The Board of Adjustment In New Hampshire

A Handbook for Local Officials

November 2015

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TABLE OF CONTENTS

Preface iii

Caution v

New Hampshire Municipalities Without A Zoning Ordinance vii

New Hampshire Village Districts With Zoning Ordinances ix

Record of Amendments xi

Introduction xvii

CHAPTER I: Organization I-1

Establishing the Board I-1
Board Members and Alternate Members I-1
Organizing the Board I-4
Rules of Procedure I-5

CHAPTER II: Powers and Duties of the Zoning Board of Adjustment II-1

Authority to Regulate the Use of Land II-1
Appeal from Administrative Decision II-3
Special Exceptions II-4
Variances II-7
Equitable Waiver of Dimensional Requirements II-18
Expansion of Nonconforming Uses II-19
Abandonment of Nonconforming Uses II-22
The ZBA Acting as the Building Code Board of Appeals II-24
Other Responsibilities II-26
What the Board Should Not Do II-28

CHAPTER III: Procedures III-1

Application III-1
Subsequent Applications III-4
Plot Plan Recommended III-4
Effect of the Appeal III-5
Notification III-5
Public Hearing III-7
Consideration of Evidence and Testimony III-9
Expenditure of Fees III-10
Disqualification III-11
Findings of Facts III-13
Statement of Reasons III-14
Decision III-14
Recommendation on the Timing, the Writing, and the Vote III-17
Attaching Conditions and Time Limits III-18
Joint Meetings and Hearings III-21
Executive Session III-21
Records III-22
Integrated Land Development Permit III-22
Summary III-23

CHAPTER IV: Appeal From Board's Decision IV-1

Rehearing IV-1
Appeal to Superior Court IV-5
Appeal of Planning Board Decision IV-7

APPENDIX A: Suggested Rules of Procedure for Local Boards of Adjustment A-1

APPENDIX B: Instructions to Applicants Appealing to the Board of Adjustment B-1

APPENDIX C: Suggested Forms C-1

Appeal from an Administrative Decision C-2
Application for a Special Exception C-3
Application for a Variance C-4
Application for an Equitable Waiver of Dimensional Requirements C-6
Newspaper Notice C-8
Personal Notice C-9
Individual Board Member Variance Worksheet C-10
Findings of Facts C-11
Notice of Decision - Granted C-12
Notice of Decision - Denied C-13

APPENDIX D: Zoning Board of Adjustment Case Law D-1

APPENDIX E: Simplex v. Newington Background Information E-1

APPENDIX F: RSAs Referenced F-1

BIBLIOGRAPHY BIBL-1

PREFACE

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 on the procedures, organization, powers, and duties 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 auspice of the New Hampshire Planning and Development Commission in 1959. The handbook was revised in 1961, 1964, 1969, 1972, and 1979. It was rewritten in 1985 to reflect the 1983 re-codification 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. The handbook has been updated annually since 2002.

This edition incorporates statutory changes enacted through the 2015 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 Timothy Bates, Benjamin 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*.

Information regarding handbooks and other publications available from the NH Office of Energy and Planning can be found at http://www.nh.gov/oep/planning/resources/publications.htm.

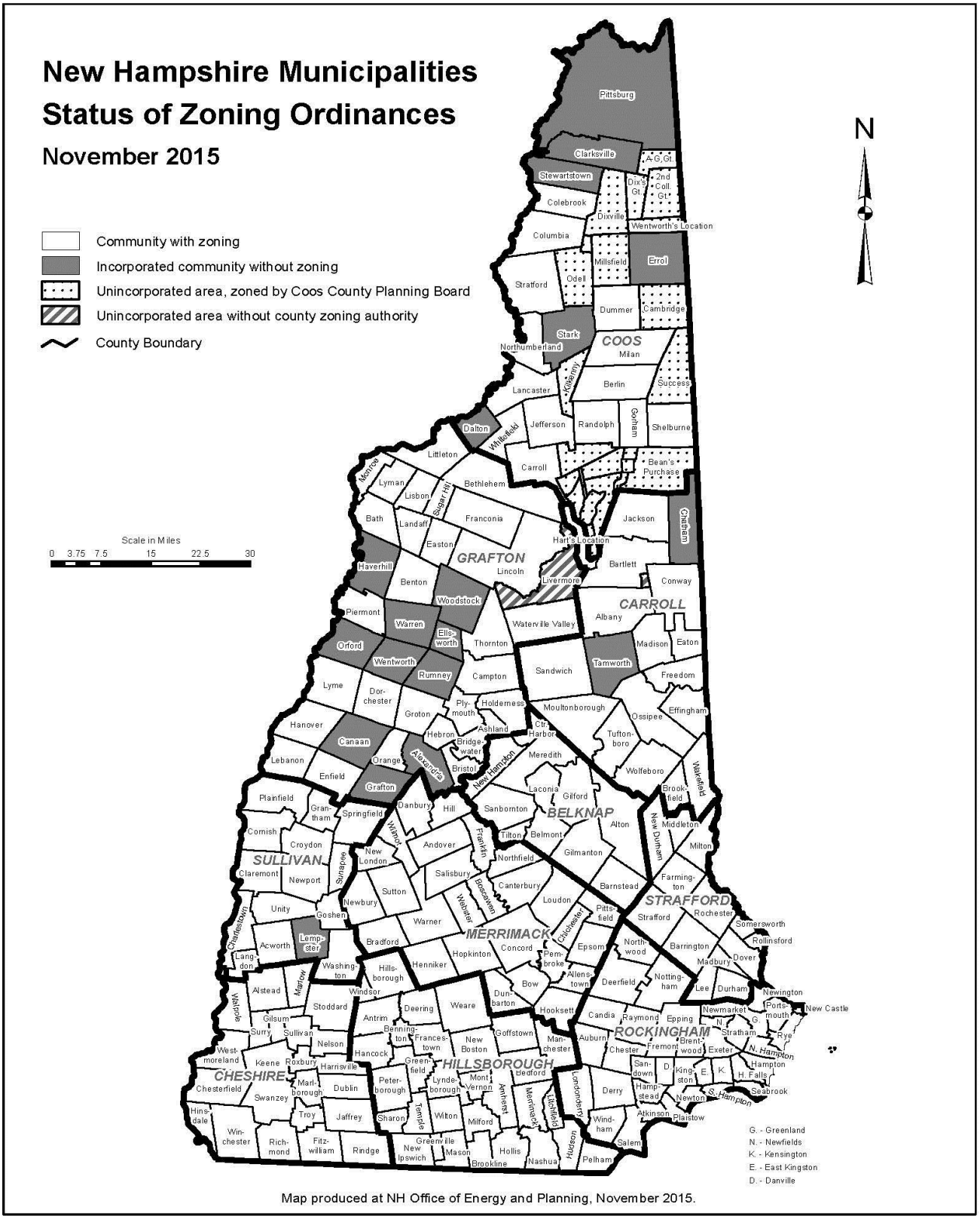
CAUTION

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.

This material is being offered as a service to users and is considered "as is" without any expressed or implied guarantee or warranty by the State of New Hampshire or any subdivision thereof pertaining to the operation and administration of the board or for the accuracy of the information provided.


New Hampshire Municipalities
Status of Zoning Ordinances
November 2015
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 3.75 7.5 15 22.5 30
N
COOS
GRAFTON
CARROLL
BELKNAP
STRAFFORD
SULLIVAN
MERRIMACK
ROCKINGHAM
HILLSBOROUGH
CHESHIRE
Pittsburg
Clarksville
Stewartstown
Colebrook
Columbia
Stratford
Dixville
Wentworth's Location
Millsfield
Errol
Odell
Dummer
Cambridge
Stark
Northumberland
Milan
Berlin
Success
Lancaster
Kilkenny
Jefferson
Randolph
Gorham
Shelburne
Dalton
Whitefield
Littleton
Carroll
Bean's Purchase
Monroe
Lyman
Lisbon
Bethlehem
Sugar Hill
Bath
Landaff
Franconia
Jackson
Chatham
Easton
Hart's Location
Haverhill
Benton
Lincoln
Bartlett
Livermore
Conway
Woodstock
Piermont
Warren
Ellsworth
Waterville Valley
Albany
Orford
Wentworth
Rumney
Thornton
Madison
Eaton
Campton
Sandwich
Tamworth
Freedom
Lyme
Dorchester
Groton
Plymouth
Holderness
Moultonborough
Effingham
Hanover
Hebron
Ashland
Ctr. Harbor
Ossipee
Canaan
Bridgewater
Tufton-boro
Lebanon
Orange
Alexandria
Bristol
Meredith
Wolfeboro
Wakefield
Enfield
New Hampton
Grafton
Laconia
Gilford
Brookfield
Plainfield
Grantham
Springfield
Danbury
Hill
Sanbornton
Alton
Middleton
Cornish
Croydon
Andover
Franklin
Tilton
Belmont
New Durham
Milton
Claremont
Newport
Sunapee
New London
Northfield
Gilmanton
Salisbury
Farmington
Unity
Sutton
Canterbury
Barnstead
Newbury
Webster
Boscawen
Loudon
Pittsfield
Rochester
Goshen
Warner
Strafford
Somersworth
Charlestown
Acworth
Lempster
Bradford
Chichester
Epsom
Northwood
Rollinsford
Langdon
Washington
Hopkinton
Concord
Pembroke
Barrington
Dover
Hillsborough
Henniker
Madbury
Alstead
Marlow
Windsor
Bow
Allenstown
Deerfield
Nottingham
Lee
Durham
Newington
Stoddard
Deering
Weare
Dunbarton
Hooksett
Newmarket
Portsmouth
New Castle
Waldoby
Gilsum
Antrim
Candia
Raymond
Epping
Surry
Sullivan
Benington
Francestown
Goffstown
Auburn
Chester
Fremont
Brentwood
Exeter
Stratham
Rye
Nelson
New Boston
Manchester
Hancock
Greenfield
Bedford
Sandown
Kingston
Hampstead
Hampton
Westmoreland
Keene
Roxbury
Harrisville
Mont Vernon
Amherst
Merrimack
Londonderry
Derry
Newton
Seabrook
Chesterfield
Marlborough
Dublin
Peterborough
Lyndeborough
Hollis
Hudson
Windham
Atkinson
Plaistow
Swanzey
Hinsdale
Troy
Jaffrey
Sharon
Temple
Wilton
Milford
Salem
Winchester
Richmond
Fitzwilliam
Rindge
New Ipswich
Greenville
Mason
Brookline
Nashua
Pelham
G. - Greenland
N. - Newfields
K. - Kensington
E. - East Kingston
D. - Danville
Map produced at NH Office of Energy and Planning, November 2015.

