be followed to ensure the legality of its actions and to maintain public confidence.

If the board holds regularly scheduled meetings, the public hearings may be held at that time, with special sessions scheduled as the occasion arises. Whether the hearing is held as a part of the business meeting or as a separate session, the chairman should call the hearing to order and request the clerk to take the roll of the board so that a quorum will be shown on the records.

Under RSA 674:33 three votes are necessary to change any administrative decision or to decide in favor of any matter legally before the board. If there is not a full board, even with alternates serving, the chairman could give the applicant the option of postponing the hearing until all members are present. If the applicant chooses to proceed with the hearing, s/he should be advised that a hearing before a 3 or 4 member board will not be grounds for a rehearing in the event the application is denied. The vote should be made on a motion to approve or disapprove the appeal and should incorporate all of the reasons for the decision. If a motion to approve does not receive three votes, the application is not automatically denied. A further motion, with reasons for the denial, should be offered and another vote taken. The applicant and others should be able to understand the reasons for the decision even though they may not agree with it.

Following the roll call, the chairman may make a brief statement of the general principles involved in the appeal process and explain the purpose of the public hearing. The chairman should then outline the rules governing the hearing and call for the first case. The following procedures are suggested:

(1) Announcement by the clerk of the case and the stated particulars.
(2) Report by the clerk of how notice was given.
(3) Petitioner's presentation of the case.
(4) Testimony by those in favor of the appeal.
(5) Testimony by those opposed to the appeal.
(6) Rebuttal by the petitioner.
(7) Rebuttal by the opposition.

The chairman should summarize the case, stating both the known and agreed facts and the alleged facts and opinions. If anyone wishes to dispute the accuracy of the summary, he should be given an opportunity to do so as this will be an important record in the event the decision is appealed. The hearing should be officially closed.

RSA 673:15 Power to Compel Witness Attendance and Administer Oaths.

The chairman of the zoning board of adjustment or the chairman of the building code board of appeals or, in his absence, the acting chairman may administer oaths. Whenever the board exercises its regulatory or quasi judicial powers it may, at its sole discretion, compel the attendance of witnesses. All expenses incurred under this section for compelling the attendance of a witness shall be paid by the party or parties requesting that a witness be compelled to attend a meeting of the board.

Although state law permits the chairman to swear in witnesses, it is not mandatory. Using this formal procedure does have the practical effect of discouraging witnesses who wish only to say they are for or against the appeal. Whether or not a witness is sworn in, he should be asked to state his name and address and interest in the case.

During the testimony, the board may, and should, ask questions. Although the burden of proof is technically on the person making the appeal, the board should determine to its satisfaction whether or not the case is sufficiently stated. In the questioning, care should be taken to avoid the appearance of trying to build a case for or against the petitioner. Only under the most unusual circumstances should a board member ask questions that do not have a legal bearing on the case. The board has no interest in whether or not the petitioner has a steady job, how many children he has, how long he has lived in the area, or what color he intends to paint his house. Such a line of questioning can only lead to a belief that the board has the power to act on the basis of this type of information, which it does not.

As a general rule cross-examination should be discouraged. Rules of testimony, cross-examination, and representation by counsel do not apply to public hearings before the board and it may prove difficult for the chairman to keep the questioning within the limits of legality and propriety. In the absence of a formal request to cross-examine, the chairman could ask that all questions be in writing and directed through the chair. Any attempt to short circuit the board by asking questions directly of the witness should immediately be ruled out of order.

The board of adjustment must keep minutes of its meetings, in accordance with the requirements of RSA 91-A:2, II. Minutes must include the names of members, persons appearing before the board, a brief description of the subject matter discussed and any final decisions. A verbatim transcript is not necessary but the record (or summary of all the evidence taken in, considered and used in reaching the decision) should contain sufficient evidence to show how the board reached its decision. A board may make an audio recording of the meeting to use in preparing the minutes or to supplement the notes taken by the secretary. Minutes of the meeting must be made available for public inspection within six days (144 hours) of the meeting.

It is essential to record the description of the case, the names and interests of those who testify, and the summary made by the chairman, which should contain the facts of the case and the claims made by each side. Any written or documentary evidence, including the plot plan, should be recorded and filed.

Expenditure of Fees

RSA 673:16, II provides a useful and potentially important financial tool for the board of adjustment. It allows local land use boards to collect fees from an applicant to cover an expense lawfully imposed upon the applicant, such as the expense of consultant services or investigative studies under RSA 676:4, I(g), or the implementation of conditions lawfully imposed as part of a conditional approval, and then to pay out those funds toward that particular purpose without having the funds first raised and appropriated by the town meeting. In other words, all of this activity can occur “off-budget” and without impacting any amounts appropriated for the operations of the board of adjustment by the annual town meeting.

The statute goes on to provide that such fees:
a. Shall be placed in the custody of the municipal treasurer;
b. Shall be paid out by the treasurer only for the purpose for which the expense was imposed upon the applicant;

c. Shall be held in a separate, nonlapsing account and not commingled with other municipal funds (but such fees may be used to reimburse any account from which an amount has been paid in anticipation of the receipt of such fees);
d. Shall be paid out by the municipal treasurer only upon the order of the board of adjustment or its designated agent for such purpose.

Such fees do not include the regular application fees, permit fees or inspection fees that are set by the local legislative body as part of an ordinance, or by the selectmen under the authority of RSA 41:9-a.

There is, however, one problem with this great, flexible scheme. RSA 676:4, I(g) referred to above, only allows planning boards to collect such fees from applicants. This raises the question about whether a board of adjustment can impose fees for those purposes, although it certainly seems that it was the overall intent of the legislature to allow a zoning board of adjustment as well as a planning board to do so. Until such time that the statute clarifies this point, the next best thing would be to amend the zoning ordinance with language that clearly authorizes the board of adjustment to do this. Such language might look like this: "The zoning board of adjustment is hereby authorized to impose reasonable fees upon an applicant for the expense of consultant services or investigative studies, review of documents and other such matters that may be required by a particular application. Any such fees shall be subject to the provisions of RSA 673:16."

If it is not possible to amend the zoning ordinance, the last option would be to adopt the same statement as part of the board's rules of procedure, except that the first part of the language would read "The zoning board of adjustment may impose reasonable fees . . ." (etc.). If that is done, it at least puts applicants on notice that they may be asked to pay such fees, but does not remove all doubt about the board's authority to impose the fees in the first place.[15]

Disqualification

RSA 673:14 Disqualification of Member.

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, or historic district commission shall participate in deciding or shall sit upon the hearing of any question 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. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairman shall designate an alternate to act in his place, as provided in RSA 673:11.

Any member of a board of adjustment who has a direct personal or financial interest in an appeal brought before the board should excuse himself from participation in that

[15] - "Harmonious Land Use Regulation: Are We All Singing In The Same Key?", Attorneys Bates and Mitchell, NHMA law lecture #1, fall 1997

hearing. The chairman, when informed of this fact, would designate an alternate member of the board to act in place of the disqualified member. The records of the hearing should clearly note the disqualification and replacement by an alternate member.

The legislature, in 1988, extended the provisions of RSA 673:14 to planning boards and historic district commissions. At the same time, the non-binding process in paragraph II. was added to allow any member of the board to seek clarification of a potential conflict. The prerogative to request a vote rests with a member of the board unless the local zoning ordinance or the board's rules of procedures provide otherwise.

The New Hampshire Supreme Court, in a discussion of the test for disqualification of board of adjustment members, said "...they (must) *meet the standards that would be required of jurors in the trial of the same matter....A juror may be disqualified if it appears that he or she is 'not indifferent'.*" (citations omitted) Winslow v. Town of Holderness Planning Board 125 NH 262, (1984). In that case the Court applied the test to a planning board member because the board was acting in a quasi- judicial capacity. The decision reached by the board was ruled invalid, even though the disqualified member's vote was only one of six affirmative votes, because *"... it was impossible to estimate the influence one member might have on his associates."* Ibid

FINDINGS OF FACTS

After the public hearing is closed, the board should deliberate, in public, and in a manner such that all discussions can be heard by the public, on the essential facts that the testimony has established. For example, if a variance has been requested, and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood, the board should vote to find as a fact that values either will, or will not, be diminished, and why (because of increased density, noise, congestion, traffic, or what have you).

The Court has strongly recommended, and has required in many instances, that specific findings be stated.

In the case of Alcorn v. Rochester 114 NH 491, (1974), the Supreme Court remanded a decision of the board of adjustment stating that *"....the failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review."*

In that decision, the Supreme Court cited, as authority, Anderson, American Law of Zoning where it is stated at 20.41, (1977):

"In general, a board of adjustment must, in each case, make findings which disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded, if the board fails to make findings which disclose a basis for its determination."

Since the Alcorn case, the New Hampshire Supreme Court has specifically required that findings of fact be made by other administrative bodies. In each case the findings were not required by statute, but the court indicated that there could be no

meaningful review without them. In the case of Trustees of Lexington Realty Trust v. Concord 115 NH 131, (1975), the Court pointed out that the requirement to make findings of fact is part of the common law even though the board of taxation is not required by statute to do so. In Society for the Protection of N. H. Forests v. Site Evaluation Committee 115 NH 163, (1975), the Court again indicated that findings of fact were necessary in order for decisions to be made by a state board. The Supreme Court in Foote v. State Personnel Commission 116 NH 145, (1976), stated that findings of fact must be made even though not required by the Administrative Procedure Act, RSA 541, because the "reviewing court needs findings of basic facts ... so as to ascertain whether the conclusions reached by it (the administrative board) were proper."

In NBAC v. Town of Weare ___ N.H. ___ (December 27, 2001) it's clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers, because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time. The important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good, too, but you have to have the conclusions on the record--say what you mean, and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason!"). Local boards must give any and all reasons.

See Findings of Facts form in Appendix C.

STATEMENT OF REASONS

The board of adjustment, after conducting the hearing, could simply vote to approve or disapprove the application. General fairness to all parties concerned, however, reinforced by New Hampshire Supreme Court decisions, strongly indicates that the board should prepare a statement of its reasons. Since the decision of the board of adjustment is so important, it is necessary for both the appealing party and the municipality to have a clear record of what occurred. The Court has stated it does not feel the entire record should have to be reviewed to determine whether or not the action of an administrative board is appropriate.

As a source of documentation for the community's position in a given case, the board should state all of the reasons for its decision to allow for proper review if that should be necessary (see Work Sheet: Statement of Reasons form in Appendix C). The reasons may be found defective if they omit an issue essential to the decision made by the board. The courts generally are unwilling to assume that a basic issue was resolved unless the reasons for the decision are clearly stated.

This requirement means the board must do more than state the conclusions in general terms. It is not sufficient for the board to simply use the language of statute and say, for example, that there is *"unnecessary hardship."* Appendix C contains guidelines for developing the decision statement.

DECISION

RSA 674:33 Powers of Zoning Board of Adjustment.

III. The concurring vote of 3 members of the board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass.

Before making its decision, the board must determine the facts of the case and apply what it understands to be the proper meaning and intent of the zoning ordinance and map. When the board exercises its power of interpretation, it must be guided by the letter and spirit of the ordinance.

The board can simplify matters by considering each requirement necessary for the granting of a variance or special exception separately rather than treating the question as a whole. With this done, there should not be any confusion as to whether the final decision was based on legal grounds. Caution, however, should be exercised not to treat the decision making process merely as a tabulation of votes on the various approval requirements by each member. Failure to satisfy any one of the review criteria is grounds for denial and that "passing" on 3 of the 5 variance criteria should not result in an approval of the appeal. There should be one clearly stated motion to "approve for the following reasons . . . " or to "disapprove for the following reasons . . . ", duly seconded, discussed and voted upon by the whole board. If the motion fails, members have the ability to make a different motion to then act upon. Failure of a motion does not mean that the opposite prevails. The board should make every effort to propose a motion that a majority of board members can agree on. In other words, if a motion to grant a variance fails by a 2 in favor - 3 opposed margin, that does not mean that the variance is automatically disapproved.

In this case, one of the three members who disapproved the motion should now propose their own new motion to disapprove the application stating the reasons for denial. The board should then vote on that motion which would likely pass, 3-2. This is especially important when there are fewer than 5 board members present since motions could result in a tie. Alternate motions should be put forward but if the board truly cannot find something at least 3 members can agree on, the meeting should be continued until a fifth member can be present. [*This is also discussed in* ***Part 3: Procedures*** *on page 26]*

In determining the effect on the "neighborhood," the ZBA is not limited to consider the effect only on owners or occupants of adjacent property. The ZBA members can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc. resulting from their familiarity with the area involved. The resolution of conflicts is a function of the ZBA. (See Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548 [1994])

RSA 676:3 Issuance of Decision.

I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval.

II. Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which such vote is taken, including the written decision containing the reasons therefor, shall be placed on file in the board's office and shall be made available for public inspection within 144 hours of such vote. Boards in towns that do not have an office of the board that has regular business hours shall file copies of their decisions with the town clerk.

Whether an application is approved or denied, the board's decision must be in writing. The applicant must be given written reasons for a disapproval if the application is denied. All of the reasons should be stated both on the record and to the applicant. In the event the denial is appealed, the board's decision could be affirmed even if one of the reasons was found to be invalid. *"...if any of the board's reasons support the denial, then the plaintiff's appeal to the superior court must fail."* Davis v. Barrington 127 NH 202, 1985.

The written decision, along with the minutes of the meeting at which the vote was taken must be on file for public inspection within 144 hours of such vote. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the board does not maintain an office with regular business hours, the municipal clerk should be given a copy of the decision in order to assure the required public access. The board's Rules of Procedure should specify the distribution of the decision and the posting/publication requirements. It is good practice not only to give a copy of the decision to the applicant as required, but also to notify the public by posting in two places and publication in a newspaper of general circulation in the town.

ATTACHING CONDITIONS AND TIME LIMITS

RSA 674:33 Powers of Zoning Board of Adjustment.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or 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.

The board of adjustment may attach conditions to a permit if it grants an appeal. Conditions must relate to the land and are usually designed to remove features of the proposed use, which are legally objectionable. For example, the board could not grant a variance to reduce the lot size requirements on the condition that the applicant builds a house with a cost in excess of a certain figure. That condition would not serve a legal purpose under the zoning statute. A board could vary the requirements of a lot size on condition that the applicant limit the height of the structure. This would ensure that abutters are not deprived of light and air - the preservation of which is a legal purpose of zoning and one of the reasons for requiring a minimum lot size.

While conditions may be attached to modify objectionable features, all other requirements for a variance or special exception must be present. The appeal cannot be granted simply because, by attaching the condition, "no harm will be done."

The New Hampshire Supreme Court, in Sklar Realty Inc. v. Merrimack and Agway, Inc. 125 NH 321, (1984), discussed planning board procedures when conditions are set as part of approval of an application. While implications for a board of adjustment are not clear, it is worth summarizing the major points made in the case. The Court distinguished between "conditions precedent" that must be fulfilled before approval is final and "conditions subsequent" that deal with issues in effect after development has occurred such as hours of operation, control of traffic, noise levels, and emissions.

The Court said, *"In a functional sense, when an applicant claims to have fulfilled a*

condition attached to an application, that condition has become a part of the application itself. An opportunity to testify on the applicant's fulfillment of such a condition is in reality, then, an opportunity to testify on the factual basis for the application as it must finally be approved or denied. Without that opportunity, the statutory right to be heard would be a limited right indeed." A compliance hearing was required to give abutters an opportunity to be satisfied that all the conditions precedent were met.

