

# ***The Basic Functions of The N.H. Zoning Board of Adjustment***

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[**Caveat:** In the interests of full disclosure: I am an attorney practicing in the planning and zoning field. However, I also serve on the Zoning Board of Adjustment in my own town. It's impossible to separate these two roles 100%.]

## ***2. ZBA BASIC FUNCTION #2 – DECIDING "GRANDFATHERING" CLAIMS.***

This topic is too complex to fully cover here. But see “Grandfathered – The Law of Nonconforming Uses and Vested Rights” (2002 Municipal Law Lecture Series, Lecture #3 by H. Bernard Waugh, Jr.), available from the N.H. Municipal Association.

(a) The *touchstone* of the issue is protecting “investment-backed expectations” from what might otherwise be an unconstitutional “taking.” The whole idea of property rights involves a paradox: Society’s concepts of what “property” *is* can change over time, and yet the very idea of “property” embodies permanence, and protection *against* changes in the rules. In other words “property” is a continually changing concept whose very meaning implies protection against change. It is the job of the law of “grandfathering” to reconcile the two halves of this paradox.

(b) The *most common mistake* is thinking “grandfathering” means the property is *exempt* from zoning (“My grandmother ran a sewing shop here 10 years ago, therefore I can put any commercial use I want.”) **Wrong.** Only a *specific* use is grandfathered – not some alternative use you had no investment-backed expectation in. (The word “commercial” is not a specific use.)

(c) *The relevant time* is when the zoning restriction first took effect. Exactly what existed at that time? A use which was illegal when it began cannot become legally “grandfathered” no matter how long it exists (at least not except under the unusual “estoppel” situation, where the town actually participated in permitting the illegality – and in those circumstances, consider using the “equitable waiver” statute instead).

(d) *Allowable expansions of Nonconforming Uses* must meet the court-created tests. The Board should look at:

(1) **The extent to which the proposed use reflects the nature and purpose of the prevailing nonconforming use. The proposal should be**

a “natural activity, closely related to the manner in which the piece of property [was] used” at the time the restriction was enacted; In other words, is it really the *same* use, simply “evolving” through new customs or technology?

(2) Whether the proposed use is merely a different manner of utilizing the same use or constitutes a use different in character, nature and kind;

(3) Whether the proposed change in use will have a substantially different effect on the neighborhood; and

(4) In the case of dimensional nonconformities, whether the proposed change or expansion renders the property proportionally less adequate, in terms of the requirement to which the property doesn’t conform. [This 4<sup>th</sup> test, although not mentioned in the *Hurley v. Hollis* case (143 N.H. 567 (1999), was set out in *New London Land Use Assn. v. New London ZBA*, 130 N.H. 510, 516 (1988).]

(e) *No Bootstrapping* into a special exception or variance. Either an owner qualifies as a “natural expansion” of a nonconforming use (under the above 4 tests), *or* he/she must qualify *in full* for the special exception or variance. The ZBA *cannot* waive any requirements for a variance or special exception merely because of a “grandfathered” aspect. Procedurally this means you should decide “grandfathering” questions *first*. If the person’s requested use is not “grandfathered,” *only then* do you examine variance or special exception issues – and in *that* examination, “grandfathering” issues are ignored.

[NOTE: This is why some applicants apply for two types of relief at the same time (a) an appeal of the zoning administrator’s decision that the desired use is not “grandfathered” *and* (b) in the alternative, a request for a variance for that use (or special exception as the case may be).

(f) Legally a variance and a nonconforming use are virtually the same thing. If you couldn’t enlarge a variance, you probably can’t enlarge a nonconforming use either.

(g) A substandard lot is *not* “grandfathered” for everything without a variance. Issues: (a) What does your ordinance say? (Is there a lot of record clause?) (b) Is the lot part of a “grandfathered” subdivision, under the so-called 4-year exemption (RSA 673:39)? (c) Otherwise apply the variance procedure to the use of substandard lots.