NEW HAMPSHIRE VILLAGE DISTRICTS WITH ZONING ORDINANCES

This table includes those village districts identified as of November 2015 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 visit the Village Districts heading on the Land Use Boards and Municipal Officials page of the Resource Library at:

http://www.nh.gov/oep/resource-library/land-use/index.htm

VILLAGE DISTRICT	TOWN	PLANNING COMMISSION	COUNTY
Haverhill Corner Precinct	**Haverhill**	**NCC**	**Grafton**
Hopkinton Village Precinct	**Hopkinton**	**CNHRPC**	**Merrimack**
Little Boars Head	**North Hampton**	**RPC**	**Rockingham**
New Hampton Village District	**New Hampton**	**LRPC**	**Belknap**
North Walpole Village District	**Walpole**	**SwRPC**	**Cheshire**
Rye Beach Village District	**Rye Beach**	**RPC**	**Rockingham**
Seabrook Beach Village District	**Seabrook**	**RPC**	**Rockingham**

NEW HAMPSHIRE REGIONAL PLANNING COMMISSIONS

Central New Hampshire Regional Planning Commission
Lakes Region Planning Commission
Nashua Regional Planning Commission
North Country Council, Inc.
Rockingham Planning Commission
Southern New Hampshire Planning Commission
Southwest Region Planning Commission
Strafford Regional Planning Commission
Upper Valley Lake Sunapee Regional Planning Commission

RECORD OF AMENDMENTS

2007

- Removed Groton from the towns with no zoning map.
- Amended Chapter II: Use and Area Variances to add reference to *John R. Harrington & a. v. Town of Warner* and text from Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, 3rd Ed., § 24.03A.
- Amended Chapter IV: Appeal from Board's Decision to add a portion about conducting the meeting to consider a motion for rehearing and added reference to *Colla v. Town of Hanover*.
- Added *John R. Harrington & a. v. Town of Warner* to Appendix D Zoning Board of Adjustment Case Law.
- Added *Colla v. Town of Hanover* to Appendix D Zoning Board of Adjustment Case Law.

2008

Note: The entire variance section was amended in 2009 so some of the changes noted below may no longer apply.

- Added a reference to *Chester Rod and Gun Club, Inc. v. Town of Chester* in the public interest variance criteria section of Chapter II on page II-9.
- Added a reference to *Garrison v. Town of Henniker* in the variance section under the first prong of the *Simplex* test for a use variance that there must be something unique about the property, not just that it is just appropriate for the proposed use.
- Added "Tests to Determine Whether 'Unnecessary Hardship' Exists to Justify Grant of a 'Use' Variance" to the unnecessary hardship section of the variance criteria.
- Added "Unnecessary Hardship – Two Factors" to the variance section.
- Added a reference to *Malachy Glen Associates, Inc. v. Town of Chichester* (March 20, 2007) in the "spirit of the ordinance must be observed" variance criteria section on page II-10.
- Added reference to the apparent conflict between RSA 676:3 (requiring minutes to be available within 144 hours) and RSA 91-A:2, II revised in 2007 requiring minutes to be available within 5 "business days") in:
  - Chapter III: Procedures - Public Hearing;
  - Chapter III: Procedures - Attaching Conditions and Time Limits;
  - Chapter IV: Appeal From Board's Decision;
  - Suggested Rules of Procedure in Appendix A.
- Added an excerpt from "Arranging Your Furniture – Operational Basics For Local Land Use Boards," H. Bernard Waugh, Jr., Esq., about how to produce the written decision in the Decision section of Chapter III, Procedures on page III-14.
- Added a quote from *Michelle J. Robinson v. Town of Hudson* No. 2005-687, December 20, 2006, on page III-16.
- The board has the inherent right to reconsider their decision to consider a motion for rehearing as long as it is within the 30-day appeal period [*74 Cox Street, LLC v. City of Nashua* (September 21, 2007)], page IV-2.
- Added a reference to *Hooksett Conservation Commission v. Hooksett ZBA* (January 23, 2003) that clarifies that the Board of Selectmen is the only municipal board that has standing to appeal a ZBA decision, page IV-2.
- Added a reference to *McDonald v. Town of Effingham ZBA*, 152 N.H. 171 (2005) that the ZBA should consider granting a motion for rehearing if they want to add additional reasons for denial, page IV-3.
- Added a reference to the board reconsidering their own decision in the rules of procedure in Appendix A on page A-3.

- Cases added to Appendix D Zoning Board of Adjustment Case Law:
  - *McDonald v. Town of Effingham ZBA*
  - *Chester Rod and Gun Club, Inc. v. Town of Chester*
  - *Garrison v. Town of Henniker*
  - *Michelle J. Robinson v. Town of Hudson*
  - *Malachy Glen Associates, Inc. v. Town of Chichester*
  - *74 Cox Street, LLC v. City of Nashua*

October 2009

- Clarification of the limited role of an inactivated alternate on page I-3.
- An alternate member can be designated to temporarily fill a vacant position on page I-4.
- Clarification that a public hearing can be continued to a specific time, place and date provided announcement is made prior to the vote to continue on page III-8.
- Minutes and the decision must be made available to the public within five business days rather than 144 hours pursuant to HB210 and SB189 on pages III-9, III-16, IV-1 and A-4.
- Copies of written decisions must be made available to applicants pursuant to SB189 on page III-15 and conditions must be included on the plat on page III-17.
- Communities have the choice as to whether to create an elected or appointed zoning board of adjustment. Previously, the statutes included provisions for how to establish a board using either organizational structure but only included provisions for how to switch from a previously established and elected board to an appointed board. New language was drafted through HB534 [CL286 (2009)] that permits, and sets the process, of switching from an appointed board to elected board on page I-2.
- General revision to the Variance section in Chapter II - Powers and Duties of the Board of Adjustment, reflecting the change to RSA 674:33 pursuant to SB147 on pages II-7 through II-15.
- Changes to various references to RSA 91-A as a result of statute changes in 2008 and 2009.
- Changes to Appendix B, *Instructions to Applicants Appealing to the Board of Adjustment*, to reflect the revised hardship criteria for a variance and that a motion for rehearing must be applied for within 30 days of the decision on pages B-1 and B-3.
- Changes to Appendix C, Suggested Forms - *Application for a Variance* - removing the distinction between a "use" and "area" variance on page C-4 and C-5.
- Changes to Appendix C, Suggested forms - *Worksheet: Statement of Reasons - Variance*, to reflect the revised hardship criteria for a variance on page C-10.
- Addition of several case summaries relating to the granting of variances: *Naser, Nine A, Daniels* and *Farrar* on pages D-31 through D-34.

March 2010

The following changes were incorporated in March 2010 during the overall format revision of the handbook.

- Replaced "honest mistake" with "good faith error in measurement or calculation" in the second full paragraph following the statute on page II-17; replaced "legitimate mistake" with "good faith error in measurement or calculation" in the Equitable Waiver section of the Instructions to Applicants on page B-2, and a similar replacement in the Application for Equitable Waiver on page C-7. These replacements were in response to *Taylor v. Town of Wakefield* (2008).
- Added a new subsection, Consideration of Evidence and Testimony, relating to *Continental Paving v. Litchfield* in the Public Hearing portion of Chapter III on page III-10.
- Revised the Variance Application form to include a section for the *Governor's Island* test if an applicant cannot meet the two criteria for an unnecessary hardship on page C-5.
- Revised the Variance Worksheet to include a section for the *Governor's Island* test if an applicant cannot meet the two criteria for a hardship on page C-10.

October 2010

The following changes were incorporated in October 2010 during the annual revision of the handbook.

- Added the new paragraph III in 673:5 clarifying the term of office of an appointed member and that they can remain in office until a successor is appointed on page I-2.
- Added the new paragraph V to RSA 673:6 regarding participation in meetings by an unactivated alternate member and amended two paragraphs on page I-3 and I-4. Added a new second paragraph to the Members and Alternates section of the Rules of Procedure in Appendix A.
- Amended the Expenditure of Fees section on page III-10 and III-11 to reflect the changes to RSA 673:16 and 676:5 expressly allowing a ZBA to assess fees to cover costs, administrative expenses and third party review and consultation.
- Added a new section, **Abandonment of Nonconforming Uses**, to Chapter II on page II-21 to reflect *Pike Industries, Inc. v. Brian Woodward* (May 7, 2010).
- Various revisions to the Suggested Rules of Procedure in Appendix A:
  - 2. Quorum - every effort should be made to see that a full board is present including one or two alternates.
  - If less than a full board is present, the applicant should be given the option to proceed or wait until a full board is present.
  - 5. Voting - addition of a new section clarifying that a tie vote does not result in the automatic approval of the opposite of the motion with the following section about Reconsideration renumbered as 6.
  - In the Applications section, clarification that appeals of administrative decisions can be taken within a designated time period (30 days are recommended) or when the decision becomes known or reasonably could have been known by the petitioner as determined by the board.
- Addition of a reference to "Conflict of Interest, Disqualification and the Local Land Use Board Decision-Making Process," NHMA Law Lecture #2, Fall 2010 at the beginning of the Disqualification section in Chapter III, page III-11.
- Replacement of the entire section about Recommendations on the Timing, the Writing of the Decision, and Vote in Chapter III, page III-15.
- Addition of a new paragraph to the Decisions section of Chapter III on page III-16 that written reasons should also be provided in the case of an approval.
- Addition of a reference to "Administrative Decisions in Planning and Zoning: How They're Made, How They're Appealed," NHMA Law Lecture #3, Fall 2010 in the Appeal of Administrative Decision section of Chapter II, page II-3.
- Addition of a reference to "Conflict of Interest, Disqualification and the Local Land Use Board Decision-making Process," NHMA Law Lecture # 2, Fall 2010 at the beginning of the Decision section in Chapter III, page III-14.

December 2011

The following changes were incorporated in December 2011 during the annual revision of the handbook.

- Added the fourth paragraph to the Caution page.
- Amended the section regarding unactivated alternates participating in deliberations on page I-4.
- Added a section regarding standing to Appeal from Administrative Decision in Chapter II on page II-4.
- Added a section about the board acting as the Building Code Board of Appeals in Chapter II on page II-22.
- Added a reference to *Atwater v. Plainfield* in the Application section of Chapter III on page III-2 and a summary of the case in Appendix D on page D-45.
- Added a notation regarding the time frame for holding a rehearing on page IV-3 and added a new section in the Application/Decision section of the Rules of Procedure on page A-5.
- Removed the reference to unactivated alternate members not being able to participate in deliberations in the Members and Alternates section of the Suggested Rules of Procedure on page A-2.
- Added a section in the Rules of Procedure about how alternates are selected to be activated on page A-2.
- Revised the Rules of Procedure amendment procedure on page A-5.
- Added *Goldstein v. Town of Bedford*, (November 22, 2006) and *Golf Course Investors of NH, LLC v. Jaffrey* (April 12, 2011) to the list of cases in Appendix D on pages D-34 and D-46 respectively.

October 2012

The following changes were incorporated in October 2012 during the annual revision of the handbook.