The Legislature modified the decision in 1986 by amending RSA 676:4 to say that a compliance hearing is not required if the conditions are minor or administrative or involve permits issued by other agencies or boards.

A board of adjustment is authorized to place conditions on a variance and failure to comply with those conditions may be a violation. (See Healey v. New Durham ZBA, 140 N.H. 232, 665 A.2d 360 [1995])

If conditions are included as part of an approval, make sure the conditions are clearly stated and specifically spelled out to avoid confusion. The applicant must know what the conditions are to be able to comply with them and the town must know in order to be able to enforce the conditions, as well. (See Geiss v. Bourassa, 140 NH 629 [1996])

The zoning ordinance may contain a provision that a special exception must be acted upon within a certain time period, such as six months to one year, or the approval will be lost. A provision can also be included which outlines the conditions under which a use allowed by special exception may be lost due to abandonment.

Commonly, the ordinance may provide that variances will lapse unless construction pursuant to the variance is begun within a certain time period. To avoid lapsing of the approval, there should be substantial construction on the property or the owner must have incurred a substantial liability that is directly related to the project.

JOINT MEETINGS AND HEARINGS

RSA 676:2 Joint Meetings and Hearings.

I. An applicant seeking a local permit may petition 2 or more land use boards to hold a joint meeting or hearing when the subject matter of the requested permit is within the responsibilities of those land use boards. Each board shall adopt rules of procedure relative to joint meetings and hearings, and each board shall have the authority on its own initiative to request a joint meeting. Each land use board shall have the discretion as to whether or not to hold a joint meeting with any other land use board. The planning board chair shall chair joint meetings unless the planning board is not involved with the subject matter of the requested permit. In that situation, the appropriate agencies which are involved shall determine which board shall be in charge.

II. Procedures for joint meetings or hearings relating to testimony, notice of hearings, and filing of decisions shall be consistent with the procedures established by this chapter for individual boards.

III. Every local land use board shall be responsible for rendering a decision on the subject matter which is within its jurisdiction.

When the situation requires permits or approvals, from more than one board, holding a joint meeting can provide the boards with an opportunity to hear the same presentation and, perhaps, get a more complete picture of what is being proposed. This procedure can also simplify and streamline the process for the applicant. Each local land use board retains responsibility for rendering a decision on the subject matter within its jurisdiction.

Before a board can participate in the joint meetings process, it must adopt rules of procedure that meet minimum statutory

requirements. In a particular case, each board would decide whether or not to agree to a joint meeting. See Appendix A for sample rules.

The board of adjustment and the planning board should meet periodically (at least once a year) to review the zoning ordinance to keep it current and maintain administrative efficiency. By analyzing the types of cases that come before it, the ZBA can advise the planning board on weaknesses or inconsistencies within the ordinance itself that might otherwise not be recognized. An amendment to the ordinance might be appropriate where the problem is a function of the wording of the ordinance or where an alternative procedure might eliminate the need for action by the board of adjustment.

The board of adjustment should keep track of requests for administrative appeals; repeated requests regarding the same subject point to a weakness in the zoning ordinance. The same is true for a large number of requests for similar types of variances.

EXECUTIVE SESSION

RSA 673:17 Open Meetings; Records.
Each local land use board shall hold its meetings and maintain its records in accordance with RSA 91-A.

New Hampshire's Right to Know Law, RSA 91-A, requires all meetings of public bodies to be open to the public. The board of adjustment, in compliance with this statute, cannot make its decisions in executive sessions. Only actions taken by the board when convened in open meetings have the status of official determinations and are legal in all regards. Executive sessions must be approved by a recorded roll call vote of the majority of the members present and may be held for deliberation only. The vote on the motion to enter an executive session must be recorded in the minutes along with the exception to the open meeting requirement contained in RSA 91-A:3 under which the closed session is justified. The discussion during the executive session must be confined to the matters stated in the motion for the session. The minutes of the meeting must provide a brief description of the subject matter discussed.

Any session at which information, evidence, or testimony is presented to the board must be an open meeting. Final approval cannot be given in executive session to any order, rule, regulation or other official action, except as provided in RSA 91-A:3,II.

A strongly held opinion, expressed both by zoning board members and by attorneys experienced in zoning cases, is that a board of adjustment would be well advised to limit executive sessions to conferences with city/town counsels on legal matters.

Decisions made by the board of adjustment affect the property rights of the citizens within its jurisdiction. To ensure full public acceptance, and to meet the legal requirements, the powers of the board must be exercised at open public meetings where each board member announces his vote, which is duly recorded by the clerk.

RECORDS

The records of the ZBA should be complete and accurate. The records should include the application, a copy of the hearing notices and the list of abutters and applicant to whom the notices were given with copies of newspaper notices or postings showing the date and location, the agenda for the hearing, and the minutes of the hearing

including any maps, plans, photographs or other documents submitted for consideration. The assistance of paid clerical staff allows board members to participate fully in the hearing and decision process.

When the decision is reached, the vote of the board (exact wording of the motion and how each members voted) should be recorded, along with any conditions that are attached to the decision and all of the reasons as determined by the board. This is especially important if the decision is appealed to superior court. The court will base its review on the written record, providing the basis for the decision is clear and complete.

SUMMARY

The board of adjustment must act on the evidence presented and base its decision on legal grounds. The board cannot deny or approve an application based on a judgment of what it considers the best interest of the area or neighborhood. The legislative body, in passing the ordinance and map, has already decided what zoning controls it believes to be best for the municipality and has determined what restrictions will be applied. The board of adjustment must act within the limits set by the ordinance and map and cannot enlarge, restrict, or disregard these limits. **The board of adjustment cannot be given legislative powers. It cannot do anything that would, in effect, be rezoning.**

Because of the limitations on the board's powers, it cannot make blanket rulings, such as deciding that it will not permit any more gas stations in a certain section, or that it will, in the future, allow certain industries to locate anywhere. This would constitute a legislative act and is beyond the board's scope of authority. The board of adjustment was created to handle individual cases, so each case must be examined on its own merits.

Boards of adjustment should also remember that, although they have quasi-judicial powers, they are not a duly constituted court and cannot rule on points of law. That is, the board cannot declare an ordinance invalid because it appears to be improperly drawn or enacted or violates state or federal law. It must assume that the ordinance is legal unless declared otherwise by a court.

When a case comes before the board of adjustment, it might be helpful to run through the following check list:

Is the application...

.... an appeal from an **ADMINISTRATIVE ORDER?**

If so -

* What is the meaning of the provision in question?

* Does the appellant meet the terms?

... a request for a **SPECIAL EXCEPTION?**

If so -

* Is the exception allowed by the ordinance?

* Are the specified conditions present under which the exception may be granted?

If the answer to both of these questions is "yes" the exception **must** be granted. "*If the board finds that all the requirements are met, it must grant the special exception. However, if the applicant is not able to demonstrate that each of the requirements are met, the ZBA must deny the special*

exception." Jensen's v. City of Dover, 130 NH 761 (1988)[16]

... a request for a **VARIANCE?**

If so -

1. Could the variance be granted without diminishing the value of abutting property?
2. Would granting the appeal not be contrary to the public interest?
3. Would denial of the permit result in unnecessary hardship to the owner?
4. Would granting the permit do substantial justice?
5. Could the variance be granted without violating the spirit of the ordinance?

If the answer to all five questions is "yes", the variance should be granted.

If the applicant fails to meet any ONE of the five variance requirements, it cannot be legally granted and should be denied.

... a request for an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS**?

* Does the request involve a dimensional requirement, not a use restriction?

If the answer is yes, the board can move on to the specific findings to grant the waiver:

* Has the violation existed for 10 years or more with no enforcement action, including written notice, commenced by the town

- or -

* Was the nonconformity discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser, and was the violation not an outcome of ignorance of the law or bad faith but as the result of a legitimate mistake?

If the answer is yes to either, the board can move on to the additional findings to grant the waiver:

* Does the nonconformity not constitute a nuisance or diminish the value or interfere with future uses of other property in the area?
* Would the cost of correction far outweigh any public benefit to be gained?

If the answer to each of the above is yes, the board shall grant an equitable waiver.

The power to grant appeals should be treated with respect and with the knowledge that the task of the board of adjustment is to correct inequities, not to create them.

[16] - *The Pit & The Pendulum*, Atty.'s Bates and Mitchell, New Hampshire Municipal Association, Municipal Law Lecture Series, lecture #3, 1995, pg. 16

PART 4: APPEAL FROM BOARD'S DECISION

REHEARING

RSA 677:2 Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions.

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 144 hours of the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed. If the decision complained against is that made by a town meeting, the application for rehearing shall be made to the board of selectmen, and, upon receipt of such application, the board of selectmen shall hold a rehearing within 30 days after receipt of the petition. Following the rehearing, if in the judgment of the selectmen the protest warrants action, the selectmen shall call a special town meeting.

RSA 677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body.

I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2 and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by the court unless the court for good cause shown shall allow the appellant to specify additional grounds.

II. Upon the filing of a motion for a rehearing, the board of adjustment, a board of appeals, or the local legislative body shall within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration. Any order of suspension may be upon such terms and conditions as the board of adjustment, a board of appeals, or the local legislative body may prescribe. If the motion for rehearing is against a decision of the local legislative body and if the selectmen, as provided in RSA 677:2, shall have called a special town meeting within 25 days from the receipt of an application of a rehearing, the town shall grant or deny the same or suspend the order or decision complained of pending further consideration; and any order of suspension may be upon such terms and conditions as the town may prescribe.

Within 30 days after the board of adjustment has made an initial decision, any person affected directly by the decision has the right to appeal that decision. The 30-day window within which a motion for rehearing must be submitted is mandatory and strictly enforced. RSA 677:2 was amended in 2005 to correct an anomaly regarding motions for rehearings. Under the old law motions had to be filed within 30 days after the decision but the 30 day period was counted beginning with the "date upon which the board voted" in effect resulting in a 29-day filing window. This anomaly was highlighted in Pelletier v. City of Manchester, No. 2003-554 (N.H. March 26, 2004). The new law provides that the 30-day period will be counted in calendar days beginning with the date *following* the date of the board vote, which is consistent with the general "reckoning of days" statute RSA 21:35 (and with common sense.)

However, if it can be shown that the minutes and written decision were not filled within 144 hours of the vote pursuant to RSA 676:3, II, the person applying for the motion for rehearing shall have the right to amend the motion within 30 days after the date on which the written decision was actually filled. Therefore, it is most

important for the board to make sure that the minutes and decision of every case are timely filled and made available to the applicant and the public to avoid motions being amended at a later date. A motion for rehearing must describe why it is necessary and why the original decision may be unlawful or unreasonable. The board must decide to grant or deny the rehearing within 30 days.

In order to submit a motion for rehearing, a person must have "standing" , i.e., the legal right to challenge the board's decision. Abutters have standing along with persons who own property close enough to the land in question to demonstrate that they are affected directly by the board's action, i.e. a person aggrieved. The board should evaluate the potential impact of ZBA action on the person requesting the rehearing to determine if they are aggrieved and have standing to file the motion. The motion should not be granted if the person requesting the rehearing is not impacted differently than the public at large. (See Weeks Restaurant Corp. V City of Dover, 119 NH 541 [1979])

Standing exists only when relevant factors lead the trier of fact to conclude that the Plaintiff has a sufficient interest in the outcome of the proposed zoning decision. Where the only adverse impact that may be felt by the Plaintiffs is that of increased competition with their businesses, there is not sufficient harm to entitle Plaintiffs' standing to appeal.
(See Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital, 139 N.H. 450, 656 A.2d 407 [1995])

If the motion for rehearing cites as a reason for the request the failure of the board to adequately explain its decision, i.e., not address all five criteria for a variance, the board could use the rehearing process to complete its records:

"The...rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts." Fisher v. Boscawen 121 NH 438, 1981.

A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time.

If the board reverses a decision at a rehearing, a new aggrieved party results and that party then has 30 days in which to appeal for a rehearing on the new decision. *"This triggered the need for plaintiff to apply for a rehearing as a precondition to appeal. This does not mean, as defendants suggest, that boards of adjustment will be forced to consider an endless series of rehearing applications, for it is only when the board reverses itself at a rehearing - thus creating new aggrieved parties - that the statute comes into play."* Shaw v. City of Manchester 118 NH 158, (1978). (See Dziama v. City of Portsmouth, 140 N.H. 542, 669 A.2d 217 [1995])

It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The

evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.

The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created but a rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake. Don't reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the board would be final until two hearings had been held. "The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the court. It is geared to the proposition that the board shall have a first opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed." (See Bourassa v. Keene, 108 N.H. 261, 234 A.2d 112 [1967])[17]

The Court stated that the statutes *"...do not serve to limit the board to consideration of the issues that the plaintiff chooses to allow."* Fisher v. Boscawen 121 NH 438, (1981). The board may, under this ruling, adopt a different interpretation of the law and base its denial at the rehearing on reasons other than those used at the first hearing. Reconsideration of an application with additional information available could result in reversing the board's original decision.

When a rehearing is held, all legal actions, such as public notice, required for the first hearing must be followed. If possible, the same board members from the original hearing should be present at the rehearing.

After the board of adjustment has acted on a petition for rehearing, it has essentially completed its responsibilities. If the petitioner makes a further appeal to the superior court, the board of adjustment will be required to produce its records and may become a party to the proceedings.

APPEAL TO SUPERIOR COURT

RSA 677:4 Appeal from Decision on Motion for Rehearing.

Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 144 hours of the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable. For purposes of this section, "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2.

RSA 677:5 Priority.

[17] - Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, 3rd Ed., sec. 21.17

Any hearing by the superior court upon an appeal under RSA 677:4 shall be given priority on the court calendar.

From the petitioner's point of view, it is important to go through the established procedures in moving forward with the appeal process. All administrative remedies, including the request for a rehearing by the board of adjustment, must be exhausted before an appeal can be taken to superior court. In New Hampshire, a person must argue his case in court on the same grounds set forth in the petition for a rehearing unless the court makes a specific exception for good cause.

RSA 677:6 Burden of Proof.

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

In reviewing a case, the court, in general, will consider only errors of law and not matters of judgment. The court is expert in law, not in zoning or local conditions. Rather than substitute its judgment for that of the board of adjustment, the court will assume that the board has more complete knowledge of the situation. Only if the board has not satisfied legal requirements, or is shown to have acted arbitrarily or in obvious disregard of the evidence will the court set aside the board's decision.

RSA 677:9 Restraining Order

The filing of an appeal shall not stay any enforcement proceedings upon the decision appealed from, and shall not have the effect of suspending the decision of the zoning board of adjustment or local legislative body. However, the court, on application and notice, for good cause shown, may grant a restraining order.

If a decision is appealed to superior court, that does not prevent the applicant from utilizing the approval unless the person appealing obtains an order from the court restraining or preventing the applicant from using the approval. An applicant who proceeds to use the approval when an appeal has been filed is doing so at his own risk because the appeal may ultimately be granted and the decision reversed requiring the applicant to undo anything done under the approval.

RSA 677:10 Evidence; How Considered.

All evidence transferred by the zoning board of adjustment or the local legislative body shall be, and all additional evidence received may be, considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of an action at law.