- Amended the multiple membership section relative to RSA 673:7 on page I-3.
- Added a paragraph about unactivated alternates participating in deliberations and our recommendation that the rules be amended to clarify the level of participation allowed on page I-4 and in the Members and Alternates section of the Suggested Rules of Procedure on page A-1.
- Added a box referencing *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162, N.H. 508 (2011) and the supreme court's interpretation of the "public interest" and "spirit of the ordinance" variance criteria on page II-11.
- Added text referencing *Malachy Glen Assoc. v. Chichester*, 155 N.H. 102 (2007) and the "substantial justice" variance criteria on page II-11.
- Added text referencing *Harborside Associates, LP v. Parade Residence Hotel, LLC* 162, N.H. 508 (2011) and the supreme court's interpretation of the "hardship" variance criteria on page II-14.
- Added RSA 673:3, IV to The ZBA Acting as the Building Code Board of Appeals under Additional Responsibilities in Chapter II on page II-24.
- Added a new section, What The Board Should Not Do, in Chapter II, page II-29.
- Added a reference to 676:3, III requiring conditions of approval to be included in the written decision and on or with any plat record to memorialize an approval on page III-17.
- Added a paragraph about holding the rehearing within 30 days of the decision on page IV-3 and in the Application/Decision section of the Rules of Procedure on page A-5.
- Added a paragraph regarding the attendance at a rehearing by the petitioner with reference to RSA 673:15, the power to compel witnesses by the ZBA chair on page IV-3.
- Added a summary of *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162, N.H. 508 (2011) in Appendix D on page D-47.

November 2013

The following changes were incorporated in November 2013 during the annual revision of the handbook.

- Added Emerald Lake Village District to the list of village districts with zoning ordinances on page ix.
- Added a reference to the new Integrated Land Development Permit process by the Department of Environmental Services and that a municipality may adopt an innovative land use control allowing a project that does not fully conform to the zoning ordinance as long as the planning board makes certain findings on page III-17.
- Added a reference to the addition of section VI of RSA 674:33 prohibiting the ZBA from requiring submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision on page III-2 and including the new statute text on page II-5.
- Added references to Ch. Law 267:9 (2013) amending RSA 674:33 explicitly stating that neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2 on page II-4 and II-7.
- Added a reference to the amendment to RSA 674:33 adding a new section I-a setting forth a minimum 2 year window within which a variance remains valid on page II-8 and showing the addition to RSA 674:33 on page II-7; added a reference in the Attaching Conditions and Time Limits section on page III-15.
- Added a reference to the amendment to RSA 674:33, IV setting forth a minimum 2 year window within which a special exception remains valid on page II-5 and showing the amendment to RSA 674:33 on page II-5; added a reference in the Attaching Conditions and Time Limits section on page III-15.
- Added further clarification on the difference between a special exception and a variance including a reference to *1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 (April 26, 2011) (an applicant may ask for a variance from one or more of the special exception requirements) on page II-5.
- Added additional clarification about the variance hardship criteria in the Variance section of Chapter II on page II-14.
- Added an excerpt from an article in *New Hampshire Town and City* about motions and decisions in the Decision section on page III-13.

- Added an excerpt from an article in *New Hampshire Town and City* about attaching conditions in the Attaching Conditions and Time Limits section on page III-16.
- Added an excerpt from an article in *New Hampshire Town and City* about precedent and subsequent conditions in the Attaching Conditions and Time Limits section on page III-17.
- Added a reference to *Steve Trefethen & a. v. Town of Derry* (2013) and RSA 21:35, II that if a filing deadline falls on a weekend or legal holiday, the action shall be deemed timely filed if done so on the next business day on page IV-2.
- Added a new section titled Appeals of Planning Board Decisions to Chapter IV containing the changes to RSA 677:15 on page IV-6.
- Retitled *Worksheet: Statement of Reasons - Variance* to *Individual Board Member Variance Worksheet* and revised its explanatory opening paragraph in Appendix C on page C-10.
- Summary of *1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 (April 26, 2011) on page D-43.
- Summary of *Steve Trefethen & a. v. Town of Derry*, Submitted: February 7, 2013 Opinion Issued: April 12, 2013 on page D-45.
- Added a section about the adoption of forms in Appendix A, Suggested Rules of Procedure on page A-3.

November 2014

- Added RSA 500-A:12, Examination to the Disqualification section of Chapter III on page III-11.
- Deleted the sentence "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." following the reference to *Geiss* on page III-18 pursuant to SB50 (2013).
- Added a notation that the implementation date for the Integrated Land Development Permit was changed in 2014 from January 1, 2015 to July 1, 2017 on page III-20.
- Added a quotation from *Merriam v. Town of Salem*, 112 N.H. 267, 268 (1972) in the Appeal to Superior Court section of Chapter IV relative to inquiries into the mental processes by which decisions were reached on page IV-6.
- Added RSA 489 Integrated Land Development Permit, and RSA 500-A:12 Examination, to the list of statutes in Appendix F.

November 2015

- Added a reference to *Accurate Transport, Inc. v. Town of Derry* in the Appeal from Administrative Decision section of Chapter II on page II-4.
- Added a reference to *Stephen Bartlett & a. v. City of Manchester* regarding the need to consider nonconforming issues first in the Variance section of Chapter II on page II-8.
- Added a reference to the Fall 2015 Law Lecture by Bernie Waugh about Grandfathering and Nonconforming Uses and updated the references to previous lectures in the Expansion of Nonconforming Uses section of Chapter II on page II-19.
- Added the fourth "pathway" to the ZBA to consider the question of expansion or changes to a nonconforming use in the Expansion of Nonconforming Uses section of Chapter II on page II-20.
- Added the fourth "test" from *New London Land Use Assoc. v. New London Zoning Board* in the Expansion of Nonconforming Uses section of Chapter II on page II-21.
- Added the Zoning Ordinances "Use It or Lose It" Clauses section from the Fall 2015 Law Lecture by Bernie Waugh about Grandfathering and Nonconforming Uses section of Chapter II on page II-23.
- Updated the text of RSA 674:34, RSA 155-A:1, and RSA 155-A:7 to be current because these were overlooked in previous editions on page II-25.
- Added a reference to the 2015 Law Lecture #3 – Implementing & Enforcing the State Building Code & the State Fire Code and deleted the section titled Relationship Between Building Codes and the State Fire Code in the ZBA Acting as the Building Code Board of Appeals section of Chapter II on page II-26.
- Added a description of the ZBA's role in the restoration of involuntary mergers to the Other Responsibilities section of Chapter II on page II-28.
- Added a description of the ZBA's role in waivers for agricultural uses of land to the Other Responsibilities section of Chapter II on page II-28.
- Added a reference to *Accurate Transport, Inc. v. Town of Derry* in the Application section of Chapter III on page III-2.
- Added a reference to *Bartlett v. Manchester* in the Application section of Chapter III on page III-3.

- Added a new text box referencing *Atherton v. Concord;* added new text suggesting recused members leave the room , added a second new text box outlining suggested recusal practice in the Disqualification section of Chapter III on pages III-11 and III-12.
- Revised the text in the opening paragraph of the Findings of Facts section of Chapter III on page III-13.
- Added a reference to *Daryl Dembiec & a. v. Town of Holderness* in the Rehearing section of Chapter IV on page IV-5.
- Added text regarding threshold questions for determining disqualification in the Disqualification section of the Meetings section in the Suggested Rules of Procedure (Appendix A) on page A-2.
- Added reference to the new 2 year time frame for ZBA decisions in the Notice of Decision – Granted form in Appendix C on page C-12.
- Added a summary of *Stephen Bartlett & a. v. City of Manchester* in Zoning Board of Adjustment Case Law (Appendix D) beginning on page D-43.
- Added summaries of *Daryl Dembiec & a. v. Town of Holderness* and *Accurate Transport, Inc. v. Town of Derry* in Zoning Board of Adjustment Case Law (Appendix D) beginning on page D-45.

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 N.H. 249 [1962])

New Hampshire's planning-enabling legislation, Revised Statutes Annotated (RSA) 672-678, 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.

CHAPTER I: 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 forms and suggestions in this document 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. Members of the zoning board of adjustment shall be either elected or appointed, subject to the provisions of RSA 673:3.

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. A local legislative body which has previously provided for the appointment of zoning board of adjustment members may rescind that action by majority vote and choose to elect board members. 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 by majority vote, 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.

III.(a) A local legislative body's decision to change from an elected to an appointed zoning board of adjustment, or from an appointed to an elected zoning board of adjustment, may be made without amending the zoning ordinance. In a town operating under the town meeting form of government, the decision may be made at any annual or special town meeting. If the town has adopted the official ballot for the election of town officers, the question may be, but is not required to be, placed on the official ballot. If the question is not placed on the official ballot, the question shall be placed in the warrant and shall be voted on as a separate article at the town meeting.

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.

Communities have the choice as to whether to create an elected or appointed zoning board of adjustment. The statutes contain provisions for how to establish a board using either organizational structure, but only included provisions for how to switch from a previously established elected board to an appointed board. In 2009, the statute was amended to permit and establish the process of switching from an appointed board to an elected board.

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.

III. The term of office for an appointed local land use board member shall begin on a date established by the appointing authority, or as soon thereafter as the member is qualified, and shall end 3 years after the date so established. If no successor has been appointed and qualified at the expiration of an appointed member's term, the member shall be entitled to remain in office until a successor has been appointed and qualified. [August, 2010]

The term of board members is 3 years, although the initial terms are 1, 2 and 3 years to stagger the terms. Subsequent appointment/election is for 3 years with one or two vacancies occurring each year.

In 2010, the statute was amended (Chapter 226, HB1174) to require the appointing authority to establish the beginning date of the term of office of an appointed member, or the date shall be when the member is qualified, and the term of office shall end three years after such date. The statute now clarifies that if no successor is appointed, the member is entitled to remain in office until a successor has been appointed and qualified.

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.

V. An alternate member of a local land use board may participate in meetings of the board as a nonvoting member pursuant to rules adopted under RSA 676:1.

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. In 2010, the statute was amended (Chapter 270, SB448) to expressly authorize alternate members to participate in meetings of the board as non-voting members "pursuant to rules adopted under RSA 676:1." (Further clarification of the role of alternates is offered in Appendix A.) 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.

RSA 673:7 stipulates that 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 two planning board members serving on the conservation commission, local governing body or a local land use board as defined by RSA 672:7. In cities, appointed members shall not hold any other municipal office; however, one member may be a member of the zoning board of adjustment, conservation commission or heritage commission, historic district commission, agricultural commission, the housing commission, or all four if such commissions exist in the municipality.

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.

Alternates should be encouraged to attend all meetings and participate with the board to a limited extent during the public hearing. The board should review their Rules of Procedure to make sure they define how and when an alternate may participate in a meeting of the board. It must be clear to all in attendance who is "on the board" and who is not, so the applicant and abutters know who will be making the decision. An alternate who is activated to fill the seat of an absent or recused member becomes a full voting member for as long as they are activated and can participate in all aspects of the process just as any other full board member.

Unactivated alternates may participate in meetings as nonvoting members. It is our recommendation that the rules of procedure specify the level of participation allowed for an unactivated alternate member and that they not participate with the board during deliberations since they may influence how others may vote but cannot vote themselves.

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.

III. The chairperson of the local land use board may designate an alternate member of the board to fill the vacancy temporarily until the vacancy is filled in the manner set forth in paragraph I or II. If the vacancy is for an ex officio member, the chairperson may only designate the person who has been appointed to serve as the alternate for the ex officio member.

Alternate members may be temporarily designated to fill a vacant seat until such time as the seat is filled in the normal manner. They can, however, be appointed to fill the vacant seat as a full member, thus relinquishing their position as an alternate, which in turn creates a new vacant alternate position for the appointing authority to fill.

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 chairperson from the appointed or elected members and may create other offices as it deems necessary.

RSA 673:9 Term of Chairperson and Officers

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

RSA 673:10 Scheduling of Meetings

I. Meetings of the heritage commission, the historic district commission, the agricultural commission, the housing commission, the building code board of appeals, and the zoning board of adjustment shall be held at the call of the chairperson 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 chairperson to conduct meetings and hearings and be the official spokesperson for the board and may include a vice chairperson to act in the absence of the chairperson 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 zoning board of adjustment 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. The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.

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. (See Appendix A – Suggested Rules of Procedure for Local Boards of Adjustment.)

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 chairperson**
     - **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**
  1. **Filing application**
  2. **Notification of public hearing**
  3. **Conducting the hearing**
  4. **Decision**
  5. **Voting**
  6. **Reconsideration by the board**
- **F. Records**

CHAPTER II: 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 the agricultural operations described in RSA 21:34-a supporting the 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.

1. **Planning Board** - primarily responsible for proposing the initial zoning ordinance and the zoning map, recommending amendments, holding public hearings on its own and petitioning 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 administer and enforce 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 672-678). 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 zoning board of adjustment. (See *Dube v. Town of Hudson*, 140 N.H. 135, 663 A.2d 626 [1995].)

APPEAL FROM ADMINISTRATIVE DECISION

(For a complete discussion on this topic see "Administrative Decisions in Planning and Zoning: How They're Made, How They're Appealed," NHMA Law Lecture #3, Fall 2010.)

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) …

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 III-1.)

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 a 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 zoning board of adjustment 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 N.H. 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.

The board should be aware of the difference between an "opinion" and a "decision" of an administrative official. In *Accurate Transport, Inc. v. Town of Derry* (August 11, 2015), the court found that the ZBA had the power to "convert" the appeal of the code enforcement officer's decision to an appeal of the planning board's decision because the code enforcement officer had merely expressed an opinion at a technical review committee meeting that the use was allowed. The appealable decision came when the planning board agreed with the code enforcement officer's opinion and voted to approve the application. Ultimately, the ZBA overturned the planning board's decision that the use was allowed and the court did not review the validity of the ZBA's decision because the petitioners did not properly challenge it on its merits.

(See a summary of the case by the NH Municipal Association on the OEP website http://www.nh.gov/oep/resource-library/laws-rules-cases/index.htm Selected Supreme Court Decisions.)

In order to bring an appeal of an administrative decision, a person must have standing. Merely being a resident and taxpayer of a town is not enough to confer standing to appeal a decision of the administrative officer who determined that there was not sufficient basis to pursue an alleged violation of the zoning ordinance concerning the voluntary merger of two lots. (See *Goldstein v. Town of Bedford* [November 22, 2006].)

Similarly, in *Golf Course Investors of NH, LLC v. Town of Jaffrey & a.* [April 12, 2011], the court found that seven residents who tried to appeal a planning board decision to the ZBA that a condominium conversion did not require site plan review did not have standing as "persons aggrieved." None were abutters, did not address how their properties would be directly affected, were actually in favor of the project with the acceptation of its size, and one had even attended the planning board meeting. To establish standing, an appealing party must show "some direct, definite interest in the outcome of the action or proceeding." Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party's property to the property for which approval is sought; (2) the type of change being proposed; (3) the immediacy of the injury claimed; and (4) the appealing party's participation in the administrative hearings. (See *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541 [1979].)

SPECIAL EXCEPTIONS

***"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*, 101 N.H. 76 (1957)**

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. Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception. (This paragraph was amended by Ch. Law 93:2, SB50, 2013.)

V. …

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision. (This paragraph was added to RSA 674:33 by Ch. Law 270:3, SB124, 2013.)

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2. (This paragraph was added to RSA 674:33 by Ch. Law 267:9, SB101, 2013.)

Under this authority, the board of adjustment has the power to grant those exceptions that 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.

A special exception is now only valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a 6 month window within which the special exception remains valid following the resolution of a planning application filed in reliance upon the special exception. (See the amendment to section IV of RSA 674:33 set out above.)

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.

"It is important to remember the key distinction between a special exception and a variance. A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5,000 square feet is permitted in the zone so

long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone (formerly termed a "use" variance), or to construct the new building partially within the side set-back line (formerly an "area" variance); and, as is set forth below in more detail, the standards for any variance without distinction are the subject of much judicial interpretation and flux.

A use permitted by special exception is also distinguishable from a nonconforming use. As described above, a special exception is a *permitted* use provided that the petitioner demonstrates to the ZBA compliance with the special exception requirements set forth in the ordinance. By contrast, a non-conforming use is a use existing on the land that was lawful when the ordinance prohibiting that use was adopted. (See *1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 [2011].) (The supreme court held that the ZBA did not err in ruling that the office building permitted by special exception is not entitled to expand per doctrine of expansion of nonconforming use.)

In the case of a request for special exception, the ZBA may not vary or waive any of the requirements set forth in the ordinance (citations omitted). Although the ZBA may not vary or waive any of the requirements set forth in the ordinance, the applicant may ask for a *variance* from one or more of the requirements. (See, *1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 [2011].) (Court noted that petitioner was allowed to use its building for office space because it had a special exception and was allowed to devote 3,700 of its building's square footage for such a use because it obtained a variance from the special exception requirement that the building's foundation not exceed 1,500 square feet).[1]

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*, 121 N.H. 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 location problems often require approval as special exceptions subject to conditions spelled out in the zoning ordinance.

[1] The Zoning Board of Adjustment in New Hampshire, NH OEP Spring Planning & Zoning Conference, May 2013; presented by Christopher L. Boldt, Esq., Donahue, Tucker, & Ciandella, PLLC.

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 N.H. 321 [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 members' 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." [2]

VARIANCES

RSA 674:33 Powers of Zoning Board of Adjustment

Effective September 22, 2013

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

(a) …

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

[2] 1998 Land Use Law Update, Timothy Bates, Esq., NH OSP Annual Planning and Zoning Conference, May 30, 1998.

(1) The variance will not be contrary to the public interest;

(2) The spirit of the ordinance is observed;

(3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and

(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

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

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

(ii) The proposed use is a reasonable one.

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

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

I-a. Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance. (This paragraph was added to RSA 674:33 by Ch. Law 93:1, SB50, 2013.)

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2. (This paragraph was added to RSA 674:33 by Ch. Law 267:9, SB101, 2013.)

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*, 120 N.H. 641 [1980]

In the 2013 case of *Stephen Bartlett & a. v. City of Manchester*, 164 N.H. 634, (see a summary of the case in Appendix D) the court held that *the ZBA must always examine the nonconforming use issue* ***first*** – even if the owner has ignored that and applied for a variance. That's because *every* variance implicitly raises the issue of what an owner can do *without* a variance – that issue being highly relevant to the question of whether "unnecessary hardship" exists. ***Lesson:*** A ZBA *in every variance case* must first check to see what the status is of any nonconforming uses.[3]

A variance is now only valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a 6 month window within which the variance remains valid following the resolution of a planning application filed in reliance upon the variance. (See the addition of section I-a to RSA 674:33 set out above.)

[3] 2015 NHMA Law Lecture #1 - *Grandfathering: The law of Non-Conforming Uses & Vested Rights* by Bernie Waugh, Esq., Gardner Fulton & Waugh PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh PLLC.

The local ordinance cannot limit or increase the powers of the board to grant variances beyond statutory authority; this power must be exercised within specific bounds. In many prior decisions, the supreme court has declared that each of the following conditions must be found in order for a variance to be legally granted:

a. The variance will not be contrary to the public interest;
b. The variance is consistent with the spirit of the ordinance;
c. Substantial justice is done by granting the variance;
d. Granting the variance will not diminish the value of surrounding properties; and
e. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

In 2009, RSA 674:33 was amended to codify the five variance criteria, including diminution of property values and, more importantly, overrule the separate criteria for "area" variances established by the landmark decision in *Michael Boccia & a. v. City of Portsmouth & a.*, 151 N.H. 85, 104 [2004].

The legislature clarified its action by including a statement of intent in SB147 (Chaptered Law 307 of 2009) 307:5 Statement of Intent. "The intent of section 6 of this act is to eliminate the separate "unnecessary hardship" standard for "area" variances, as established by the New Hampshire Supreme Court in the case of *Boccia*, and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in *Simplex Technologies, Inc. v. Town of Newington & a.*, 145 N.H. 727 [2001], as those standards have been interpreted by subsequent decisions of the supreme court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the *Simplex* decision, as exemplified by cases such as *Governor's Island Club, Inc. v. Town of Gilford & a.*, 124 N.H. 126 [1983]."

COMMENT: Proving a Negative

"The applicant still has the burden of persuasion on all five 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 four 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."

1999 Municipal Law Update: The Courts; H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

The Five Variance Criteria

1. The variance will not be contrary to the public interest.

In the case of *Gray v. Seidel*, 143 N.H. 327 [February 8, 1999] the New Hampshire 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.

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public? (See *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 [2005] on page D-24.)

2. The spirit of the ordinance is observed.

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."* [4]

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 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 *Maureen 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."

[4] Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 4.

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."*

In *Malachy Glen Associates, Inc. v. Town of Chichester*, [March 20, 2007], the supreme court stated that *"The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance." [Chester Rod and Gun Club v. Town of Chester, 152 N.H. at 580]*

[T]o be contrary to the public interest... the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality...

Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare."

The new statutory language was tested in the case of *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508 [2011]. The opinion discusses each element in the context of two separate variances granted to permit the installation of two different types of signs on a hotel property, and is currently the only case our supreme court has decided that interprets the meaning of the newly revised statute. Based upon the language of the opinion, we now can state the following regarding application of the elements to actual applications for relief:

a. Public interest and spirit of the ordinance. As held in *Farrar v. Keene*, 158 N.H. 68 [2009], the two elements are related. For a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. There are two methods to answer this question:

   1. Examine whether granting the variance would alter the essential character of the neighborhood; or
   2. Examine whether granting the variance would threaten the public health, safety or welfare.

NHMA Law Lecture #1 – "Procedural Basics for Planning and Zoning Boards," Fall 2012
Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson
New Hampshire Local Government Center, page 32. [October 2012]

3. Substantial justice is done.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. 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 granting a variance that meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

Any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also, the court will examine whether the proposed development is consistent with the area's present use. (*Malachy Glen Associates v. Town of Chichester* 155 N.H. 102 (2007) [October 2012])[5]

[5] NHMA Law Lecture #1 - Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32.