The superior court will not reopen the question of facts pertaining to the case unless the records of the board are too meager to show the basis for the decision. However, the Supreme Court has stated, *"This court has consistently held that upon review the trial court may hear any and all additional evidence presented that will assist in evaluating the reasonableness of a zoning board decision."* Shaw v. Manchester 120 NH 529, 1980.

The necessity for a board to maintain complete records and to make its decision on the basis of recorded evidence is clear. A board whose decisions are frequently overturned by a court may soon become a center of controversy and weaken the entire structure of zoning administration.

"*The key to a defensible record is a clear and complete record. When faced with a land use appeal, as a preliminary matter, the Court orders submittal of the "record". Just what is the record? It is the*

summary of all the evidence taken in, considered and used in reaching the decision. Normally, Court appeals center on the reasonableness of the result reached based on the evidence considered. Normally, inquiring into the member's legal interpretations, or the mental process used in reaching a decision is not permitted." Merriam v. Salem, 112 N.H. 267 (1972).[18]

The court re-emphasized this point in Olszak v. Town of New Hampton 139 N.H. 723, (1995) and cited the Merriam case in holding that "*plaintiff's burden of proof in zoning appeals is sustained by evidence that the decision of the board could not be reached by reasonable men. Evidence of the thought process of members of the ZBA is irrelevant to this issue*."

[18] - *Conduct of a Public Meeting, Including Compliance with RSA 91-A, Conflicts of Interest and Preservation of a Defensible Record,* Bernard H. Campbell, Esq., New Hampshire Municipal Association, Municipal Law Lecture Series, lecture #1, Fall 1992, pg. 11.

APPENDIX A

SUGGESTED RULES OF PROCEDURE FOR LOCAL BOARD OF ADJUSTMENT

Board of Adjustment City/Town of _____

Rules of Procedure

AUTHORITY

l. These rules of procedure are adopted under the authority of New Hampshire Revised Statutes Annotated, 1983, Chapter 676:1, and the zoning ordinance and map of the city/town of _____.

OFFICERS

1. **A chairman** shall be elected annually by a majority vote of the board in the month of _____. The chairman shall preside over all meetings and hearings, appoint such committees as directed by the board and shall affix his/her signature in the name of the board.
2. **A vice-chairman** shall be elected annually by a majority vote of the board in the month of _____. The vice-chairman shall preside in the absence of the chairman and shall have the full powers of the chairman on matters which come before the board during the absence of the chairman.
3. **A clerk** shall be elected annually by a majority vote of the board in the month of _____. The clerk shall maintain a record of all meetings, transactions and decisions of the board, and perform such other duties as the board may direct by resolution.
4. All officers shall serve for one year and shall be eligible for re-election.

MEMBERS AND ALTERNATES

1. Up to **five alternate members** shall be appointed, as provided for by the local legislative body, and should attend all meetings to familiarize themselves with the workings of the board to stand ready to serve whenever a regular member of the board is unable to fulfill his/her responsibilities.
2. Members must reside in the community and are expected to attend each meeting of the board to exercise their duties and responsibilities. Any member unable to attend a meeting shall notify the chairman as soon as possible. Members, including the chairman and all officers, shall participate in the decision making process and vote to approve or disapprove all motions under consideration.

MEETINGS

l. **Regular meetings** shall be held at (place), at (time) on the (day) of each month. Other meetings may be held on the call of the chairman provided public notice and notice to each member is givenin accordance with RSA 91-A:2, II.

2. **Quorum.** A quorum for all meetings of the board shall be three members, including alternates sitting in place of members.

The board will make every effort to ensure that a full five-member board is present for the consideration of any appeal.

If any regular board member is absent from any meeting or hearing, or disqualifies himself from sitting on a particular case, the chairman shall designate one of the alternate

members to sit in place of the absent or disqualified member, and such alternate shall be in all respects a full member of the board while so sitting.

3. **Disqualification.** If any member finds it necessary to disqualify himself from sitting in a particular case, as provided in RSA 673:14, he shall notify the chairman as soon as possible so that an alternate may be requested to sit in his place. When there is uncertainty as to whether a member should be disqualified to act on a particular application, that member or another member of the board may request the board to vote on the question of disqualification. Any such request shall be made before the public hearing gets underway. The vote shall be advisory and non-binding.

Either the chairman or the member disqualifying himself before the beginning of the public hearing on the case shall announce the disqualification. The disqualified member shall absent himself from the board table during the public hearing and during all deliberation on the case.

4. **Order of Business.** The order of business for regular meetings shall be as follows:
   a. Call to order by the chairman
   b. Roll call by the clerk
   c. Minutes of previous meeting
   d. Unfinished business
   e. Public hearing
   f. New business
   g. Communications and miscellaneous
   h. Other business
   i. Adjournment

(Note: Although this is the usual order of business, the board may wish to hold the hearings immediately after the roll call in order to accommodate the public).

APPLICATION/DECISION

1. **Applications.**

   a. Each application for a hearing before the board shall be made on forms provided by the board and shall be presented to the clerk of the board of adjustment who shall record the date of receipt over his or her signature.

   Appeals from an administrative decision taken under RSA 676:5 shall be filed within ___ (30 days recommended) days of the decision.

   At each meeting, the clerk shall present to the board all applications received by him or her at least 7 days before the date of the meeting.

   b. All forms and revisions prescribed shall be adopted by resolution of the board and shall become part of these rules of procedure.

2. **Public Notice.**

   a. Public notice of public hearings on each application shall be given in the (insert name of local newspaper) and shall be posted at (insert both locations) not less than five days (5) before the date fixed for the hearing. Notice shall include the name of the applicant, description of property to include tax map identification, action desired by the applicant, provisions of the zoning ordinance concerned, the type of appeal being made and the date, time and place of the hearing.

   b. Personal notice shall be made by certified mail to the applicant and all abutters not less than five (5) days before the date of the hearing. Notice shall also be given to

the planning board, city/town clerk and other parties deemed by the board to have special interest. Said notice shall contain the same information as the public notice and shall be made on forms provided for this purpose.

c. The applicant shall pay for all required notices costs in advance.

3. **Public Hearing.** The conduct of public hearings shall be governed by the following rules:

a. The chairman shall call the hearing in session and ask for the clerk's report on the first case.

b. The clerk shall read the application and report on how public notice and personal notice were given.

c. Members of the board may ask questions at any point during testimony.

d. Each person who appears shall be required to state his name and address and indicate whether he is a party to the case or an agent or counsel of a party to the case.

e. Any member of the board, through the chairman, may request any party to the case to speak a second time.

f. Any party to the case who wants to ask a question of another party to the case must do so through the chairman.

g. The applicant shall be called to present his appeal.

h. Those appearing in favor of the appeal shall be allowed to speak.

i. Those in opposition to the appeal shall be allowed to speak.

j. The applicant and those in favor shall be allowed to speak in rebuttal.

k. Those in opposition to the appeal shall be allowed to speak in rebuttal.

l. Any person who wants the board to compel the attendance of a witness shall present his request in writing to the chairman not later than 3 days prior to the public hearing.

m. The board of adjustment will hear with interest any evidence that pertains to the facts of the case or how the facts relate to the provisions of the zoning ordinance and state zoning law.

n. The chairman shall present a summary setting forth the facts of the case and the claims made for each side (see Findings of Facts form in appendix C). Opportunity shall be given for correction from the floor.

o. The hearing on the appeal shall be declared closed and the next case called up.

4. **Decisions.** The board shall decide all cases within (30 recommended) days of the close of the public hearing and shall approve, approve with conditions, or deny the appeal. Notice of the decision will be made available for public inspection within 144 hours, as required by RSA 676:3, and will be sent to the applicant by certified mail. If the appeal is denied, the notice shall include the reasons therefore. The notice shall also be given to the planning board, the board of selectmen, town clerk, property tax assessor and other town officials as determined by the board. Notice shall be published in the (insert name of local newspaper) and shall be posted in two locations at (insert both locations - should be the same places as the hearing notices.)

RECORDS

1. The records of the board shall be kept by the clerk and made available for public inspection at (insert description of office or location) in accordance with RSA 673:17.

2. Final written decisions will be placed on file and available for public inspection within 144 hours after the decision is made. RSA 676:3.

3. Minutes of all meetings including names of board members, persons appearing before the board, and a brief description of the subject matter shall be open to public inspection within l44 hours of the public meeting. RSA 91-A:2 II.

AMENDMENTS

These rules of procedure may be amended by a majority vote of the members of the board provided that such amendment is read at two successive meetings immediately preceding the meeting at which the vote is to be taken.

WAIVERS

Any portion of these rules of procedure may be waived in such cases where, in the opinion of the board, strict conformity would pose a practical difficulty to the applicant and waiver would not be contrary to the spirit and intent of the rules.

JOINT MEETINGS AND HEARINGS*

1. RSA 676:2 provides that the board of adjustment may hold joint meetings or hearings with other "land use boards," including the planning board, the historic district commission, the building code board of appeals, and the inspector of buildings, and that each board shall have discretion as to whether or not to hold a joint meeting with any other land use board.
2. Joint business meetings with any other land use board may be held at any time when called jointly by the chairman of the two boards.
3. A public hearing on any appeal to the board of adjustment will be held jointly with another board **only** under the following conditions:
   a. The joint public hearing must be a formal public hearing on appeals to both boards regarding the same subject matter; and
   b. If the other board is the planning board, RSA 676:2 requires that the planning board chairman shall chair the joint hearing. If the other board is not the planning board, then the board of adjustment chairman shall chair the joint hearing; and
   c. The provisions covering the conduct of public hearings, set forth in these rules, together with such additional provisions as may be required by the other board, shall be followed; and
   d. The other board shall concur in these conditions.

***** Format for Joint Meeting Procedures and Instructions to Applicants (Appendix B) are adapted, with thanks, from Town of Gilford Rules of Procedure, September 1984.

APPENDIX B

INSTRUCTIONS TO APPLICANTS APPEALING TO THE BOARD OF ADJUSTMENT

IMPORTANT: READ ALL INSTRUCTIONS CAREFULLY BEFORE FILLING OUT ATTACHED APPLICATION

The board strongly recommends that, before making any appeal, you become familiar with the zoning ordinance, and also with the New Hampshire Statutes TITLE LXIV, RSA Chapters 672- 677, covering planning and zoning.

Four types of appeals can be made to the board of adjustment:

VARIANCE: A **variance** is an authorization, which may be granted under special circumstances, to use your property in a way that is not permitted under the strict terms of the zoning ordinance. For a variance to be legally granted, you must show that your proposed use meets **all five** of the following conditions:

l. The proposed use would not diminish surrounding **property values**.

2. Granting the variance must not be contrary to the **public interest**.

3. Denial of the variance would result in **unnecessary hardship** to the owner. Hardship, as the term applies to zoning, results if a restriction, when applied to a particular property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions of the property that distinguish it from other properties under similar zoning restrictions. The NH Supreme Court has established a new test for unnecessary hardship for a use variance consisting of 3 elements:

a. that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;

b. that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

c. that the variance would not injure the public or private rights of others.[19]

For an area variance, an applicant can demonstrate unnecessary hardship by establishing that:

a. special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and

b. the applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.

4. Granting the variance would do **substantial justice**.

5. The proposed use is not contrary to the **spirit of the ordinance**.

If you are applying for a variance, you must first have some form of determination that your proposed use is not permitted without a variance. Most often, this determination is a denial of a building permit. A copy of the determination must be attached to your application.

APPEAL FROM AN ADMINISTRATIVE DECISION: If you have been denied a building permit or are affected by some other decision regarding the administration of the

[19] - "2001 Land Use Law Update", Atty. Tim Bates, NH OSP Annual Planning and Zoning Conference, May 12, 2001, pg. 1

_____ zoning ordinance, and you believe that the decision was made in error under the provisions of the ordinance, you may appeal the decision to the board of adjustment. The appeal will be granted if you can show that the decision was indeed made in error.

If you are appealing an administrative decision, a copy of the decision appealed from must be attached to your application.

SPECIAL EXCEPTION: Certain sections of the zoning ordinance provide that a particular use of property in a particular zone, will be permitted by special exception if specified conditions are met. The necessary conditions for each special exception are given in the ordinance. Your appeal for a special exception will be granted if you can show that the conditions stated in the ordinance are met.

If you are applying for a special exception, you may also need site plan or subdivision approval, or both, from the planning board. Even in those cases where no planning board approval is needed, presenting a site plan to the planning board will assist in relating the proposal to the overall zoning. This should be done before you apply for a special exception.

EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS: The board may grant an equitable waiver only for existing dimensional nonconformities provided the applicant can meet the required standards.

a) The nonconformity was not discovered until after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser;

b) The nonconformity was not an outcome of ignorance of the law or bad faith but was instead caused by a legitimate mistake;

If these conditions are satisfied, the board can move on to the additional findings to grant the waiver:

c) The nonconformity does not constitute a public or private nuisance nor diminish the value or interfere with future uses of other property in the area; and

d) The cost of correction would far outweigh any public benefit to be gained.

In lieu of the requirements in paragraphs (a) and (b), the violation has existed for 10 years or more with no enforcement action, including written notice, commenced by the town.

For any appeal, the application form must be properly filled out. The application form is intended to be self-explanatory, but be sure that you show:

WHO owns the property? If the applicant is not the owner, this must be explained.

WHERE is the property located?

DESCRIBE the property. Give area, frontage, side and rear lines, slopes and natural features, etc.

WHAT do you propose to do? Attach sketches, plot plans, pictures, construction plans, or whatever may help explain the proposed use. Include copies of any prior applications concerning the property.

WHY does your proposed use require an appeal to the board of adjustment?

WHY should the appeal be granted?

Prepare a list of all abutting property owners, have it verified at the city/town office, and attach it to your application. If you have any difficulty, consult the assessor's office, but the accuracy of the list is your responsibility.

Mail or deliver the completed application, with all attachments to the clerk of the board or to the office of the board of selectmen. A fee is charged sufficient to cover the cost of

preparing and mailing the legally-required notices. Make check payable to city/town of _____ and remit with your application.

The board will promptly schedule a public hearing upon receipt of your properly-completed application. Public notice of the hearing will be posted and printed in a newspaper, and notice will be mailed to you and to all abutters and to other parties whom the board may deem to have an interest, at least five days before the date of the hearing. You and all other parties will be invited to appear in person or by agent or counsel to state reasons why the appeal should or should not be granted.

After the public hearing, the board will reach a decision. You will be sent a notice of decision.

If you believe the board's decision is wrong, you have the right to appeal. The selectmen, or any party affected, have similar rights to appeal the decision in your case. To appeal, you must first ask the board for a rehearing. The Motion for Rehearing may be in the form of a letter to the board. The motion must be made within 30 days after the decision is filed and first becomes available for public inspection in the board's office, and must set forth the grounds on which it is claimed the decision is unlawful or unreasonable.

The board may grant such a rehearing if, in its opinion, good reason is stated in the motion. The board will not reopen a case based on the same set of facts unless it is convinced that an injustice would be created by not doing so. Whether or not a rehearing is held, you must have requested one before you can appeal to the courts. When a rehearing is held, the same procedure is followed as for the first hearing, including public notice and notice to abutters.

See RSA Chapter 677 for more detail on rehearing and appeal procedures.