4. The values of surrounding properties are not diminished.

Perhaps Attorney Timothy 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 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."* [6]

Also, in *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632, 644 A.2d 548 [1994], the court stated that the resolution of conflicts is a function of the zoning board of adjustment.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

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 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 zoning board. 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 New Hampshire Supreme Court issued an opinion in *Simplex Technologies, Inc. v. Town of Newington & a*, which dramatically changed the standard for granting zoning variances. The court refined the long-held standard for unnecessary hardship and established three conditions that must be used by boards of adjustment when determining if a hardship exists. (See Appendix E for background information about this significant court decision.)

On May 25, 2004, the New Hampshire Supreme Court issued an opinion in *Michael Boccia & a. v. City of Portsmouth & a*, 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.

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[6] Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 3.

This distinction between "use" and "area" variances has caused confusion for boards and has been the subject of much litigation. The legislature addressed this issue in 2009 with the passage of SB147 to remove this distinction and codify the five variance criteria in the statute. Boards must now use the "reasonable use" and "relationship" criteria from the *Simplex* decision for determination of unnecessary hardship for all variance cases. The statute also now codifies the much stricter pre-*Simplex* standard for unnecessary hardship derived from *Governor's Island Club v. Town of Gilford*, 124 N.H. 126 [1983] which would still apply if the applicant was unable to meet the *Simplex* standards.

Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* (the *Governor's Island* standard) in order to demonstrate unnecessary hardship, a landowner may now establish unnecessary hardship by satisfying the following conditions:

RSA 674:33, I(b) (5) (A) Powers of Zoning Board of Adjustment

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

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

Why does the new law codify the old *Governor's Island* standard in addition to the *Simplex* standard if *Governor's Island* was overruled by *Simplex*?

Simplex did not entirely overrule *Governor's Island*. In *Simplex*, the court said the definition of unnecessary hardship, as established in *Governor's Island* and subsequent cases, had become "too restrictive in light of the constitutional protections by which it must be tempered." [145 N.H. at 731]

The court, therefore, adopted a less restrictive test. However, there is not a one-dimensional spectrum of variance cases so that an application that satisfies *Simplex* will automatically satisfy *Governor's Island*. There may be a rare case in which the applicant could satisfy the *Governor's Island* test but not the *Simplex* test.

This most likely would happen where there is clearly a "fair and substantial relationship… between the general purposes of the zoning ordinance and the specific restriction on the property" – and the variance therefore fails on the second prong of *Simplex* – but because of special conditions, the effect of the restriction on the property is to preclude any reasonable use. If such an application is judged solely on the *Simplex* standard, it fails, but the result would be to deprive the owner of any reasonable use of the land – an unconstitutional taking. Thus, there has to be a secondary "safety valve" since the alternative would be for a court to invalidate the zoning restriction altogether. Subparagraph (5) (B) provides relief for the applicant in that rare case.

"The Five Variance Criteria in the 21st Century," NHMA Law Lecture #2, Fall 2009

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? Once the purposes of the ordinance provision have been established, the property owner needs to establish that, because of the special conditions of the property, application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any "fair and substantial" way.[7]

[7] This is comparable to the standard suggested in *St. Onge v. Concord*, 95 N.H. 306, 308 [1949]: "It may, therefore, be stated that 'unnecessary' as used in this connection, means 'not required to give full effect to [the] purpose of the ordinance'."

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.

And:

(ii) The proposed use is a reasonable one. (the reasonable use test)

The applicant must establish that, because of the special conditions of the property, the proposed use is reasonable. This is not exactly how the court stated this requirement in *Simplex,* where it said applicants must show that the zoning restriction "interferes with their reasonable use of the property, considering the unique setting of the property in its environment."[8] That statement was not helpful, but the court clarified it in *Bonnita Rancourt & a. v. City of Manchester*[9] stating that "after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable'." [10]

The new law does not require - nor did *Rancourt* - an investigation of how severely the zoning restriction interferes with the owner's use of the land. It merely requires a determination that, owing to special conditions of the property, the proposed use is reasonable (see the corresponding write-up on page II-16). This is necessarily a subjective judgment - as is almost everything having to do with variances - but presumably it includes an analysis of how the proposed use would affect neighboring properties and the municipality's zoning goals generally. It clearly includes "whether the landowner's proposed use would alter the essential character of the neighborhood."[11]

The two paragraphs that follow are from *The Five Variance Criteria in the 21st Century*, New Hampshire Municipal Association Law Lecture #2, Fall 2009.

> The second of the two parts of the hardship criteria in RSA 674:33, I(b)(5)(A)(ii) – "The proposed use is a reasonable one" – cannot be considered in isolation and must be read in conjunction with the introductory language in subparagraph A – ". . . owing to special conditions of the property that distinguish it from other properties in the area . . ." - so that the criterion as a whole is ". . . owing to special conditions of the property . . . the proposed use is a reasonable one." In other words, the board needs to find that a use (or dimensional requirement) which otherwise must be considered unreasonable (because it violates the ordinance) is rendered reasonable by the special conditions of the property (or of its setting or environment, as *Simplex* says).
>
> Board members should also be cognizant of the intent of Ch. Law 307 (2009) (the law that amended RSA 674:33) which was to eliminate the separate "use" and "area" variance standards of the *Boccia* decision and to deem that the unnecessary hardship standard is satisfied if the applicant meets the standards established in *Simplex* as those standards have been interpreted by subsequent decisions of the supreme court.

In the context of these sign variances, (*Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508 [2011]) the court stated the test to mean, "...hardship exists when, owing to special conditions of the land, (1) there is no fair and substantial relationship between the general public

[8] 145 N.H. at 731-32.
[9] 149 N.H. 51, 54 [2003].
[10] Id. at 54.
[11] *John R. Harrington & a. v. Town of Warner*, 152 N.H. 74, 81 (2005); see also *Farrar v. City of Keene*, No. 2008-500, slip op. at 4 (N.H. May 7, 2009).

purpose of the ordinance and the specific application of the ordinance to the property at issue, and (2) the use for which the variance is sought is "reasonable." The court did not reach the second test for hardship set forth in the statute, since it determined the applicant had provided sufficient evidence to establish entitlement under the first test. We also learn that the size of a building may constitute the "special conditions" that form the basis for "unnecessary hardship." [October 2012] [12]

[12] NHMA Law Lecture #1 – Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32 [October 2012].

In a case decided after *Rancourt*, the court adopted a more muddled approach, and one that is irreconcilable on its face with *Rancourt*, although it did not acknowledge the inconsistency. In *John R. Harrington & a. v. Town of Warner*, 152 N.H. 74 (2005), the court stated: "This [reasonable use] factor includes consideration of the landowner's ability to receive a reasonable return on his or her investment." Although "[r]easonable return is not maximum return," this factor requires more than a "mere inconvenience." This factor, however, does not require the landowner to show that he or she has been deprived of all beneficial use of the land. Rather, this factor should be applied consistently with our sound policy, enunciated in *Simplex*, of being "more considerate of the constitutional right to enjoy property." Nevertheless, "mere conclusory and lay opinion concerning the lack of reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence." Id. at 80-81 (emphasis in original) (citations omitted). Apparently, then, *Harrington* would require an applicant to prove that the zoning restriction causes some measurable decrease in the property's value. The amount of the required decrease is not quantified, but it is more than a "mere inconvenience" and less than a deprivation of all beneficial use of the land. The court in *Rancourt* had not considered at all the effect of the zoning restriction on the landowners' ability to receive a reasonable return on their investment. Rather, the court simply examined the proposed use of the property in light of its "special conditions" and determined that it was reasonable (see 149 N.H. at 54). Given that the variance in question merely allowed the owners to construct a two-horse barn on their residential property, (see id. at 52) it is unlikely that the denial of the variance would have affected the return on their investment in any material way. Thus, it seems that they would have failed the test announced in *Harrington*.

The new law adopts *Rancourt*'s formulation over *Harrington's* because it is clearer and because, while *Harrington* is inconsistent with *Rancourt*, it did not expressly overrule *Rancourt*. Further, in the two cases in which the court actually purported to follow the *Harrington* approach - one of them being *Harrington* itself - it affirmed the grant of a variance even though there was, in fact, no "actual proof" about return on investment. In *Harrington*, the only evidence on this point was "[the land owner's] unsupported conclusion that without the variance, he might have to let the property 'go back to the previous owner'" (152 N.H. at 82). The supreme court acknowledged that this was inadequate but affirmed the finding of unnecessary hardship anyway, specifically on the ground that it found the proposed use "reasonable." (See id. at 82-83) That is exactly what the court had done in *Rancourt*. Similarly, in *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009), the court acknowledged that the applicant "submitted minimal evidence of a reasonable return of his investment in the property," (slip op. at 4) but still concluded that unnecessary hardship was established (see id. at 4-5).

In both *Harrington* and *Farrar*, the court stated that evidence of adverse effect on "reasonable return" is just one of three "nondispositive factors" and therefore, apparently, not an absolute requirement, even though it was explained in terms of the "actual proof" that is "required." (See *Harrington*, 152 N.H. at 80; *Farrar*, slip op. at 3, 4.) This seems to explain how the applicants got around this "requirement" in both cases. The second nondispositive factor, according to *Harrington*, is whether the property is "burdened by the zoning restriction in a manner that is distinct from other similarly situated property" (152 N.H. at 81). Of course, this factor is entirely dispositive if it is not satisfied - in the absence of special conditions, the inquiry ends. The third factor is "consideration of the surrounding environment." Id. "This includes evaluating whether the landowner's proposed use would alter the essential character of the neighborhood." Id. That certainly makes sense, but it seems to be an obvious element of any evaluation of the reasonableness of the use. Thus, in the end, it appears that *Harrington's* test comes down to this: there must be special conditions of the property and the proposed use should not alter the essential character of the neighborhood. Evidence of adverse effect on the owner's investment return is encouraged but not required. If this is different from the approach taken in *Rancourt*, the difference is minimal.

Taken from "The Five Variance Criteria in the 21st Century"
New Hampshire Municipal Association Law Lecture #2, Fall 2009.

"Use" and "Area" Variances and "Spot Zoning"

New Hampshire law no longer distinguishes between a "use" or "area" variance. New Hampshire law requires the existence of unnecessary hardship for the granting of any variance, whether it is for a use not allowed in a particular zone or a deviation from a dimensional requirement.

Municipalities are encouraged to review their variance application forms and make necessary changes to reflect the elimination of the distinction between use and area variances. See the suggested form in Appendix C.

Requests for variances are often the most difficult cases that zoning boards have to consider. Opposition of neighbors or the fact that no abutters appear at the hearing should not sway boards. The board must review each of the five variance criteria 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 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 variance requests merely on the basis of a claim of improper spot zoning. On the contrary, although a 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. 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 variance may alter the character of a neighborhood, forever beginning a domino effect as adjacent, affected properties seek similar requests 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

Ch. Law 218, SB415 [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:

V. 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 zoning board of adjustment may grant a waiver only if each of the four findings as outlined in the statute are made: (a) lack of discovery; (b) good faith error in measurement or calculation; (c) no diminution in value of surrounding property; and (d) the cost of correcting the mistake outweighs any public benefit.

In lieu of the zoning board of adjustment 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 zoning board of adjustment, 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 H. Bernard Waugh, Jr., Esq.

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 allows 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.

Much has been written about this topic and it has been the subject matter of many NH Municipal Association law lectures, most recently as Law Lecture #1 in the Fall of 2015 – "Grandfathering: The Law of Non-Conforming Uses & Vested Rights" by H. Bernard Waugh, Jr., Esq., Gardner Fulton & Waugh, PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh, PLLC. Earlier lectures include "Vested Property Rights and Changes in Use," John J. Ratigan, Esq., Douglass P. Hill, Esq., Clay Mitchell, Esq., NH Municipal Association Lecture #3, Fall 1997, and "GRANDFATHERED! The Law of Nonconforming Uses and Vested Rights" by H. Bernard Waugh, Jr., Esq., NH Municipal Association Legal Counsel, Fall 1994. Attorney Waugh also presented these materials at the Fall 2009 OEP Planning and Zoning Conference, GRANDFATHERED – The Law of Nonconforming Uses and Vested Rights (2009 Ed.).

"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])[13] (citations omitted)

The question of expansions and changes in a nonconforming use may reach the zoning board of adjustment 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 zoning board of adjustment 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.

Another possibility would be if the owner makes an application to the planning board claiming that some aspect of the application is "grandfathered" from zoning. The planning board can decide just on that issue which can be appealed to the ZBA under RSA 676:5, II.

A fourth way this issue might come before the board is if an application for a special exception or variance is submitted. 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, is merely a different manner of utilizing the same use, doesn't make the property proportionately less adequate, and doesn't have a substantially different impact on the neighborhood; or

[13] "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.

- 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 New Hampshire 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. (I.e., does the proposed change arise "naturally" through evolution, such as new and better technology, or changes in society.)
- 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?
- 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.

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 Zoning Board*, 130 N.H. 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 N.H. 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 N.H. 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.[14]

[14] 1997 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 31, 1997.

The zoning board of adjustment does have the authority to attach conditions to the continued enjoyment of a nonconforming use as illustrated by *Peabody v. Town of Windham*, 142 N.H. 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."[15]

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.[16] Municipalities are cautioned to proceed very carefully at their own peril lest the floodgates be opened for unwanted expansions, unless such ordinances are crafted very carefully.

ABANDONMENT OF NONCONFORMING USES

In *Pike Industries, Inc. v. Brian Woodward*, No. 2009-126 [May 7, 2010] the court determined that the subjective intent of the landowner is not relevant when the zoning ordinance defines abandonment of a nonconforming use as discontinuance for more than a year. There is no abandonment when a business owner keeps his facility ready to produce and deliver a product, even if such products are not actually produced.

Beginning prior to 1960, Pike Industries had operated an asphalt batching plant in the Town of Madbury as a nonconforming use in its zoning district. Between October of 2005 and August of 2007, no asphalt was actually produced at the facility, but the company did take steps to maintain and repair equipment, solicit bids for work and train personnel to operate the facility. In April of 2007, Pike sought permission from the planning board to alter the use of the site from asphalt batching to concrete batching. Abutters objected, arguing that the asphalt batching had been abandoned, the use could not be restarted and, further, that the concrete batching use was an impermissible change of use. The planning board rejected these arguments, and the abutters appealed to the zoning board of adjustment.

The ZBA found that the failure to actually produce asphalt for a period in excess of one year constituted an abandonment of the use under the terms of the zoning ordinance, and that it need not consider the intent of the landowner in making this determination. Pike appealed to the superior court, which reversed the ZBA decision on abandonment and remanded the matter to the ZBA for a consideration of the intent of the landowner. The abutters appealed to the supreme court.

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[15] 1998 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.
[16] 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

In two previous cases, the court set forth two different rules regarding abandonment of a nonconforming use. In *Lawlor v. Salem*, 116 N.H. 61 [1976], the court held that the right to a nonconforming use could be lost by abandoning the use, and that the subjective intent of the landowner was a factor in the determination of whether abandonment had occurred in fact. However, in *McKenzie v. Eaton Zoning Board of Adjustment*, 154 N.H. 773 [2007], the court found that a municipality may lawfully draft its ordinance to define "abandonment of a nonconforming use" without regard to the intent of a landowner to abandon that use.

Here, the town had drafted its ordinance to define abandonment as discontinuance for more than one year, without regard to the intent of the landowner. The court applied the rules from *McKenzie*, and ruled that intent was irrelevant. It also found that when a business maintains a site in a state of readiness to continue the nonconforming use, there is no abandonment even if no product is actually created at the site. *"We agree with the trial court's analogy of the asphalt plant to a store. A store owner must set up a store front, stock the store with merchandise, maintain a staff, pay utilities, and advertise its services. Even with all of the preparations, however, the store owner cannot guarantee that customers will purchase merchandise."* Therefore, the original determination of the planning board was reinstated, and Pike Industries may either resume the asphalt batching use or seek a new site review approval to alter the use to a concrete batching plant.[17]

Zoning Ordinance "Use It or Lose It" Clauses[18]

Some ordinances get around having to prove the intent to abandon and the overt act, by setting a time deadline for any nonconforming use to be restored. A typical provision might say that any nonconforming use which is discontinued may be resumed within 2 years, but no later.

How valid are these clauses? In *McKenzie*, the NH Supreme Court made it clear that these clauses must be presumed valid by a zoning board. The case involved a shed which was "grandfathered" from a lakeshore setback, and which had been destroyed by wind. The ordinance said destroyed structures must be built back within one year or lose their nonconforming status. The ZBA, based on advice from Yours Truly and a prior version of this lecture, held that the 1-year clause didn't apply because the owner hadn't intended to "abandon" the right to build the shed back (under *Lawlor*). But the Court held that the ordinance applied, rather than the Lawlor case. Justice Duggan, in a concurring opinion, suggested that the result might have been different if the owner had specifically raised a constitutional "takings" claim.

In light of *McKenzie*, here is my (corrected) advice on how to handle these clauses:

(a) If the owner doesn't raise any constitutional "taking" claim, the 'use-it-or-lose-it' clause should be applied strictly and literally. (And any claim that isn't raised before the Board itself usually can't be raised later in court - see RSA 677:3, I.)

(b) If a constitutional "taking" claim is raised, the common law of abandonment (under *Lawlor*) should be applied. But still the failure to resume the use within the stated period should still be presumed to incorporate an intent to abandon, in the absence of contrary evidence. After all, every citizen is presumed to have notice of the 'use-it-or-lose-it' period in the ordinance (again, "ignorance of the law is no excuse").

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[17] *New Hampshire Town and City*, NHMA, July/August 2010.

[18] *Grandfathering: The Law of Non-Conforming Uses & Vested Rights* by Bernie Waugh, Esq., Gardner Fulton & Waugh, PLLC and Adele Fulton, Esq., Gardner Fulton & Waugh, PLLC, NHMA Law Lecture #1, Fall 2015.

(c) The only kind of case where the failure to have an intent to abandon might be decisive - despite a 'use-it-or-lose-it' clause - is where the failure to resume the use (or structure) during the period was due to circumstances truly beyond the control of the owner (for example, a red tape delay in obtaining a State permit) and again, only if the owner explicitly raises a constitutional claim and the Board states in its decision that it is based on constitutional law (a decision you'll probably want to consult the Board's attorney about).

Be careful when applying "use-it-or-lose-it" clauses. In *Pike Industries, Inc.*, the Madbury ZBA held that an asphalt plant had lost its nonconforming status under a 1-year clause because no asphalt had been produced for a year. But the Court said the Board's outlook was too narrow. The evidence showed that Pike spent $24,000 during that year to keep its plant ready to produce asphalt if any were ordered. Thus the business had not been discontinued. The Court said "a store owner cannot guarantee that customers will purchase merchandise."

THE ZBA ACTING AS THE BUILDING CODE BOARD OF APPEALS

State and Local Building Codes

If a municipality adopts a building code, they must provide for the position of a building inspector and establish a building code board of appeals (BCBA). The BCBA could be the zoning board of adjustment or the board of selectmen if there is no ZBA.

RSA 673:1 Establishment of Local Land Use Boards

V. Every building code adopted by a local legislative body shall include provisions for the establishment of the position of a building inspector, who shall issue building permits, and for the establishment of a building code board of appeals. If no provision is made to establish a separate building code board of appeals, the ordinance shall designate the zoning board of adjustment to act as the building code board of appeals. If there is no zoning board of adjustment, the board of selectmen shall serve as the building code board of appeals.

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

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.

Ideally there will be a separate BCBA; however, if the building code does not designate a separate BCBA and the code designates the ZBA by default to fill that role, it becomes another duty of the board of adjustment.

Any person aggrieved by a decision of the building inspector dealing with the building code may appeal to the BCBA. If the ZBA is the BCBA, then they assume these statutory powers. The statute gives little guidance or standards to help the board consider an application but does allow the board to "vary" how any provision is applied to a particular case when, in their opinion, the enforcement of the specific provision would do "manifest injustice and would be contrary to the spirit and purpose of the building code and the public interest."

It is recommended that if the ZBA is faced with an appeal of a decision of the building inspector relative to the building code, they handle the appeal as they would an appeal from an administrative decision. The plaintiff should complete the appeal from an administrative decision application form and include a copy of the written decision of the building inspector citing the exact portions of the

building code that are in question and how the project does, or does not, comply with the building code.

RSA 674:34 Powers of Building Code Board of Appeals

The building code board of appeals shall hear and decide appeals of orders, decisions, or determinations made by the building official or fire official relative to the application and interpretation of the state building code or state fire code as defined in RSA 155-A:1. An application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of the state building code or the state fire code.

The state building code (SBC) is a collection of nationally recognized codes adopted by reference.

RSA 155-A:1 Definitions

IV. "New Hampshire building code" or "state building code" means the adoption by reference of the International Building Code 2009, the International Existing Building Code 2009, the International Plumbing Code 2009, the International Mechanical Code 2009, the International Energy Conservation Code 2009, and the International Residential Code 2009, as published by the International Code Council, and the National Electrical Code 2014, as amended by the state building code review board and ratified by the legislature in accordance with RSA 155-A:10. The provisions of any other national code or model code referred to within a code listed in this definition shall not be included in the state building code unless specifically included in the codes listed in this definition.

The local building inspector or the State Fire Marshal's office may enforce the state building code.

RSA 155-A:7 Enforcement Authority

I. The local enforcement agency appointed pursuant to RSA 674:51 or RSA 47:22 shall have the authority to enforce the provisions of the state building code and the local fire chief shall have the authority to enforce the provisions of the state fire code, provided that where there is no local enforcement agency or contract with a qualified third party pursuant to RSA 155-A:2, VI, the state fire marshal or the state fire marshal's designee may enforce the provisions of the state building code and the state fire code, subject to the review provisions in RSA 155-A:10, upon written request of the municipality.