APPENDIX C

SUGGESTED FORMS

APPLICATION FORMS
- Appeal from an Administrative decision
- Special Exception
- Use Variance
- Area Variance
- Equitable Waiver of Dimensional Requirements

NEWSPAPER NOTICE

PERSONAL NOTICE

WORKSHEETS
- STATEMENT OF REASONS- USE VARIANCE
- STATEMENT OF REASONS – AREA VARIANCE

FINDINGS OF FACTS

NOTICE OF DECISION: GRANTED

NOTICE OF DECISION: DENIED

APPEAL FROM AN ADMINISTRATIVE DECISION

To: Board of Adjustment,
Town of _____

Case No. _____
Date filed_____
_____
(signed - ZBA)

Name of applicant _____
Address _____
Owner _____
(if same as applicant, write "same")

Location of property _____
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPEAL FROM AN ADMINISTRATIVE DECISION
Relating to the interpretation and enforcement of the provisions of the zoning ordinance.
Decision of the enforcement officer to be reviewed _____
_____
_____
_____ Number _____ Date _____
article _____ section _____ of the zoning ordinance in question: _____
_____
_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR A SPECIAL EXCEPTION

Do not write in this space:
Case No: _____
Date filed: _____
_____
(signed – ZBA)

To: Board of Adjustment,
Town of _____

Name of applicant _____
Address _____
Owner _____
(if same as applicant, write "same")

Location of property _____
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPLICATION FOR A SPECIAL EXCEPTION
Description of proposed use showing justification for a special exception as specified in the zoning ordinance article _____ section _____
_____
_____

Explain how the proposal meets the special exception criteria as specified in article _____, section _____ of the zoning ordinance: ([list all criteria from ordinance]

Criteria 1 - _____
_____
_____

Criteria 2 - _____
_____
_____

Criteria 3 - _____
_____
_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR A USE VARIANCE

To: Board of Adjustment,
Town of _____

Do not write in this space:
Case No: _____
Date filed: _____
_____
(signed – ZBA)

Name of applicant _____
Address _____
Owner _____
(if same as applicant, write "same")

Location of property _____
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPLICATION FOR A USE VARIANCE
A variance is requested from article _____ section _____of the zoning ordinance to permit _____
_____
_____

Facts supporting this request:
1. The proposed use would not diminish surrounding property values because:
_____
_____
_____

2.Granting the variance would not be contrary to the public interest because:
_____
_____
_____

3. Denial of the variance would result in unnecessary hardship to the owner because:
a. the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment such that:
_____
_____
_____
b. that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:
_____

_____

_____

c. the variance would not injure the public or private rights of others since:

_____

_____

_____

4. Granting the variance would do substantial justice because:

_____

_____

_____

5. The use is not contrary to the spirit of the ordinance because:

_____

_____

_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR AN AREA VARIANCE

To: Board of Adjustment,
Town of _____

Do not write in this space:
Case No: _____
Date filed: _____
_____
(signed – ZBA)

Name of applicant _____
Address _____
Owner _____
(if same as applicant, write "same")

Location of property _____
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPLICATION FOR AN AREA VARIANCE
A variance is requested from article _____ section _____of the zoning ordinance to permit _____
_____
_____

Facts supporting this request:
1. The proposed use would not diminish surrounding property values because:
_____
_____
_____

2.Granting the variance would not be contrary to the public interest because:
_____
_____
_____

3. Denial of the variance would result in unnecessary hardship to the owner because:
a. the following special conditions of the property make an area variance necessary in order to allow the development as designed _____
_____ ; and
_____
_____

b. the same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because _____

_____
_____.
_____

4. Granting the variance would do substantial justice because:

_____
_____
_____

5. The use is not contrary to the spirit of the ordinance because:

_____
_____
_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR AN EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

To: Board of Adjustment,
Town of _____

Do not write in this space:
Case No: _____
Date filed: _____
_____
(signed – ZBA)

Name of applicant _____
Address _____
Owner _____
(if same as applicant, write "same")

Location of property _____
(street, number, sub-division & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPLICATION FOR AN EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

An Equitable Waiver of Dimensional Requirements is requested from article _____ section _____ of the zoning ordinance to permit _____
_____
_____

1. Does the request involve a dimensional requirement, not a use restriction?
( ) yes ( ) no

2. Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the town _____
_____
_____
_____

- or -

Explain how the nonconformity was discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser
_____
_____
_____
_____ and how the violation was not an outcome of ignorance of the law or bad faith but resulted from a legitimate mistake _____
_____

_____
_____

3. Explain how the nonconformity does not constitute a nuisance nor diminish the value or interfere with future uses of other property in the area _____
_____
_____
_____

4. Explain how the cost of correction far outweighs any public benefit to be gained
_____
_____
_____

Applicant _____ Date _____
(Signature)

NEWSPAPER NOTICE

BOARD OF ADJUSTMENT, CITY/TOWN _____

Notice is hereby given that a hearing will be held at:

_____

(time) (date) (place)

concerning a request by _____

(applicant's name)

for _____ concerning

(type of appeal)

article _____ section _____ of the zoning ordinance.

Applicant proposes to _____

_____

on the property located at _____

_____in the _____ zone.

Signed _____

Chairman, Board of Adjustment

PERSONAL NOTICE

BOARD OF ADJUSTMENT, CITY/TOWN OF

Dear _____,

You are hereby notified of a hearing to be held at :

_____

(time) (date) (place)

concerning a request by _____

(applicant's name)

for _____

(type of appeal)

concerning _____

article _____ section _____ of the zoning ordinance.

Applicant proposes to _____

_____

on property located at _____

in the _____ zone.

Signed _____

Chairman, Board of Adjustment

WORK SHEET: STATEMENT OF REASONS – USE VARIANCE

Petition for a variance of _____
for property located at _____

After reviewing the petition and after hearing all of the evidence and by taking into consideration the personal knowledge of the property in question, the _____ board of adjustment should consider the following before making a motion to approve or disapprove the request:
(community)

l. There (would - would not) be a diminution in value of surrounding properties as a result of the granting of this variance because.....

2. The granting of this variance (would - would not) be contrary to the public interest because.....

3. Since
a. the zoning restriction as applied to the property (interferes - does not interfere) with the reasonable use of the property, considering the unique setting of the property in its environment such that .....

and

b. there (is - is not) a fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property because .....

and

c. that the variance (would - would not) injure the public or private rights of others since .....

4. By granting this variance substantial justice (would - would not) be done because.....

5. The use contemplated by petitioner as a result of obtaining this variance (would - would not) be contrary to the spirit of the ordinance because.....

WORK SHEET: STATEMENT OF REASONS – AREA VARIANCE

Petition for a variance of _____
for property located at _____

After reviewing the petition and after hearing all of the evidence and by taking into consideration the personal knowledge of the property in question, the _____ board of adjustment should consider the following before making a motion to approve or disapprove the request:
(community)

l. There (would - would not) be a diminution in value of surrounding properties as a result of the granting of this variance because.....

2. The granting of this variance (would - would not) be contrary to the public interest because.....

3. Since
a. the following special conditions of the property make an area variance necessary in order to allow the development as designed; and

b. the same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because

4. By granting this variance substantial justice (would - would not) be done because.....

5. The use contemplated by petitioner as a result of obtaining this variance (would - would not) be contrary to the spirit of the ordinance because.....

FINDINGS OF FACTS

BOARD OF ADJUSTMENT, CITY/TOWN _____

Hearing held at: _____
(time) (date) (Location)

concerning a request by _____
(applicant's name)

for _____ concerning
(type of appeal)

article _____ section _____ of the zoning ordinance.

Applicant proposes to _____
_____

on the property located at _____
_____in the _____ zone.

Summary of the facts of the case discussed at the above public hearing:

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

NOTICE OF DECISION

ZONING BOARD OF ADJUSTMENT
CITY/TOWN OF _____, NEW HAMPSHIRE

Case No: _____

You are hereby notified that the appeal of
_____
_____
for a _____
regarding section _____ of the zoning ordinance has been **GRANTED,** subject to the conditions listed below, by the affirmative vote of at least three members of the zoning board of adjustment.

CONDITIONS:
1. _____

2. _____

3. _____

_____
Chairman,
Board of Adjustment

_____
Date

Note: The selectmen, any party to the action or any person directly affected has a right to appeal this decision. See New Hampshire Revised Statutes Annotated, Chapter 677, available at (insert location where statutes can be reviewed). This notice has been placed on file and made available for public inspection in the records of the ZBA on (insert day and date) and has been published in the (insert newspaper name) on (insert day and date). Copies of this notice have been distributed to: the applicant, Planning Board, Board of Selectmen, Town Clerk, Property Tax Assessor, (insert any others as required by the board's Rules of Procedure).

NOTICE OF DECISION

ZONING BOARD OF ADJUSTMENT
CITY/TOWN OF _____, NEW HAMPSHIRE

Case No: _____

You are hereby notified that the appeal of
_____
_____
for a _____ regarding
section _____ of the zoning ordinance has been **DENIED,** for the reasons/facts listed below, by vote of the board of adjustment.

REASONS /FACTS SUPPORTING THE DENIAL:
1. _____
2. _____
3. _____
4. _____
5. _____

_____
Chairman,
Board of Adjustment

_____
Date

Note: The selectmen, any party to the action or any person directly affected has a right to appeal this decision. See New Hampshire Revised Statutes Annotated, Chapter 677, available at (insert location where statutes can be reviewed). This notice has been placed on file and made available for public inspection in the records of the ZBA on (insert day and date) and has been published in the (insert newspaper name) on (insert day and date). Copies of this notice have been distributed to: the applicant, Planning Board, Board of Selectmen, Town Clerk, Property Tax Assessor, (insert any others as required by the board's Rules of Procedure).

APPENDIX D

ZONING BOARD OF ADJUSTMENT CASE LAW

The following are summaries of cases cited in the text with a notation of where they can be found in the body of the handbook. For a more complete listing and summary of cases, see New Hampshire Court Decision Affecting Zoning & Land Use Regulations, OSP, June 1994, updated and revised by Susan D. Bielski, Esq. In 1995. Additional case summaries can also be found in Current Development in Land Use Law, by attorneys Peter J. Loughlin and Robert D. Ciandella, lecture #3, Fall 1996, 21st Annual New Hampshire Municipal Association, Municipal Law Lecture Series from which many of the following summaries have been included.

Gelinas v. Portsmouth 97 NH 248, 1952 (See page 12)

The court first stated the present 5 conditions for a variance when they found that a residentially zoned lot in a low, swampy area used as a dump and adjacent to a newly constructed, heavily used four-lane highway was absolutely valueless unless used for commercial purposes. Furthermore, the lot was located in an area which was becoming commercial as a result of the construction of the new highway, creating a situation causing unnecessary hardship.

Shell Oil v. Manchester l0l NH 76, 1957 (See page 10)

Manchester ZBA denied a permit to build a filling station. The court reversed the decision and determined that the permit was to be treated as a special exception and therefore the only function of the board was to determine if the special exception requirements of the ordinance had been met.

Dumais v. Somersworth 101 N.H. 111, 134 A.2d 700 1957 (See page 26)

Somersworth ZBA revoked a permit issued by the building inspector for a three-stall garage in a residential district for the storage of "trucks and/or private cars." The supreme court partially vacated the revocation deciding that the permit properly allowed construction and use of the building for the storage of private automobiles but confirming the revocation concerning the use of the garage for the storage of trucks. The court found that the appeal was timely filed since inquiry had been made to the building inspector as soon as the abutter became aware that construction was about to start.

Jaffrey V. Heffernan l04 NH 249, l962. (See page 1)

Zoning ordinance was held to be invalid because of the failure of the ordinance to provide for a zoning board of adjustment.

Bosse v Portsmouth, 107 N.H. 523, 226 A.2d 99, 1967 (See page 18)

The court found spot zoning when the legislative body rezoned an area surrounded by single-family residential to light industrial although hundreds of acres of industrial property were vacant.

Bourassa v. Keene, 108 N.H. 261, 234 A.2d 112, 1967 (See page 45)

Trucking company owner was ordered by the city to cease using the premises as the trucking company headquarters. The trucking company appealed directly to the superior court and the abutters intervened, seeking dismissal because the plaintiff failed to initially apply for a rehearing before the board of adjustment.

Merriam v. Salem, 112 N.H. 267, 1972 (See page 47)

Board of adjustment's denial of an application for a mobile home park was upheld by the trial court. During the trial, the plaintiff's attorney called as his only witness, the chairman of the board of adjustment and proposed various questions calling for interpretations of law and other designed to obtain his reasons for voting as he did, insisting that they have a right to examine board members "subjective and objective standards in granting and denying variances and exceptions."

Alcorn v. Rochester 114 NH 491, 1974 (See page 35)

The board of adjustment had stated that it "lacked jurisdiction" in a particular case. The Court remanded the case back to the board so that the real basis for the decision could be made.

A year later, when the board had not clarified its decision, the court stated that the board's action indicated a lack of basis for the denial and ordered the plaintiff's appeal sustained unless the board complied with the order within 60 days.

Trustees of Lexington Realty Trust v. Concord 115 NH 131, 1975 (See page 36)

No meaningful review if no specific findings of facts are made.

Hanson v. Manning 115 NH 367, 1975 (See page 99)

Hardship scrutiny has been brought into the present era when the court found evidence that the zoning restrictions would make development of the plaintiff's land more difficult because of the existence of ledge and wetlands. The court pointed out, however, that there was nothing to distinguish the plaintiff's land from other land in the same area with respect to suitability for which it was zoned. It then went on to hold that "[a]lthough RSA 31:72 (now **RSA 674:33**) authorizes the granting of a variance when the literal enforcement of the ordinance will result in 'unnecessary hardship,' it does so only when that hardship is 'owing to special conditions.' Absent `special conditions' which distinguish the property from other property in the area, no variance may be granted even though there is a hardship."

Society for the Protection of N. H. Forests v. Site Evaluation Committee 115 NH 163, 1975 (See page 36)

Society for the Protection of N. H. Forests and the Audubon Society of New Hampshire appeal from the decision of the site evaluation committee, a State administrative agency, approving the location of a nuclear generating facility in Seabrook, New Hampshire. The court remanded the case for the limited purpose of requiring that the site evaluation committee provide basic findings of fact on the existing record to support the ultimate conclusions it has reached.

"A reviewing court needs findings of basic facts to understand administrative decisions and to ascertain whether the facts and issues considered sustain the ultimate result reached."

"Where, as in this case, the administrative agency is required by statute to make not only general discretionary findings such as the effect of the nuclear facility on the aesthetics and historical sites, but also complex factual determinations of its effect on regional development, air and water quality, the natural environment and the public health and safety, the law demands that findings be more specific than a mere recitation of conclusions."

"Finally, in the process of making basic findings the committee will be compelled to weigh with care the evidence before it and to delineate the basic facts supporting its conclusions, thereby rendering the process of public hearings more meaningful to the participants."

Foote v. State Personnel Commission 116 NH 145, 1976 (See page 36)

Plaintiff, an employee of the New Hampshire Home For The Elderly at Glencliff, was terminated and appealed her dismissal to the State Personnel Commission who sustained her discharge. The Supreme Court remanded the matter to the commission for "findings setting forth the facts on which it concluded that the plaintiff's conduct constitutes willful insubordination in sufficient detail so that we can determine the validity of its conclusion".

"Absent basic findings, we cannot determine on what part of the contradictory testimony the personnel commission ruled her conduct constituted willful insubordination. The commission's ultimate and only order in this case was that the employee's discharge was proper. 'Appeal denied' does not provide the answer."

"In order to properly perform its functions under **RSA Ch. 541** this reviewing court needs findings of basic facts by the personnel commission so as to ascertain whether the conclusions reached by it were proper."

Trottier v. City of Lebanon 117 NH 148, 1977 (See page 9)

Board of adjustment was upheld in its interpretation that a right of way did not constitute a street and, therefore, building permit could not be issued.

Shaw v. City of Manchester 118 NH 158, 1978 (See page 44)

Where the ZBA originally denies a variance, the petitioner has 20 days to apply for a rehearing. If the rehearing is granted and the ZBA then grants the variance, new aggrieved party has 20 days to apply for another rehearing. If that request for a rehearing is denied, he then has 30 days to appeal to superior court.

Ouimette v. City of Somersworth 119 NH 292, l979 (See page 98)

Somersworth ZBA granted a variance to build above-ground gasoline storage tanks so defendant, Agway Petroleum Co., could expand their business onto land they held an option on in the business district B. Testimony centered on the hardship to Agway if the variance were denied. Evidence was presented that Agway could find no other suitable lot with the correct dimensions and slope for its above-ground storage tanks. Abutting business owner appealed issuance of the variance raising the issue of the authority of the local zoning board to grant a variance when the only hardship alleged results from the special needs of an option holder of the property as opposed to special characteristics of the property. The court found for the plaintiff holding, in part, that "[t]he hardship alleged by the defendants is that Agway cannot expand its business if barred from moving to this lot because of the zoning ordinance. Reliance on these factors to support a variance reflects a fundamental misconception of the

function of a variance in a comprehensive zoning scheme. Agway's inability to move cannot support a variance from a comprehensive zoning scheme. The inability to use land for one particular purpose is irrelevant to whether a variance should be granted."

Weeks Restaurant Corp. V City of Dover, 119 NH 541 1979 (See page 44)

Weeks Restaurant Corp. , which is located in the interior of a traffic circle in Dover, was found to have standing to protest the construction of another restaurant which was near, but not immediately adjacent to the Weeks property.

Sprague v. Acworth l20 NH 64l, l980. (See page 12)

Owner of a small, oddly shaped lot on a lake was granted a variance to build. A new ordinance required various setbacks from the lake, road and side lot lines which resulted in a triangularly shaped buildable area of only 195 square feet. The court found that these factors would have essentially prevented any use of the lot.

Fisher v. Dover 120 NH 187, 1980 (See page 28)

McQuade Realty was granted a variance to convert a 32 room house into a multi-family apartment complex in 1973. The variance was appealed to superior court, remanded back to the ZBA who again granted the variance on December 5, 1974. A second appeal to superior court resulted in second remand to the ZBA. On May 13, 1976, the ZBA now denied the variance and no appeal was made by McQuade Realty.

On July 30, 1976, McQuade filed a second application for a variance which was substantially the same as previously requested which was now granted by the ZBA. After affirming the decision at a rehearing, the plaintiff once again appealed to superior court which upheld the variance noting that the plaintiff had not sustained her burden of overcoming the statutory presumption that findings of a zoning board are prima facie lawful and reasonable.

Plaintiff appealed, and the court agreed, holding that "the board committed an error of law when it approved the defendant's second application for a variance without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board."

Shaw v. Manchester 120 NH 529, l980. (See page 46)

V.H.S. Realty, Inc. was denied a variance and special exception for a grocery store/gasoline station in a residential zone. After a rehearing the board granted the special exception and abutter Shaw appealed to superior court. V.H.S. moved to dismiss on the grounds that it had not been timely filed but the superior court found for Shaw. V.H.S. appealed, lost and the case was remanded for a trial on the merits. (Shaw v. City of Manchester, 118 N.H. 158 [1978]) During the trial, expert testimony was given concerning traffic effects that was not heard at the local level. A transcript was made and forwarded to the ZBA members who all stated they would not have changed their minds even if this testimony had been available to them. On July 31, 1979, the court found for Shaw and set aside the approvals as being "unreasonable."

"This court has consistently held that upon review the trial court may hear any and all additional evidence presented that will assist in evaluating the reasonableness of a zoning board decision."

"The effect of the proposed use on traffic was at the very heart of the court's determination whether the zoning board acted reasonablely. Therefore, the court's examination of evidence relevant to possible traffic problems was not in error."

Barry v. Town of Amherst 121 NH 335, 1981 (See page 31)

A 1979 amendment deleted injustice as a ground for a reversal of a ZBA decision. The board is required to hold a public hearing within 30 days of receipt of the notice of appeal. However, since the statute does not contain language providing for automatic approval if the hearing is not held within that time, no such provision exists.

Moore v. Rochester 121 NH 100, 1981

Concern for growth of medical practice is personal economic hardship and not the requisite type of hardship caused by uniqueness of the land.

Barrington East Cluster Unit I Owner's Association v. Barrington l2l NH 627, l98l. (See page 11)

Trial court upheld a special exception for a shopping mall. Plaintiff owner's association contended that the trial court erred in holding that the board found the existence of the factors set forth in the ordinance for a special exception. Supreme court disagreed with the trial court and remanded back to the ZBA.

No evidence was presented that the proposal would not be injurious to adjacent property, would not cause a substantial diminution of area property values and would not constitute a nuisance or a danger to the health, safety and general welfare of the community. On the contrary, there was testimony that the proposed mall would adversely affect the value of the condominiums and would cause serious traffic congestion.

"Although the board can rely on its personal knowledge of certain factors in reaching its decision, its decision must be based on more than the mere personal opinion of its members. Because the minutes of the hearing reveal that the board did not have sufficient information before it to make the required findings, we remand this case to the board for a rehearing, but do not suggest what results should then be reached."

Fisher v. Boscawen 121 NH 438, l98l (See pages 44 & 45)

Plaintiff was denied a special exception for a gravel pit after the ZBA submitted the application to the planning board for its consideration. The planning board determined that the proposed location of the gravel pit was not appropriate and the ZBA's subsequent denial included as a reason that "[t]he special exception may not be permitted without approval of the site as an appropriate location by the Planning Board."

The plaintiff requested a rehearing and the board reheard the case again denying it in a letter including the statement that the board had "considered the recommendation of the Planning Board" but had "made its own determination." The letter further stated that the decision of the planning board is "only advisory and not binding on the Zoning Board of Adjustment." The court held that the ZBA may use the rehearing process to correct its own mistakes and decide that the original reason for denial was erroneous and proceed to consider the application again and deny it for another reason.

U-Haul Company of NH and VT Inc. v. Concord 122 NH 910, 1982

A location of commercial property may involve greater security risks and is uniqueness of the land and buildings which constitutes unnecessary hardship.

U-Haul sought to construct a residential apartment at its commercial site in order to increase security in an area of high vandalism and theft. The ZBA determination that security was a personal hardship was found unreasonable by the court because the security problem was related to the remote location of the property where less police protection existed. The land's location was unique and created an unnecessary hardship that supported the issuance of a variance.

Governor's Island Club v. Gilford 124 NH 126, 1983 (See page 98)

A landowner requested a variance to subdivide a lakefront parcel into two lots each with less than the square footage required by the zoning ordinance. The court found that no basis existed for a hardship, which must distinguish the parcel from other lots in the same area. *"The land involved here fails to meet this test. It is undisputed that Gagne's shorefront parcel is entirely suitable for use as a residential lot; it has been so used at least since 1937. The zoning ordinance has the same effect on this parcel as it does on every other parcel smaller than 60,000 square feet; vis., to render a subdivision of that parcel impermissible. Any resulting injustice is general, rather than specific, and if it is to be remedied, that must be done by way of an amendment to the zoning ordinance rather than by a variance."*

Sklar Realty Inc. v. Merrimack and Agway, Inc. 125 NH 321, 1984 (See pages 11 & 38)

Agway, Inc. sought to construct a dry feed plant in the Town of Merrimack. Agway submitted a site plan to the planning board and applied to the town's board of adjustment for a special exception to the zoning ordinance to allow it to build in a wetlands area. The board granted the exception with conditions. Later Agway revised the plans to address concerns of the planning board. An abutter challenged whether the special exception was still valid after the plan had been revised. The court held that the plan must be resubmitted to the board of adjustment for a determination whether the special exception granted to a wetlands ordinance survived the revision.

The court also ruled that a compliance hearing must be held so abutters can be satisfied that any conditions set by the planning board to be fulfilled before final approval have, in fact, been met.

Winslow v. Town of Holderness Planning Board 125 NH 262, 1984 (See page 35)

Since the planning board is a quasi-judicial body, a board member should be disqualified if he is not indifferent. The board's decision is voidable if the disqualified member participates.

Speaking as a private citizen at a public hearing, Mr. Mastro spoke in favor of a proposed subdivision that did not meet the requirements of subdivision regulations. After Mr. Mastro became a member of the board, the board approved the subdivision proposal, with conditions, by a clear majority, 6-1. The Supreme Court applied the criteria used for disqualification of board of adjustment members: "standards that would be required of jurors in the trial of the same matter" because, in this case, the planning board was acting in a quasi-judicial capacity. Stricter rules of fairness are required than when a legislative function is involved.

A board member must be disqualified if the member is not indifferent to the controversy. Mr. Mastro's prior public comments indicated prejudgment, which constitutes cause for disqualification. Secondly, the court held that a decision of a board is voidable if a disqualified member participates, without reference to whether the result was produced by his vote.

Davis v. Barrington 127 NH 202, l985. (See page 38)

The planning board denied an 8 unit condominium subdivision approval citing 6 reasons. After review by a master, the court agreed with his finding that 2 of the 6 stated reasons for denial were valid and that was all that was needed to deny the application.

Margate Motel v. Town of Gilford 130 NH 91, 1987

Unnecessary hardship must arise not from personal circumstances of the owner, but from some unique condition of the parcel of land distinguishing it from others in the area and barring any reasonable use of the land consistent with literal enforcement of the zoning ordinance.

The Gilford Zoning Board of Adjustment granted a variance from setback requirements to the Bluebird Motel. The Motel owners planned to raze existing, outdated cottages and construct a two story motel. An abutter, Margate Motel, appealed the grant to superior court, which affirmed the town's actions. The decision was reversed on appeal to the Supreme Court, which found that the evidence presented did not support a finding of unnecessary hardship. The finding of hardship was based only on the personal and financial condition of the owners, not on the uniqueness of the parcel. The Gilford Ordinance listed twenty-five uses for the property that the defendants could consider.

To support a variance, it must be shown:

1) no diminution in value of surrounding property would be suffered;
2) granting of the variance would not be contrary to the public interest;
3) denial of the variance would result in unnecessary hardship to the landowner seeking it;
4) granting the permit would do substantial justice;
5) the use must not be contrary to the spirit of the ordinance.

New London Land Use Assoc. v. New London, 130 NH 510, 1988 (See page 22)

Lakeside Lodge consists of 17 housekeeping units on a 17 acre parcel in a residential district that requires 2 acres per dwelling unit. Since the Lodge was in operation before the zoning ordinance was enacted, the nonconforming use on less than the required acreage was allowed to continue. The Board of Adjustment granted the owners a special exception to allow a planned unit development. The existing buildings would be razed and replaced with 17 condominium units and a clubhouse building. Although the number of dwelling units would remain the same, the living, storage and common space would more than double.

On appeal of the abutter, Land Use Association, the Supreme Court overruled the lower court's decision that upheld the granting of the special exception. The Court stated that the nonconforming use was related to the commercial operation in a residential district. The Court agreed with the Association that the nonconforming density cannot be used to satisfy density standards required for a special exception. In its decision, the Court said, "Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the use at

the time of enactment of the ordinance creating the nonconforming use. However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate.

Jensen's v. City of Dover, 130 NH 761, 1988 (See page 42)

Special exception denial for an 86 unit mobile home park was upheld by the court on the basis that there was sufficient evidence on the issues of adverse effect on overall land values and traffic impact to support the board's denial.

Devaney v. Windham, 132 NH 302, 1989 (See page 22)

Plaintiff owned a cottage on a lot that did not meet the setback requirements of the zoning ordinance at the time of purchase. When he began to remodel the camp without a building permit, the town issued a cease and desist order. He continued to add on to the camp, including a second story on the building, a two story addition, and an unapproved septic system. A requested variance was denied, a further cease and desist order issued, but the work continued. Superior court granted the Town's request for an injunction that required the plaintiff to return the building to dimensions complying with the zoning ordinance.

On appeal, the Supreme Court affirmed the injunction. The Court stated that while a "natural expansion" of a nonconforming use may be allowed, the expansion in this case was substantial enough to constitute a new use and could not be permitted. The Court cited the principle that setback requirements are designed to prevent overcrowding on substandard lots. This expansion violated that principle and served to block an abutter's view of the water and sunsets and decreased the amount of sunlight coming into her house. (See also Stevens v. Town of Rye, 122 NH 688 [1982]; New London v. Leskiewicz, 110 NH 462 [1970])

Crossley v. Town of Pelham, 133 NH 215, 1990 (See page 100)

If the land is reasonably suited for a permitted use, no hardship can be found and no variance can be granted, even if the other four parts of the five-part test for the granting of a variance have been met.

Landowners went before the Pelham ZBA for a variance to replace the one-car garage on their nonconforming lot with a larger two-car garage. Neighbors appealed the granting of the variance to the Superior Court, claiming that the requisite unnecessary hardship did not exist in this case, where the landowners simply wanted a larger garage. The Superior Court found hardship, but was overturned on appeal to the Supreme Court. The Court noted that the hardship cited was a result of the landowners' personal circumstances, that a one-car garage or even no garage would still be a reasonable use consistent with the ordinance, and that therefore the superior court erred as a matter of law in finding unnecessary hardship supporting the grant of a variance.

Granite State Minerals v. Portsmouth, 134 NH 408, 1991 (See page 23)

Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid.

Grey Rocks Land Trust v. Town of Hebron, 136 NH 239, 1992 (See page 98)

A marina had been operating for several years as a viable commercial entity before requesting variance to expand, owner was clearly making reasonable use of his property and thus hardship justifying variance did not exist.

Decision of ZBA granting a variance to a nonconforming marina for construction of additional boat storage facility was reversed. In order to validly grant a variance, a ZBA must make specific factual findings showing, among other things, that the deprivation resulting from a denial of a variance is so great as to deprive the owner of ANY reasonable use of his land, and that the hardship is the result of some unique condition of the land and not the personal circumstances of the owner. The party seeking the variance has the burden of producing evidence sufficient for the Board to establish these requirements.

A nonconforming use may not form the basis for a finding of uniqueness to satisfy the hardship test, as the fact that the use is nonconforming has nothing to do with the land itself. Additionally, the proposed expansion of the marina would have a substantially different impact upon the neighborhood's scenic, recreational and environmental values in contravention of the purpose of the zoning ordinance, and thus would be beyond the scope of "natural expansion" allowed by law. Therefore the ZBA's grant of a variance was invalid.

Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548, 1994 (See pages 13, 14 & 37)

Plaintiff abutters appealed order of Superior Court upholding issuance by the ZBA of a special exception authorizing an apartment as an accessory use to a convenience store.

Dziama v. City of Portsmouth, 140 N.H. 542, 669 A.2d 217, 1995 (See page 44)

RSA 677:3 (Rehearing by Board of Adjustment) requires an aggrieved party to file a new Motion For Rehearing that raises any new issues that result from the granting of an earlier Motion For a Rehearing. If an applicant did not have to file a second Motion For Rehearing when conditions changed, the board would not have an opportunity to correct any errors that it may have made and the Superior Court would be limited to consideration of errors alleged in the original rehearing motion.