RSA 674:51 Power to Amend State Building Code and Establish Enforcement Procedures

The state building code established in RSA 155-A shall be effective in all towns and cities in the state and shall be enforced as provided in RSA 155-A:7. In addition, towns and cities shall have the following authority:

I. The local legislative body may enact as an ordinance or adopt, pursuant to the procedures of RSA 675:2-4, additional provisions of the state building code for the construction, remodeling, and maintenance of all buildings and structures in the municipality, provided that such additional regulations are not less stringent than the requirements of the state building code. The local legislative body may also enact a process for the enforcement of the state building code and any additional regulations thereto, and the provisions of a nationally recognized code that are not included in and are not inconsistent with the state building code. Any local enforcement process adopted prior to the effective date of this paragraph shall remain in effect unless it conflicts with the state building code or is amended or repealed by the municipality.

II. Any such ordinance adopted under paragraph I by a local legislative body shall be submitted to the state building code review board for informational purposes.

III. The local ordinance or amendment adopted according to the provisions of paragraph I shall include, at a minimum, the following provisions:

(a) The date of first enactment of any building code regulations in the municipality and of each subsequent amendment thereto.

(b) Provision for the establishment of a building code board of appeals as provided in RSA 673:1, V; 673:3, IV; and 673:5.

(c) Provision for the establishment of the position of building inspector as provided in RSA 673:1, V. The building inspector shall have the authority to issue building permits as provided in RSA 676:11-13 and any certificates of occupancy as enacted pursuant to paragraph III, and to perform inspections as may be necessary to assure compliance with the local building code.

(d) A schedule of fees, or a provision authorizing the governing body to establish fees, to be charged for building permits, inspections, and for any certificate of occupancy enacted pursuant to paragraph III.

IV. The regulations adopted pursuant to paragraph I may include a requirement for a certificate of occupancy to be issued prior to the use or occupancy of any building or structure that is erected or remodeled, or undergoes a change or expansion of use, subsequent to the effective date of such requirement.

A municipality may adopt additional codes from the International Code Council, which are not included in the SBC.

RSA 674:51-a Local Adoption of Building Codes by Reference

In addition to the local powers under RSA 674:51 a municipality may adopt by reference any of the codes promulgated by the International Code Conference which are not included in the state building code under RSA 155-A.

For more information about the relationship between the State Building Code and the State Fire Code, see the 2015 NHMA Law Lecture #3 - Implementing & Enforcing the State Building Code & the State Fire Code by Audrey Cline, Building Inspector/Code Enforcement Officer, Town of Stratham; Carrie Rouleau-Cote, Building Inspector, Town of Auburn; and Stephen C. Buckley, Esq., Legal Services Counsel, New Hampshire Municipal Association.

OTHER RESPONSIBILITIES

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

Developments of Regional Impact

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.

Earth Excavation

RSA 155-E:1, III allows the zoning board of adjustment 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).

Junkyard Licensing

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

Airport Zoning

RSA 424:6-a Application of Zoning and Planning Laws

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.

"Official Map"

In a community which has adopted the "official map" statute, RSA 674:13 authorizes a zoning board of adjustment 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 New Hampshire have a true "official map."

Interim Zoning

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

Building on Class VI and Unapproved Private Roads

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.[19]

Historic District Commission Appeals

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 677:1-14 govern where there is no zoning ordinance.

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

Appeals of Decisions of the Governing Body Relating to the Restoration of Involuntarily Merged Lots

RSA 674:39-aa, II empowers the board of adjustment to hear appeals of decision of the governing body relating to the restoration of involuntarily merged lots. These appeals should be handled in the same fashion as would any appeal of an administrative decision under RSA 676:5.

Waivers for Agricultural Uses of Land

Under the provisions of RSA 674:32-c, II, an applicant can seek a waiver from the zoning board of adjustment, building code board of appeals (if the municipality has one), or "other applicable land use board" – which would include the planning board – if the applicant can show that compliance with the requirements effectively prohibit an agricultural use allowed under this subdivision of Chapter 674, or that the requirements are otherwise unreasonable in the context of the agricultural use.

WHAT THE BOARD SHOULD NOT DO

Informal Advice and Advisory Opinions

The board should never issue advisory opinions or render informal advice regarding any particular development proposal. The board only acts when there is a formal application for a variance, special exception, appeal of an administrative decision or application for an equitable waiver, or if being asked to act on any other statutory responsibility. In contrast to the planning board, there is no preliminary review process as outlined in RSA 676:4, II for the zoning board of adjustment.

> ***"The ZBA's greatest fact-finding challenge comes when it hears an appeal to a decision of the historic district commission. 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."***
>
> NHMA Municipal Law Lecture #3, Fall 1999, "Getting the Facts Straight"
> Benjamin Frost, Esq. and Clayton Mitchell, Esq.

CHAPTER III: 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, and 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 timeframe 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.[20]

Also see *Atwater v. Plainfield,* No. 2009-199, [July 20, 2010]. In this case, the planning board conditionally approved an application for site plan review. Final approval was granted 14 days later. The petitioners filed an appeal to the ZBA 28 days after the original conditional approval had been issued. The ZBA denied the appeal, finding that it had been filed 13 days late. The superior court upheld this decision, and the petitioners appealed to the supreme court. The supreme court agreed, holding that the 15-day appeal period found in the local zoning ordinance began to run as soon as the conditional approval was issued. In this case, the zoning ordinance provided that the appeal period to the ZBA was 15 days.

Atwater was cited in *Accurate Transport, Inc. v. Town of Derry* [August 11, 2015], where the court looked at the timeliness of an appeal of a code enforcement officer's decision that the ZBA converted to an appeal of the planning board decision. The appeal window began from the date of the written decision, not when the CEO offered his opinion during a technical review committee meeting of whether or not a use was allowed.

(See a summary of the case by the NH Municipal Association on the OEP website http://www.nh.gov/oep/resource-library/laws-rules-cases/index.htm Selected Supreme Court Decisions 2015.)

Section VI was added to RSA 674:33 in 2013 prohibiting the ZBA from requiring submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision. See the amended text of RSA 674:33 on page II-5.

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 chairperson, clerk, town planner or whoever 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

[20] 1999 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 22, 1999.

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 this 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 are sufficiently supported. If the application is not fully or correctly completed, 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.

The board should always consider whether the relief sought is needed.

"Given the complexity of zoning regulation, the obligation of municipalities 'to provide assistance to all their citizens seeking approval under zoning ordinances,' and the importance of the constitutional right to enjoy property, we cannot accept that the mere filing of a variance application limits the ZBA or superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place." (citations omitted)

Stephen Bartlett & a. v. City of Manchester, 164 NH 634, February 25, 2013

In *Bartlett*, the church had applied for a use in one of its buildings that the City said was not allowed, thus prompting the church to seek a variance which the ZBA granted. During the proceedings, it was noted that the use was actually accessory to the church as a whole and a variance was not needed. The superior court agreed but the supreme court remanded the case back to the superior court, with orders that it be sent down to the ZBA for a further hearing on the accessory use issue. When deliberating a variance, the board should always consider if the use might be allowed for some other reason and whether the variance is even needed. And applicants who are denied a building permit because the administrative official finds that the use is not allowed, should always be informed that they can appeal the administrative decision and need not go straight to a variance application.

(See summaries of the case on the OEP website http://www.nh.gov/oep/resource-library/laws-rules-cases/index.htm Selected Supreme Court Decisions 2013.)

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 N.H. 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 and 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 underway 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 of the time and place of the hearing 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 than the statute. 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 Governmental 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.

RSA 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 with 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 N.H. 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 chairperson 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 chairperson could give the applicant the option of postponing the hearing until all members are present. If the applicant chooses to proceed with the hearing, he/she 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. (Also discussed in the **DECISION** section on page III-14.)

Following the roll call, the chairperson may make a brief statement of the general principles involved in the appeal process and explain the purpose of the public hearing. The chairperson 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 chairperson 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, they should be given an opportunity to do so as this will be an important record in the event the decision is appealed.

If the board finds that they cannot conclude the public hearing within the time available, they may vote to continue the hearing to a specific time, place and date with no additional notice required so long as they make the formal announcement before voting to continue the hearing. If the board just votes to continue the hearing without announcing the specific time, place and date when the hearing will resume, they will be required to provide formal notice of the reconvened hearing as was done originally. Upon its conclusion, the hearing should be officially closed before the board begins its formal deliberations.

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

The chairperson of the zoning board of adjustment or the chairperson of the building code board of appeals or, in the chairperson's absence, the acting chairperson 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 chairperson 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 chairperson to keep the questioning within the limits of legality and propriety. In the absence of a formal request to cross-examine, the chairperson 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 promptly recorded and open to public inspection not more than 5 business days after 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 chairperson 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.

CONSIDERATION OF EVIDENCE AND TESTIMONY

In *Continental Paving v. Town of Litchfield*, 929 A. 2d 467 [2009], the zoning board of adjustment denied a special exception in part based on general information contained in a conservation fact sheet from the NH Audubon Society and discounted expert testimony from witnesses for the applicant. The supreme court vacated the denial and remanded the issue back to the zoning board of adjustment with an order to grant the special exception. Boards must consider the source of the evidence presented and give due weight to what is presented. General information presented cannot be considered the "personal knowledge" of the members.

> ***"We have previously held that in arriving at a decision, the members of the ZBA can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Thus, ZBA members may base their conclusion upon 'their own knowledge, experience, and observations,' in addition to expert testimony. We reject, however, the Town's contention that information contained in exhibits before the ZBA is transformed into 'personal knowledge' through individual ZBA members using such information to 'educate themselves.' Rather, the exhibits were simply evidence before the ZBA."*** **(citations omitted)**

EXPENDITURE OF FEES

RSA 673:16 Staff; Finances

II. Any fee which a local land use board, acting pursuant to this title, collects from an applicant to cover an expense lawfully imposed upon that applicant, including but not limited to the expense of notice, the expense of consultant services or investigative studies under RSA 676:4, I(g) or RSA 676:5, IV, or the implementation of conditions lawfully imposed as part of a conditional approval, may be paid out toward that expense without approval of the local legislative body. Such fees:

(a) Shall, whenever held by the municipality, be placed in the custody of the municipal treasurer, subject to the same investment limitations as for other municipal funds.

(b) Shall be paid out 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; provided, however, that such fees may be used to reimburse any account from which an amount has been paid out in anticipation of the receipt of said fees.

(d) Shall be paid out by the municipal treasurer only upon order of the local land use board or its designated agent for such purpose. This paragraph shall not apply to application, permit, or inspection fees which have been set by the local legislative body as part of an ordinance, or by the selectmen under RSA 41:9-a. Notwithstanding RSA 672:7, a building inspector shall not be considered a "local land use board" for purposes of this section.

RSA 676:5 Appeals to Board of Adjustment

IV. The board of adjustment may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.

V.(a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.

(b) A board of adjustment retaining services under subparagraph (a) shall require detailed invoices with reasonable task descriptions for services rendered. Upon request of the applicant, the board of adjustment shall promptly provide a reasonably detailed accounting of expenses, or corresponding escrow deductions, with copies of supporting documentation.