Plaintiff was denied relief by the ZBA on a procedural basis. ZBA granted motion for rehearing reversing itself on the procedural denial, but denying the request on a substantive basis. Plaintiff did not file an additional motion for rehearing, but appealed directly to the Superior Court. The Superior Court dismissed the appeal on the basis that the Plaintiff should have flied a second motion for rehearing. The Plaintiff took the position that under Shaw v. City of Manchester, 118 N.H. 158 (1978) only one Motion For Rehearing need be filed. The Supreme Court found that the law was unclear and while indicating that from this point forward a second motion for rehearing must be filed if the reason for denial is changed, the Plaintiff was allowed to go back to the board and file a motion for rehearing.

Dube v. Town of Hudson, 140 N.H. 135, 663 A.2d 626, 1995 (See page 8)

The ZBA has explicit statutory authority to review a planning board's construction of the zoning ordinance.

In construing a ZBA appeal, the Superior Court must treat all ZBA findings as prima facie lawful. The order or decision appealed from may not be set aside except for errors of law, unless the Court is persuaded by the balance of probabilities, on the evidence before it,

that the decision is unreasonable. The Supreme Court will not overturn the Superior Court's decision unless it is unsupported by the evidence or legally erroneous.

Husnander v. Town of Barnstead, 139 N.H. 476, 660 A.2d 447, 1995 (See page 99)

The variance is the safety valve of zoning administration (quoting 2 E. Ziegler, Rathkopf's The Law of Zoning and Planning, § 38.01 [1] (4th ed. 1994)). In determining whether a hardship exists sufficient to prevent the owner from making any reasonable use of the land, the operative use is "reasonable", a word that has been central to the development of the common law. Lot in this case had a strange configuration due to the shoreline and the only reasonable use of the property was for a single family home.

Plaintiff appealed decision of the Superior Court upholding the Defendant's grant of a variance to the intervenor to construct a single family home on Lower Suncook Lake. After reviewing evidence and taking a view, the Trial Court found that the granting of the variance was the only reasonable action that could have been taken under the circumstances. Because of setbacks, the building envelope on the lot was an elongated, somewhat curved strip roughly 70 feet long. The slope of the lot, abundance of ledge and remote location prevented other uses permitted under the ordinance. Supreme Court affirmed.

Healey v. New Durham ZBA, 140 N.H. 232, 665 A.2d 360, 1995 (See page 39)

In determining whether a structure complies with the terms of the zoning ordinance, Courts will look at the structure's internal composition objectively rather than the subjective intent of the owners.

A board of adjustment is authorized to place conditions on a variance and failure to comply with those conditions may be a violation.

For purposes of determining whether vested rights exist, Courts will examine the facts as they were when the relevant zoning ordinance amendment took affect and the landowner who claims a vested right bears the burden of proving all necessary elements establishing that right.

Intervener obtained a variance in 1988 to construct a one family dwelling with a one car garage and septic system on their property on Merrymeeting Lake. In March of 1990 the Town enacted a "Shorefront Conservation Area" ordinance which prohibited multi-family dwellings and limited the amount of impervious material permitted on a lot. After the enactment of the ordinance, the interveners paved their driveway causing the amount of impervious material to exceed the limits permitted. The status of the property was the subject of a hearing before the ZBA and on appeal of the ZBA decision, the Trial Court found that the interveners had violated the ordinance by building a two family dwelling and installing pavement in excess of the maximum allowed and violated the variance by constructing a two car garage. The Trial Court ordered the modification of the garage and removal of certain pavement. The Supreme Court affirmed that the home, garage and driveway all violated the zoning ordinance.

Ray's State Line Market, Inc. v. Town of Pelham 140 N.H. 139, 665 A.2d 1068, 1995 (See page 23)

Interveners Jaroski appeals decision of Superior Court reversing the denial by the Defendant of application of the Plaintiff for permits to change two sign faces on existing signs and to make an internal change to about 100 square feet out of the 2,000 square foot nonconforming convenience store. The Supreme Court affirmed.

Miller v. Town of Tilton 139 N.H. 429, 655 A.2d 409, 1995 (See page 19)

Appeal by Plaintiffs of Superior Court Order denying their Motion for Summary judgment and validating the rezoning of their land by Defendant Town of Tilton. Supreme Court affirmed.

In 1989 Plaintiffs purchased industrially-zoned property. The border of an agricultural buffer zone between residential and industrial land had shifted several times during the previous decade affecting the zoning of the land in question and in 1990 an abutting residential property owner submitted a petitioned zoning article requesting the enlargement of the agricultural buffer zone to its original borders which included Plaintiffs' land. The planning board opposed the petition, but it was approved by the voters. Plaintiffs argued that the petition for rezoning was not timely flied and that it constituted spot zoning.

Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital, 139 N.H. 450, 656 A.2d 407, 1995 (See page 44)

Plaintiff, operator of a health club 1.7 miles from Exeter Hospital, appealed grant of site review for new athletic facility at the Hospital to be open to patients and the general public. Plaintiffs requested certiorari from the Superior Court claiming standing to appeal on the basis that they owned property within the Town and because the fitness center would compete against their businesses. Superior Court denied certiorari ruling they were not "persons aggrieved". ZBA denied separate administrative appeal on a similar basis. Superior Court granted Defendant's Motion for Summary judgment and Supreme Court affirmed.

Olszak v. Town of New Hampton 139 N.H. 723, 661 A.2d 968 1995 (See pages 47 & 98)

Geiss v. Bourassa, 140 NH 629 (1996) (See page 39)

In 1989, a special exception was granted allowing “office and storage and maintenance of the vehicles and equipment of Ken’s Waste Disposal business.” At the hearing, the applicant had stated that they would keep about twenty-five containers on the property and there would be no storage of garbage. No objections were raised. Over the years, more and more empty dumpsters became stored on the property, a mechanic occasionally worked on a truck late into the evening and from time to time a truck would be stored overnight loaded with garbage.

The now angry abutters sued asking the court to enjoin the use on the grounds that it constitutes a nuisance and violates the conditions of the special exception. The superior court (and later the Supreme Court) ruled against the plaintiffs finding that there was no nuisance, and it did not violate either implicit or explicit conditions of the special exception. Even if there were implied conditions that, arguably, had occasionally been violated, the character of the use had not been changed.

Conforti v. City of Manchester, 141 N.H. 78 (May 29, 1996) (See page 23)

A preexisting nonconforming 1912 movie theater in Manchester was renovated and the owner began holding live rock concerts. The city notified the owner that the live shows violated the zoning ordinance. This administrative decision was appealed to the ZBA which denied the appeal. This denial was upheld by both the superior and Supreme Courts stating that live rock concerts was not a permissible expansion of the nonconforming use as a movie theater.

Peabody v. Town of Windham, 142 NH 488 (December 29, 1997) (See page 23)

New owners of a former well drilling business (preexisting nonconforming use) began to bring asphalt paving equipment onto the site and were told to stop by the building inspector and the property be returned "to those uses permitted by the zoning ordinance or the non-conforming use of a company that drills wells." The plaintiff appealed the administrative decision and the ZBA denied the appeal and ordered that no paving equipment or vehicles with residual paving materials be parked or repaired on the property.

After a rehearing, the ZBA reaffirmed their decision with 3 specific limiting conditions. The plaintiffs appealed to superior court which ruled that the conditions imposed by the ZBA were unreasonable and beyond its authority. The town now appealed to the Supreme Court who reversed the lower court stating that as a general matter of law the ZBA also has the power to attach conditions to appeals from decisions of administrative officers involving nonconforming uses, provided the conditions are reasonable and lawful.

The court went on to affirm that although nonconforming uses are protected, the property owner's rights to do as they please are not unlimited since the controlling policy of zoning law is to carefully limit the expansion of nonconforming uses with the goal of reducing them to conforming uses altogether. As a result, the court reversed all of the superior court's rulings, and upheld the limiting conditions attached by the ZBA. [20]

Cormier v. Town of Danville ZBA, 142 N.H. 775, (May 14, 1998) (See page 11)

The town of Danville denied a special exception for an excavation asserting that the road the trucks would use was a "historic landmark" and "natural landmark" which the excavation would adversely impact thus failing to meet two of the Danville special exception criteria. The plaintiff appealed to the superior court which agreed with the ZBA and upheld its denial but the Supreme Court reversed.

The Supreme Court found there was nothing in the record to support the ZBA's conclusion that the excavation would have an adverse impact on the road. The Court reminded the board that "the law demands that findings be more specific than a mere recitation of conclusions." Second, the court found that the road was not a historic landmark within the meaning of the ordinance. The court found little evidence as to its historic significance other than its age and the town's assertion that "it provides a physical and aesthetic link to the 18th century Tuckertown settlement." Lastly, the Court was unable to conclude that the road was a "natural feature" and relied on the Webster's dictionary definition of "natural" since it was not defined in the local ordinance. Because there were no supportable findings that the project would be incompatible with or have a detrimental impact on natural features or historic landmarks, the decisions of the ZBA and trial courts were reversed. [21]

Tausanovitch v. Town of Lyme, 143 N.H. 144, (November 9, 1998) (See page 27)

The landowner received a building permit for a bed and breakfast on June 12 and Tausanovitch did not file an appeal until August 6. The ZBA rules did not specify a time

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[20] - 1998 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 30, 1998

[21] - 1998 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 30, 1998

period within which appeals must be filed only that they be done in "a reasonable time." However, Tausanovitch already knew about the proposed bed and breakfast from the owner, a hearing notice and seeing the posted building permit. The Court ruled that in this context that the 55 day delay was not "reasonable".

Gray v. Seidel 143 N.H. 327 (February 8, 1999) (See page 13)

The Meredith ZBA denied a variance for a dock solely because the applicant failed to show any affirmative benefit to the public interest. The Court noted that the statute itself (**RSA 674:33, I(b)**), only requires a showing that the variance "will not be contrary to the public interest."

Hurley, et al v. Hollis, 143 N.H. 567 (May 25, 1999) (See page 23)

In 1993 the Town of Hollis amended its zoning ordinance "to allow a certain reasonable level of alteration, expansion or change to occur by special exception" to preexisting nonconforming uses if certain factors were satisfied. In 1994 the ZBA granted a special exception to the owner of a nonconforming machine tool business that would allow the construction of a new 18,000 square foot building across the road from the original location of the business along with a 32-space parking lot that would accommodate the expansion of the operation from 12 to 25 employees. A group of abutters appealed the grant of the special exception to superior court and won, and won again when the business owner appealed to the Supreme Court.

The case turned on the court's determination that both the language inserted into the zoning ordinance and the circumstances surrounding the adoption of the amendment by the voters demonstrated the it was not the intent to grant any greater expansion rights to nonconforming uses than are generally available under State law. (See **RSA 674:19** and the many Supreme Court cases that have referred to the statute in working out the details of how and to what degree a preexisting nonconforming use may be altered or expanded.) [22] Hollis voters subsequently approved an amendment to the zoning ordinance that broadened the rights of property owners to expand non-conforming uses, thus circumventing the Supreme Court's opinion.

Simplex Technologies, Inc. v. Town of Newington _____ NH _____ (January 29, 2001) (see page 14 & Appendix F)

Simplex wanted to use industrially zoned land for commercial purposes (a bookstore and a restaurant) in an area where the zoning permitted large shopping centers on the other side of the highway. While there were a limited number of commercial uses on the easterly side of the highway, the ZBA denied the variance, finding that none of the criteria for the granting of the variance had been met.

The trial court affirmed the ZBA's denial, on the basis that the hardship criterion had not been met. the Court concluded, "We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the

[22] - 2000 Land Use Law Update, Atty. Timothy Bates, OSP Annual Planning and Zoning Conference, May 6, 2000

constitutional right to enjoy property." The Court then announced the new three-part standard by which owners can demonstrate unnecessary hardship:

(1) 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;
(2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
(3) The variance would not injure the public or private rights of others."

NBAC v. Town of Weare ___ N.H. ___ (December 27, 2001) (See page 36)

NBAC sought to establish a gravel operation in Weare. When it appeared before the ZBA for a special exception, NBAC presented information that indicated the property was not in the Town's acquifer protection zone. The ZBA granted the special exception, then NBAC went to the Board of Selectmen for the excavation permit (under RSA 155-E:1, III, the Planning Board is the "regulator" of gravel operations, unless town meeting specifies otherwise--which was apparently the case in Weare).

As it turned out, the property was over an aquifer. The Town's own experts, however, determined that the proposed gravel operation met the standards of the Town's excavation ordinance. Nonetheless, the Board of Selectmen denied the permit on the grounds that:

- it would be injurious to the public welfare and would be visible from the road;
- it could have a profoundly detrimental impact on the environment, a pond, and the aquifer;
- a false statement was presented to the ZBA;
- the operation was not in the best interests of the community;
- the application did not fully comply with the gravel ordinance; and
- it would have a long-term negative impact on the aquifer and would be injurious to the residents of the Town.

The Board of Selectmen did not go any further to establish findings of fact.

NBAC moved for a rehearing, which the Selectmen denied. NBAC appealed to Superior Court, arguing that there was insufficient evidentiary basis for the Selectmen's decision, and that the Selectmen were collaterally estopped (remember this from Old Street Barn v. Peterborough? collateral estoppel = the issue has already been decided, and can't be relitigated by the same party in a different action). The Superior Court upheld the Selectmen's decision.

On appeal to the Supreme Court, NBAC argued that the Selectmen failed to provide adequate reasons for its decision, instead relying on the minutes of a public hearing. NBAC argued that this meant that the Superior Court had to speculate as to what portion of the public record the Selectmen were using as basis for their decision. The Town argued that this issue was waived,

as it was not raised in NBAC's motion for rehearing by the Selectmen. The Court agreed with the Town.

NBAC also argued that the Superior Court applied the wrong standard of review, with the suggestion that the Court should have weighed all of the evidence to establish "on the balance of the probabilities" that the Selectmen's decision was correct (RSA 677:6 and 677:15). Instead of putting all of the evidence into one pot and assessing it, the Supreme Court held that the individual points upon which the Selectmen based their decision should be assessed to determine "...if a reasonable person could have reached the same decision..." If any one of the findings of the Selectmen could be upheld, then its decision would stand. Here, the Supreme Court held that NBAC had failed to prove that all of the reasons used by the Selectmen were wrong.

Finally, NBAC argued that the Selectmen couldn't decide upon the same issues considered and resolved by the ZBA (collateral estoppel). The Court dodged this question sufficiently, by saying that there were reasons supporting the Selectmen's decision that had never been considered by the ZBA (I don't use "dodged" as a criticism: the court only decides those things it really must).

Some thoughts:

Public Welfare: the Court reiterated its understanding of "public welfare" as a broad and inclusive concept, embodying values that are "spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled," quoting Asselin v. Conway, 137 N.H. 368,371 (1993). This is important stuff--too often, local boards are faced with the question, "How can you define THAT?" In a sense, the Court is saying that public welfare is like art: you know it when you see it. But...

Fact Finding: it's clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers, because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time.

More Fact Finding: the important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good, too, but you have to have the conclusions on the record--say what you mean, and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason!"). Local boards must give any and all reasons.

Bonnita Rancourt & a. v. City of Manchester Submitted: November 21, 2002, Opinion Issued: January 10, 2003

In 2000, the Gately's bought a three (+/-) acre lot in Manchester, after correctly determining that stabling horses was a permitted use in the relevant district. In 2001, they contracted to build a single family house, then sought a permit to build a barn to stable two horses. To their surprise, they were informed that the city had recently amended its zoning ordinance to prohibit livestock (including horses) in the district. They filed for a variance, which the ZBA granted; Rancourt, an abutter, appealed to the superior court, and the court upheld the grant of variance. Rancourt appealed to the supreme court.

The supreme court recounted the standards that must be used by the superior court and by itself. The superior court should uphold the ZBA's decision unless it finds that the ZBA made errors of law or that the ZBA's decision was unreasonable based upon a balance of probabilities. Likewise, the supreme court will not reverse a superior court decision unless it finds that the court's decision is unsupported by evidence on the record or is legally erroneous. None of that happened here, and the supreme court upheld the superior court's decision, and recounted some of the evidence that supported the ZBA's decision.

When going over the standard for a variance, the supreme court recounted its January 2001 decision in Simplex v. Newington, in which it altered 25 years of jurisprudence by changing the standard by which zoning boards are to judge variance requests. In Simplex, the court recited the variance criteria thus:

According to RSA 674:33, I(b), a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. See RSA 674:33 (1996 & Supp. 2000). In addition, the board may not grant a variance if it diminishes the value of surrounding properties. See Ryan v. City of Manchester Zoning Board, 123 N.H. 170, 173, 459 A.2d 244, 245 (1983).

In Rancourt, however, this is how the court looked at the criteria:
RSA 674:33, I(b) (1996) authorizes a zoning board of adjustment to grant a variance if the following conditions are met: (1) the variance will not be "contrary to the public interest"; (2) "special conditions" exist such that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship"; (3) "the spirit of the ordinance shall be observed"; and (4) "substantial justice" will be done.

In Rancourt, the supreme court omitted the variance criterion dealing with diminution of surrounding property values. Either the court made a mistake, or it has turned its back on its own 50-year-old standard (the "diminution of values" criterion originally appeared in Gelinas v. Portsmouth, 97 N.H. 248 (1952)). An alternative explanation, and I think a reasonable one, is that the court is simply lumping the diminution criterion into the third prong of the Simplex test for hardship, which is as follows:

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

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.

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

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

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

This is perhaps similar to a "no harm - no foul" standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance*?

Certainly, if a person uses his/her property to the detriment of a neighbor's property value, then it can be argued that the neighbor's "private rights" have been injured.

Another point of interest in this case is the manner in which the court addressed the first prong of the Simplex hardship test--the reasonableness of the proposal in light of the unique setting of the property in its environment. Exactly what is meant by this test was fodder for a lot of discussion/debate when Simplex was decided. The court didn't help much by way of explanation, except to note in Simplex that the surrounding neighborhood had changed to such a degree that the limitations of the zoning ordinance were overly strict--i.e., that the requested variance should be granted in that case. It had little to do with the subject property itself. In Rancourt, the supreme court looked at how the property differed from others in the neighborhood (larger, hence could accommodate livestock more readily), and also recounted approvingly the nature of the property where the horses were proposed to be stabled ("thickly wooded buffer"). So it seems that an analysis of "setting of the property in its environment" should entertain considerations both of what the property itself is like, and what's going on in the surrounding neighborhood. [*Ben Frost, NH OEP, January 2003*]

Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, Argued: June 12, 2002, Reargued: January 14, 2003, Opinion Issued: January 23, 2003

The Hooksett planning board was hearing an application for a gas station/convenience store, and the conservation commission submitted to it a memo claiming that the use wasn't permitted under the zoning ordinance. The planning board sought the opinion of the code enforcement officer (CEO), who determined that the use was permitted. The commission appealed that determination to the ZBA, which found in favor of the CEO. The commission's motion for rehearing was denied by the ZBA. The commission then appealed to superior court. The ZBA moved to dismiss the case, arguing that the commission didn't have standing to appeal to superior court. The court denied the motion. The ZBA appealed the denial of the motion to dismiss to the supreme court. The supreme court found in favor of the ZBA--meaning that the commission did not have standing to appeal to superior court--and reversed the lower court: therefore, case dismissed.

This seems simple enough, but the supreme court's opinion is a rich analysis of statutory history that warrants reading. It resulted in a rare 3-2 split among the justices and an invitation to the legislature for clarification.

There are three basic steps in a ZBA appeal, each invoked by a different statute and each entitling different people to take action:

Appeal to ZBA. RSA 676:5, I--appeals may be taken to the ZBA regarding anything within the board's jurisdiction by "any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." Here the conservation commission easily fits into this as a municipal "board" affected by the decision of the CEO.

Motion for rehearing. RSA 677:2--rehearing of the ZBA decision may be requested by "the selectmen, any party to the action or proceedings, or any person directly affected thereby". This is the crux of the matter, as you will soon see. Apparently, the Hooksett ZBA originally believed that the conservation commission had standing to move for a rehearing, as the ZBA denied the motion, rather than refusing to consider it altogether (but this point is not clear in the supreme court's opinion).

Appeal to superior court. RSA 677:4--appeal of a ZBA decision may be made by "Any person aggrieved by any order or decision of the zoning board of adjustment... For purposes of this section, 'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2."

In argument to the supreme court, the ZBA maintained that the conservation commission did not have standing to appeal to the superior court because it also did not have standing to request a rehearing by the ZBA--specifically, that the commission was not a "party to the action." The court found that among municipal boards, only the selectmen have the authority to request the ZBA to rehear a decision. To support this reasoning the court said:

"The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, 'the prompt and orderly review of land use applications . . . would essentially grind to a halt.' . . . Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application. . . . Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation. . . . Finally, '[t]o permit contests among governmental units . . . is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted. . . . Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults.'" (citations omitted)

So even though it was the conservation commission that brought the original appeal to the Hooksett ZBA, it should not be considered "party" to the matter for the purpose of moving for rehearing or subsequent appeal to superior court. Among municipal boards, only the selectmen can act in that role.

I think that a different result might occur if the conservation commission could demonstrate that it was an abutter or had some other particularized interest in the matter being considered. So, if the conservation commission owned or held an easement on abutting property, or if it could demonstrate that land it controlled would be adversely impacted by a proposal even though not directly abutting, then the conservation commission might be able to demonstrate standing to move for rehearing and also to appeal to superior court. Note that the supreme court dismissed the notion that the conservation commission should be considered party to the action because it has a statutory duty to protect the town's natural resources. The court said that duty only allows it to appeal to the ZBA, not to take the action any further than that. In her dissent, Justice Dalianis said "As the commission initiated the proceedings before the ZBA, it seems evident to me that the commission is a 'party' to [the proceedings before the ZBA]. Accordingly, the commission was entitled to appeal the ZBA's decision to the superior court." [*Ben Frost, NH OEP, January 2003*]

Maureen Bacon v. Town of Enfield Argued: June 12, 2003, Opinion issued: January 30, 2004 (See page 101)

The NH Supreme Court recently handed down a deliciously complex opinion in Bacon v. Enfield (links below) that addresses (though does not necessarily clarify) some of the aspects of hardship delineated three years ago in Simplex v. Newington. Here, the court affirmed a superior court decision upholding the denial of a variance by the Enfield ZBA. The facts, briefly, are these: Bacon owned a shorefront home. The structure was legally non-conforming, as it did not comply a 50-foot shoreland setback enacted subsequent to the construction of the building. Bacon hired a contractor to install a propane boiler and an attached shed to contain it--she was converting from wood and electric heat. The shed was on the shore side of the house. Neighbors complained after the construction was complete, and

the application for a variance (presumably necessary before she could get a building permit for what she had already had done) was the result. The ZBA denied the variance, finding with a touch of irony that it "(1) did not meet the "current criterion of hardship"; (2) violated the spirit of the zoning ordinance; and (3) was not in the public interest." (ironic emphasis added). The ZBA denied a request for rehearing. Bacon appealed.

The superior court upheld the ZBA's decision, finding that there were reasonable alternatives to the use proposed by Bacon, and that there was a clear relationship between the purposes of the zoning ordinance generally and the specific 50-foot setback. The court said that granting the variance "would have some effect on the public rights of others in that it increases congestion along the shoreline and reduces minimally the filtration of runoff into the lake." (Remember that lack of impact upon the public and private rights of others is one of the prongs of the hardship criterion in Simplex.) The court also determined that the variance requested was not within the spirit of the ordinance, and that granting it would not do substantial justice (it's not clear that the ZBA decided that last point--substantial justice--so I don't know why the superior court addressed it).

Now we come to the good part--the supreme court's handling of this case. Writing for the court, Chief Justice Broderick gave great deference to the superior court and focused solely on the court's treatment of the "spirit of the ordinance." To quote: "...the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance. . . . .We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon's part, and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA "acted reasonabl[y] and lawfully" in denying the variance." Having come to this conclusion with regard to the spirit of the ordinance, Broderick chose not to address the other variance criteria.

The trouble with Broderick's opinion is that no other justices agreed with him. Duggan wrote a concurrance, with which Dalianis joined, coming to the same conclusion but for different reasons. Nadeau wrote a dissent, with which Brock (sitting by special appointment) joined. This decision looks like one of the characteristically split opinions of the US supreme court, in miniature.

The Duggan Concurrence.
Although agreeing with Broderick's conclusion, Justice Duggan preferred to focus on the hardship criterion of variances. He did so for reasons that most ZBA members will appreciate: to give you guidance. Duggan noted that hardship is the highest hurdle to surmount in a variance request, and that as a result of Simplex there was confusion. He said, "because

Simplex recently changed the unnecessary hardship standard, we believe that analysis of the unnecessary hardship factor in this case will provide guidance to trial courts and zoning boards when reviewing requests for variances." Duggen engaged in a fairly wide-ranging and extensively researched opinion, citing sources from other jurisdictions and academia. Despite the court's recent contrary treatment of a variance in Rancourt v. Manchester, Duggan felt that "Even under the Simplex standard, merely demonstrating that a proposed use is a "reasonable use" is insufficient to override a zoning ordinance. Such a broad reading of Simplex would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations." He then suggested that variance analyses should reflect the kinds of considerations used when examining whether or not there has been a constitutional taking of private property (under either the NH or US Constitutions). Finally, and perhaps most importantly, he concludes that "use" and "area/dimensional" variances should be treated differently. While the "use" variance goes to the heart of the purpose of zoning--the segregation of land according to use--"area" variances instead deal with matters that are to be regarded as "incidental limitations to a permitted use..." Merging these two lines of thought, he concluded "in considering whether to grant an area variance, courts and zoning boards must balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in Simplex."

Regarding the Simplex hardship prong that addresses the unique setting of the property in its environment, Duggan called for a comparison of the subject property to others similarly situated--which is really a pre-Simplex hardship test. He cites Rancourt as standing for this proposition (a variance for horses in a residential zone was OK because of the country setting, the unusual size of the lot, and the existence of a thick wooded buffer).

In conclusion, Duggan found that Bacon had failed to demonstrate unnecessary hardship. He suggested that there were other reasonable alternatives to the proposal (this too, harkens back to a pre-Simplex analysis), finding that the proposal was a request of convenience, not one of necessity. Finally, he felt that there was nothing unique about Bacon's property, in relation to other lakeside homes in the same district--they were similarly burdened by the setback requirement.

But remember, joining with Duggan was only Dalianis. Now for the dissent...

Nadeau's Dissent.
The court's Simplex opinion, which was unanimously decided (Brock, Broderick, Dalianis, and Horton (upon whose Grey Rocks dissent the Simplex opinion was largely based)), was written by Justice Nadeau. You may recall that the impact of the decision was to effectively recast how ZBAs were supposed to deal with the hardship question in variances (the other criteria were not addressed in Simplex). The bottom line of Simplex can be found in this quotation from it, appearing in Nadeau's instant dissent: "...there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." And so, the pendulum swung back toward property rights.

Here, Nadeau made fairly quick work in dismissing Broderick's opinion, suggesting that the "public interests" would only be affected by the proposal in a "de minimis" manner that was not worthy of the court's consideration. He then focused the bulk of his energy on Duggan's concurrence. The Simplex hardship test contains the following prong: [the variance should be granted if] "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." In the current case, Nadeau stated that after Simplex, a comparison of "similarly situated properties" was no longer necessary. Rather, only those considerations that pertain to the property itself should be entertained. In support of this, Nadeau cites the Rancourt case, stating that among the factual findings--"country setting, unusually large lot size, the configuration of the lot, and thick wooded buffer"--only the lot size dealt with a comparison with other properties. [Note that Nadeau only explicitly addresses one prong of the hardship test--uniqueness--and purposely leaves the other two. Given the language of his quick dismissal of Broderick's opinion, however, I believe that Nadeau would have found the proposal to be consistent with the other two prongs: no fair and substantial relationship between the ordinance and the specific restriction, and no injury to the private or public rights of others.]

So what are we to make of this case? It's hard to say, and I'm reminded of law school analyses of complex opinions that center upon figuring out who carries the swing vote. Where's the swing vote here? It could be suggested that Broderick is the swing vote, but there's an untold complexity--not so much in this case, but in the court's evolving views on hardship: the court's opinion in Simplex overturned a decision of superior court judge Richard Galway, who has just been nominated to the supreme court by Governor Benson. My guess is that if Galway is appointed, he could provide the vote that swings the court's pendulum back again. Time will tell. [*Ben Frost, NH OEP, February 2004*]

Thomas Ireland v. Town of Candia, Argued: March 11, 2004, Opinion Issued: May 17, 2004

The court affirmed a superior court decision dismissing a case against the Candia ZBA, in which the ZBA denied two variances. The plaintiff filed a motion for rehearing, which the ZBA ultimately decided was filed too late. The superior court agreed. The supreme court affirmed, basically saying that it really meant what it said in Pelletier v. City of Manchester. [*Ben Frost, NH OEP, May 2004*]

Michael Boccia & a. v. City of Portsmouth & a. Argued: March 11, 2004 Opinion Issued: May 25, 2004

(See Appendix G for information about this groundbreaking case.)

Russell Shopland & a. v. Town of Enfield Argued: October 8, 2003 Opinion Issued: July 15, 2004

The Shoplands owned a seasonal cottage consisting of one room and a bathroom for a total of approximately 378 square feet of living space. They wished to expand the cottage by building a two-bedroom, one-bathroom addition, adding an additional 338 square feet of living space. The cottage was within the fifty-foot setback from Crystal Lake. Because the addition was an expansion of a nonconforming use within the fifty-foot setback, the Shoplands sought a variance.

The ZBA denied the variance because: (1) it was "contrary to the public interest in that further violating the setback might endanger the health of the lake and establish a bad precedent"; (2) denying the variance did not result in unnecessary hardship; and (3) the substantial justice provided to the Shoplands was "outweighed by the potential loss suffered by the general public if harm is done to the lake." In finding that the Shoplands did not establish unnecessary hardship, the ZBA noted that "many of the other lots in the area suffer the same topographical problems."

On appeal, the superior court vacated the ZBA's decision. Applying the *Simplex* test (because *Boccia* had not yet been decided at the time of the superior court decision), the court decided that the applicants had satisfied the "hardship" requirement. The Supreme Court reversed and remanded the case back to the lower court with instructions to determine if the newly announced *Boccia* standard was met. The Supreme Court did not mention the "public interest" or "substantial justice" findings of the ZBA, either of which were sufficient grounds for denial. It appears the Supreme Court viewed this case as an "area" variance case with seemingly no consideration that this might be a "use" variance.

Leonard Vigeant v. Town of Hudson No. 2004-126, February23, 2005

In May 2004, with its *Boccia v. City of Portsmouth* decision, the New Hampshire Supreme Court created a new unnecessary hardship standard for area variances, while limiting the application of the *Simplex* unnecessary hardship standard to use variances. In this case, involving the denial by the Hudson Zoning Board of Adjustment of a setback variance, the Court interprets the application of the new area variance criteria.

A developer proposed construction of a five-unit multifamily dwelling in a business zone where multifamily dwellings, defined by the ordinance as three or more attached dwelling units, are permitted. The 1.6 acre parcel was described as "long, narrow, [and] mostly rectangular" An area of wetlands was located on the parcel's southerly boundary, "created by drainage from Route 111 and failure to maintain the drainage ditch." The zoning ordinance required a 50-foot setback from Windham Road, which bounds the property, as well as from any wetlands.

The developer sought a variance to allow development within 30 feet of Windham Road, as well as a special exception to allow temporary encroachment 10 feet into the wetlands during

construction. The ZBA unanimously denied the variance request, finding no evidence of hardship, that the multifamily dwelling proposal was not consistent with the spirit of the zoning ordinance, that there would be a diminution of surrounding property values and that it would be contrary to the public interest. The special exception request was also denied.

The ZBA denied the developer's request for a rehearing, which was accompanied by a letter from a real estate appraiser who stated that the multifamily development would not have an impact on the value of surrounding property. The developer appealed to the superior court, which overturned the ZBA's denial of the variance. The trial court applied the *Simplex* variance standard because the Supreme Court had not yet reached its decision in *Boccia,* which established the new unnecessary hardship standard for area variances.

The trial court noted that the proposed five-unit multifamily dwelling was a permitted use of the property and found that the lot was "unique, not just in its setting, but in its very character and description." The trial court wrote, "It would be difficult to envision any reasonable permitted use which could be made of this parcel of real estate. Any reasonable permitted use of this real estate would probably require at least similar relief from the setback requirements."

The trial court also found no evidence that surrounding property values would be adversely affected by the variance, or that the variance would not be consistent with the spirit of the zoning ordinance, or that the variance was contrary to the public interest.

The town appealed the trail courts decision to the Supreme Court, which noted that since *Simplex* it had "further refined" the unnecessary hardship standard in *Boccia.* The *Boccia* unnecessary hardship standard requires the applicant for an area variance to satisfy two factors: "(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance."

Under the first factor, the Court explained, "the landowner need not show that without a variance the land would he valueless. Rather, assuming that the landowner's plans are for a permitted use, but special conditions of the property make it difficult or impossible to comply with applicable setbacks or other restrictions, then the area variance might be necessary from a practical perspective to implement the proposed plan."

The Court said that under the first factor "it is implicit.., that the proposed use must be reasonable. When an area variance is sought the proposed project is presumed to be reasonable if it is a permitted use under the town's applicable zoning ordinance." An area variance cannot be denied because the ZBA disagrees with the proposed use of the property, the Court said,

Because multifamily housing was a permitted use in the business zone, the court said, "the issue is whether the plaintiff has shown that to build five multifamily dwelling units it is necessary to obtain a setback variance, given the property's unique setting in its environment." The Court pointed out the fact that the trial court had found that "because of the setback from Windham Road and the wetlands buffer zone ... there would be an area of only approximately

20 to 25 feet in width and less than 200 feet in length which could be developed." The Court agreed with the trial court that "it would be difficult to envision any reasonable permitted use which could be made of this parcel of real estate."

Under the second factor, the Court said, "the question is whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances. Whether an area variance is required to avoid an undue financial burden on the landowner is determined by a showing of an adverse effect amounting to more than mere inconvenience, . . . The applicant is not, however, required to show that without the variance the land will be rendered valueless or incapable of producing a reasonable return."

The Court explained that "there must be no reasonable way for the applicant to achieve what has been determined to be a reasonable use without a variance. In making this determination, the financial burden on the landowner considering the relative expense of available alternatives must be considered."

The Court said the Hudson ZBA incorrectly focused on whether fewer than five dwelling units were more suitable. "In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material," the Court wrote.

The Court held that the developer satisfied the two *Boccia* hardship criteria for an area variance. Because the setback requirements from Windham Road and the wetlands buffer zone would leave a buildable space of only 20 to 25 feet wide and less than 200 feet long, the Court wrote, "The evidence supports the conclusion that there is no reasonable way for the plaintiff to achieve the permitted use without a variance. We hold that the plaintiff's proposed use is a permitted use and that special conditions of the property make it impossible to comply with the setback requirements. From a practical standpoint, an area variance is necessary to implement the proposed plan."

Susan Slack, NHMA Legal Services Counsel
New Hampshire Town and City, April 2005

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APPENDIX F

SIMPLEX V. NEWINGTON BACKGROUND INFORMATION

[*The following discussion of Simplex Technologies, Inc. v. Town of Newington and its effect on variance applications is from materials prepared by Atty. Peter Loughlin, distributed at the Office of State Planning Annual Planning and Zoning Conference on May 12, 2001. We are grateful to him for allowing us to use this material.*]

In his October 1992 dissenting opinion in *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 246, Justice Sherman Horton stated: "I would ask for a full reconsideration of our definition of hardship, in the appropriate case...." Justice Horton determined that the appropriate case to reconsider the definition of unnecessary hardship was the otherwise unremarkable case of *Simplex v. Newington*. On January 29, 2001, the New Hampshire Supreme Court signaled a new tact on the subject of unnecessary hardship when it stated as follows:

"We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property."

The Supreme Court's decision represents a significant change in the law regarding variances, however, contrary to some speculation, it did not reverse the entire body of variance law that has been developing over the last 50 years. Rather, it represents the latest stage in the continuing evolution of this one particular aspect of zoning law. Much of the law regarding variances remains unchanged.

I. ASPECTS OF VARIANCE LAW NOT CHANGED BY SIMPLEX V. NEWINGTON

A. Purpose of Variances: The reason why variances are part of the law of zoning remains unchanged. "Variances are included in a zoning ordinance to prevent an ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Ouimette v. City of Somersworth*, 119 NH 292, 294 (1979).

B. Burden of Proof: The parties seeking a variance continue to have the burden of establishing each of the requirements for that variance. *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992).

C. Presumption of Validity: There continues to be a presumption that all zoning ordinances are valid, and the party challenging their constitutionality carries the burden of overcoming this presumption. *Town of Nottingham v. Harvey, 120 N.H.* 889, 892 (1980)

D. Financial Hardship Not Enough: The law regarding financial hardship remains the same. The fact that the application of an ordinance may cause a landowner to suffer some financial loss is not (by itself) sufficient to create an unnecessary hardship. *Governor's Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983); *Olszak v. Town of New Hampton*, 139 N.H. 723, 726 (1995).

E. Personal Circumstances of Owner: A hardship does not exist if it just relates to the personal circumstances of the landowner. *Ryan v. City of Manchester*, 123 N.H. 170, 174

(1983)(health problems which prevented landowner from working outside her home did not justify variance for business in home in residential district).

F. Necessary Hardship: Variances may still be granted only if the application of an ordinance creates an "unnecessary hardship." All land use regulations may cause hardship to a landowner. The hardship may be considered "necessary" if it affords commensurate public advantage and is required in order to give full effect to the purposes of the ordinance. *Grey Rocks (dissent p 247)*

II. THE STATUTE AUTHORIZING VARIANCES

The New Hampshire Supreme Court created the definition of unnecessary hardship for this State and the Supreme Court has now redefined it. The standard zoning enabling legislation adopted by the New Hampshire Legislature in 1925 spells out the basic requirements for a variance and those requirements cannot be changed by the Court. **RSA 674:33,I(b)** provides that the Zoning Board of Adjustment shall have the power to:

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.

III. REQUIREMENTS CONTINUE TO EXIST IN ORDER FOR A VARIANCE TO BE GRANTED

1. the granting of a variance cannot result in the diminution of value of surrounding properties.
2. the variance cannot be contrary to the public interest.
3. the granting of a variance will result in substantial justice remains in place.
4. The use resulting from the variance must not be contrary to the spirit and intent of the ordinance.

IV. THERE MUST BE SPECIAL CONDITIONS RELATED TO THE PROPERTY THAT IS THE SUBJECT OF THE VARIANCE APPLICATION

The requirements regarding *special conditions* have not changed and must be kept in mind when applying the new standard for hardship. The statute allows the granting of a variance only when "owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Unless there are special conditions regarding a particular piece of property that cause the ordinance to result in unnecessary hardship, a variance cannot be granted. Examples of "special conditions" might be where an unusual shape of a lot causes the setback requirements to eliminate any reasonable building envelope, *Husnander v. Town of Barnstead*, 139 N.H. 476 (1995) (banana shaped building envelope unusable without relief), or where all other lots enjoyed the benefits sought by applicant. *Belanger v. Nashua*, 121 N.H. 389 (1981) (most other lots had commercial uses).

If all other lots in the zoning district are similarly affected by the zoning ordinance so that there are no "special conditions" affecting the lot of the applicant, the applicant is not entitled to variance relief. *Hanson v. Manning*, 115 N.H. 367 (1970)("Absent 'special conditions' which distinguish the property from other property in the area, no variance may be granted even though there is hardship." p 369 - applicant had 130 acres characterized by ledge and wetlands

just like every other parcel in that portion of the Town); *Crossley v. Town of Pelham*, 133 N.H. 215 (1990)(200 of applicants' neighbors had homes also on undersized lots which could not accommodate a two car garage without variance relief).

V. WHAT *SIMPLEX V. NEWINGTON* HAS CHANGED

Simplex v. Newington has not turned zoning law, or for that matter all variance law, on its ear. It does, however, reflect two significant changes: (1) it signals the New Hampshire Supreme Court's changing attitude toward private property rights and the granting of variance relief, and (2) it explicitly marks the change in the Court developed definition of "unnecessary hardship."

The Change In The Court's Attitude

Before *Simplex*: Between 1987 and 1992, the Court took a very hard line on variances. In each of ten cases decided during that time period, the Court ruled that variances should not have been granted.

After *Simplex*: Just how far the Court's attitude concerning unnecessary hardship will evolve remains to be seen. The clear thrust of the Court's thinking at the present time is summarized in the following paragraph from the *Simplex* decision:

"Inevitably and necessarily, there is a tension between zoning ordinances and property rights, as Courts balance the rights of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess and protect property. *See N.H. Const. pt. I, arts. 2, 12.* These guarantees limit all grants of powers to the State that deprive individuals of the reasonable use of their land."

In short, rather than routinely finding that the difficult conditions for variances have not been met, the Court will now be much more inclined to try to attempt to strike a balance between municipal regulations and private property rights.

APPENDIX G

BOCCIA V. PORTSOUTH BACKGROUND INFORMATION

Boccia: Court Distinguishes Between Use and Area Variances

Since the NH Supreme Court handed down its startling decision in *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001), in which it lowered the bar for property owners to demonstrate "unnecessary hardship" as part of a request for a zoning variance, planners in New Hampshire have watched the Court's subsequent zoning decisions with wariness and fascination. On May 25, 2004, the other shoe dropped, in the form of the Court's opinion in *Boccia v. City of Portsmouth*, __ N.H. __ (2003). In *Boccia*, the Court concluded that it must distinguish between use variances and dimensional variances, observing that the hardship criteria of *Simplex* could only logically be applied to uses of land.

The *Boccia* case involves a long and convoluted history, but the important elements can be summarized fairly simply. A Portsmouth property owner, Raymond Ramsey, wanted to develop his land for a 100-room hotel, opposite the existing Marriot Hotel on Market Street Extension. After a legal battle that resulted in a court-ordered zoning change allowing the hotel use, Ramsey then applied to the ZBA for six variances. These included lot size, frontage, front yard setback, two side yard setbacks, and rear yard setback. The ZBA granted the variances, which was appealed by the owner of the land underlying the Marriot Hotel, Michael Boccia. The superior court remanded the decision to the ZBA for further proceedings to clarify its opinion. Applying the Simplex hardship criteria the ZBA again granted the variances, which was again appealed by Boccia. The superior court upheld the ZBA's decision to grant the variances. Boccia appealed to the Supreme Court.

The *Boccia* decision was written by the most recent appointee to the Court, Richard Galway. Recall that it was his superior court decision in *Simplex* that was reversed by the Supreme Court—not because Galway had misapplied the law, but because the Supreme Court had misstated the law of hardship and was attempting to correct it in *Simplex*. In *Boccia*, Galway borrowed heavily from the concurring opinion of Justices Duggan and Dalianis in the Court's confusing and complex decision in *Bacon v. Town of Enfield*, __ N.H. __ (2004). In their *Bacon* concurrence, Duggan and Dalianis advocated for a view of hardship that would distinguish between use and area variances. Five months later, that view became the law.

The Court said:

> "Here, the [superior] court upheld the ZBA's finding that the use of the property as a 100-room hotel was reasonable, given the unique setting of the property in its environment. In so doing, the court applied the *Simplex* test for unnecessary hardship to an area variance. The question remains, however, whether this *Simplex* test governs the unnecessary hardship prong when seeking an area variance. We do not believe it does."

Having already reviewed how it has looked upon area variances in the past, and especially focusing on the *Bacon* concurrence, the Court concluded:

> "...we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met."

Drawing on other jurisdictions, the Court developed the following two-prong test for finding hardship in area variances:

(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and

(2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

In applying the first prong, the Court said that the owner does not need to establish that without the variance the property would be valueless—rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In this case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong, the Court explained, calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined. The Court found that the record in this case was insufficient to determine if this prong had been met, and remanded for further proceedings.

This is a watershed case that will be discussed for years to come; its practical implications are yet untold. Although the first prong of the new area variance hardship test is legally thorny (exactly what constitutes "special conditions of the property"?), it seems that the second prong will be more problematic for zoning boards to apply. Each request for an area variance will have the potential to result in a fishing expedition, as angry abutters hire experts to develop "reasonable" alternatives to counter the "reasonable" proposal of the applicant. In the end, it seems that the side with the greater resources (meaning the capacity to hire the best experts) will win out.

Thus, the question that remains open is how to assess the use proposed by the applicant in light of the second prong of the area variance hardship test. In the *Boccia* case, the proposal was for a 100-unit hotel. The second prong identifies "the benefit sought by the applicant" as the measure of reasonableness-does this mean that the ZBA should be looking at all hotel alternatives, or just 100-unit hotel alternatives? Reading between the lines, my feeling is that the Court would prefer to start with 100-unit alternatives, but then look at others and review the financial impact. The test would be something like this: can you get the applicant an approximation of the specific use that's proposed (rather than the general use allowed) without imposing an "undue" financial burden.

Also, in this case, the Court took pains to remind the reader that hardship is only one of five parts of the variance consideration. In this case, however, the lower court had already found that the other four parts of the variance test (which are not different for use or area variances) had been met. In *Simplex*, the ZBA had found against the applicant on several of the hardship criteria, but weirdly enough, only the hardship criterion had been appealed.

Ben Frost
NHOEP August 2004

New Variance Criteria: *Simplex* and *Boccia*

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 (dimensional) 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.

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