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 676:5, IV, or the implementation of conditions lawfully imposed as part of a conditional approval, and then to pay out those funds towards 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, non-lapsing 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. Given the possibility that redundant studies may be requested of the same application, both zoning and planning boards are limited to assessing fees where it will not "substantially replicate a review and consultation obtained by" the other board.

DISQUALIFICATION

No Public Official may vote on any matter in which he or she has a conflict of interest. The general rule is that a conflict of interest requiring disqualification will be found when an official has a direct personal or pecuniary (financial) interest in the outcome. That interest must be "immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative." *Atherton v. Concord*, 109 N.H. 164 (1968).

As the court in *Atherton* explained, *"The reasons for this rule are obvious. A man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a personal financial interest which is, or may be, in conflict with the public interest."*

It is a question of degree, and all the circumstances need to be considered in each case. However, the standard is objective: Would a person of "ordinary capacity and intelligence" be influenced by the financial interest?

From "Conflict of Interest, Disqualification and the Local Land Use Board Decision-Making Process"
NHMA Law Lecture #2, Fall 2010

RSA 673:14 Disqualification of Member

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing 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 chairperson shall designate an alternate to act in the member's 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 themselves from participation in that hearing. The chairperson, 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. It is strongly urged that such a recused member actually leave the meeting room for the duration of the public hearing and deliberations to quell even the notion of participation by the disqualified member.

4. How to Recuse Oneself Properly

If a member does recuse himself or herself, how should they behave at that point? It is critical to note that simply saying "I recuse myself" is not enough. The member must take steps to make the recusal effective - **literally**. The member should immediately leave their seat at the board table, and preferably, leave the room until the board moves on to the next subject. If the member remains in the meeting room, taking a seat with the general public is appropriate. These actions make it clear to all in attendance that the official is, for all purposes, no different from any member of the public in relation to this matter.

Of course, a person does not lose their status as a citizen when they become a local official, and a recused board member may wish to be heard on the matter just like any other member of the public. In some cases, the member may be a party to the action if, for example, they are the applicant in a land use case or an abutting landowner. Parties to the case have a legal right to be heard on the application, so they may certainly participate in that capacity. In most cases, the member with the conflict is not a party to the case. In that situation, the better practice (both legally and for the sake of appearances, which matter in these situations) is for the member to remain quiet if they stay in the room. However, if they feel strongly about the matter, they have the right to speak during the time set aside for public comment or testimony. If a recused member does this, they should begin with a statement that they are speaking on their own behalf as a citizen and not as a member of the board. This helps solidify the understanding that the member is not participating in the board's consideration of the matter.

In any case, if the member remains in the room, they should not act in any way as a member of the board. It would be improper, for example, for the member to ask questions of the parties (other than at times when the general public is permitted to do so), engage in discussion that is occurring only among board members, or vote on the matter. This is just as risky as remaining at the table or failing to recuse oneself in the first place. *"[M]ere participation by one disqualified member [is] sufficient to invalidate the tribunal's decision because it [is] impossible to estimate the influence one member might have on his associates."* *Winslow v. Town of Holderness Planning Board*, 125 N.H. 262 [1984]. It is also advisable to refrain from using body language to indicate an opinion or try to influence a decision of the board. Remember, appearances count in this situation. Members should be concerned not only about the legal ramifications, but the political consequences of questionable behavior.

From "Conflicts and Ethical Considerations for Land Use Boards"
NHMA Law Lecture #2, Fall 2013

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 N.H. 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)

RSA 500-A:12 Examination

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

FINDINGS OF FACTS

At the conclusion of public testimony but before the public hearing is closed, the board should begin to 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. This practice is helpful should the board have any additional questions for the applicant or if they need clarification about any evidence or testimony presented while establishing the facts of the case. An example of fact finding would be 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 N.H. 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 N.H. 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 NH Forests v. Site Evaluation Committee*, 115 N.H. 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 N.H. 145 [1976] stated that findings of fact must be made even though not required by the Administrative Procedure Act, RSA 541-A:36, 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*, 147 N.H. 328 [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, 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

(For a complete discussion on this topic see "Conflict of Interest, Disqualification and the Local Land Use Board Decision-Making Process," NHMA Law Lecture #3, Fall 2010.)

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 the **Public Hearing** section on page III-7.)

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].)

The following excerpt was taken from *Attaching "Conditions" to Approvals in Land Use Boards*, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.

II. Improving the Quality of Motions and Decisions

The language of your decisions is not being drafted for the benefit of those who are in the room making the decision; the language is drafted for those who will use the decision in the future to implement the approved project, or to take enforcement action if the landowner or a successor owner fails to live up to the conditions imposed upon the project. Remember, the relief offered by land use boards runs with the land, and is not personal to the person who initially sought the relief, unless you are dealing with the special disability exception for variances contained in RSA 674:33, V. Here are some thoughts:

A. A motion should be clearly stated, and a written copy should be provided to the person who is taking the minutes, when possible. Think about how many times each of you as board members has seen a situation where a discussion of an issue ends with a member stating, "Are we all agreed?," followed by heads nodding in unison. How is the person taking the minutes to record that action? What are the chances that at least one member perceives the "agreement" differently from at least one other member? How are the parties and the public to understand the action that has been taken? Please stop, and assure that all motions are clearly and verbally stated. When possible, a written copy should be provided to the person taking the minutes, to reduce the chances of error and misunderstanding.

B. The motion should describe the plan set submitted by the applicant that is actually being used to craft the approval. As projects become more complex, the number of submissions of different versions of the plans, in both paper and electronic formats, steadily increases. Thus, for the benefit of future officials and board members, the motion should describe the plan set being used as the basis of the motion. Often the engineer or surveyor will include a project or file number, and a block with the date of the latest revisions. Refer to that information in your motion. Don't grant a final approval until the plan set that is to be recorded at the Registry of Deeds agrees in all respects with the motions and conditions of approval imposed along the way. That is, be sure that the "final approval" of the final plan set really does reflect completion of all of the "conditions precedent."

C. Be careful that the words you use accurately describe what you want to accomplish. For example, don't say, "I move to approve the ten foot variance." While it may be clear to everyone in the room that night what the board is attempting to accomplish, how can a building official determine what that means five years later when a surveyor requests information to create a plot plan that will be used as part of the landowner's mortgage closing process?

Instead, say something like, "I move to approve the applicant's request for a variance from section _____ of the zoning ordinance to permit the construction of a single family structure that is located twenty feet from the easterly sideline of the land shown on Tax Map ____ Lot ____ when thirty feet is required, in accordance with a plan entitled, _____ as drawn by _____, dated ____, and submitted by the applicant as part of this hearing, with the following conditions: _____."

D. Don't expect the parties to draft the language that you want. If the parties are represented by lawyers, you can expect to receive a written proposed motion to support the view of the party being represented, and a written request for findings of fact. The lawyers are approaching the case as litigators and advocates for their client's position, not necessarily from the viewpoint of board members.

If the parties are primarily represented by an engineer or a surveyor, the Board will receive a great deal of graphical evidence (plans), and perhaps written reports that describe the outcome of wetland studies, drainage calculations, or traffic counts or traffic movements during a study period.

That is, don't expect the lawyers to create graphical plans, and don't expect the engineers to craft a motion and request for findings of fact that would satisfy the Board. It is not realistic, except in the most straightforward of uncontested matters, for the members to simply attend a Board meeting and hope that one member will be able to immediately craft a clear motion for approval with accurate, complete and meaningful conditions that capture all of the thoughts of the Board. A well-crafted decision takes time, and advance preparation. It need not be completed in a single meeting if the Board needs to consider drafts of the decision, or to obtain legal advice regarding aspects of the decision. Please do not say to the person taking the minutes or the chairperson, "You know what I mean, just clean it up for the minutes and notice of decision."

It is perfectly lawful to request a party to file proposed documents, or to request staff for the board to prepare a proposal in advance, or for a board member to craft and bring a proposal to a meeting to use as a basis for discussion. (See *Webster v. Candia*, 146 N.H.

430 [2001].) What is not lawful is to deliberate as a board on such proposals outside of a public meeting, either by holding an unnoticed meeting of the members, or through e-mail. See RSA 91-A:2, and RSA 91-A:2-a. Your discussions on the proposed documents must take place only within a duly noticed and convened public meeting, and not otherwise.

E. Be very careful before incorporating any codes or other requirements by reference if the Board does not have a clear understanding of the implications of the action. For example, Boards will often require an applicant to "meet the requirements of the Police and Fire Departments." This can have unexpected consequences.

See *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 [2012], where that type of requirement was added as a condition of approval. Once the applicant met with the Fire Chief, the unusually steep nature of the lot and its driveway caused the chief to require the installation of residential sprinklers in a house, since the fire equipment could not get close enough to the house itself to provide service. The landowner balked at the requirement, altered the structure and took residence without an occupancy permit. In an enforcement action, the landowner defended by citing to a state statute that prohibited a planning board from imposing such a condition. The supreme court found that the requirements of the State Fire Code controlled the situation, and not the planning board statute.

RECOMMENDATION ON THE TIMING, THE WRITING, AND THE VOTE

The board does not need to reach a decision on the same night as the hearing was held and can take time to consider the evidence and testimony and render a decision at a later time. This is especially helpful in contested cases following a controversial hearing where a "cooling off period" might be needed. To make a sound decision, the board needs to create a carefully worded and well thought out written motion, which can be difficult to do following a lengthy hearing.

Once the evidentiary portion of the hearing is concluded, the evidence presented and testimony complete, the board may want to keep the public hearing portion of the meeting open as they begin deliberations. This would allow the board time to start talking about the case while allowing an opportunity for the applicant or abutters to provide clarification about the evidence or testimony and answer any questions the board may have.

The board should close the public hearing only when they feel all the necessary information to reach a decision has been gathered. At that point, the board could continue deliberations without the possibility of further participation by the applicant, abutters, or the public, or could recess the deliberations to a future meeting.

One practice the board could use would be to assign the task of drafting a motion to approve or disapprove the application to one or more board members. The member(s) would then take the intervening time between meetings to draft a motion for action and bring it to the next meeting where the full board would discuss the motion, make any amendments necessary and vote on the motion, or make alternative motions to consider. The point is that the board need not feel compelled to reach a decision immediately upon the close of the hearing but can take time to consider what they have learned and develop a well thought out decision. Care must be taken, however, to not discuss the case with each other during this time to not run afoul of the Right to Know Law.

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 and make a copy of the decision available to the applicant. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

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 and all conditions of approval, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days 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.

III. Whenever a plat is recorded to memorialize an approval issued by a local land use board, the final written decision, including all conditions of approval, shall be recorded with or on the plat.

Whether an application is approved or denied, the board's decision must be in writing and given to the applicant along with 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 N.H. 202 [1985]

Though not required by the statute, the board should also provide written reasons for approval. The board would be better able to defend their position if appealed by an abutter, would instill public confidence and would allow future boards and interested parties a better understanding of how the decision was reached. When an application is approved with conditions, those conditions must be included in the written decision and included with or on any plat recorded to memorialize an approval as contained in RSA 676:3, III.

The written decision, along with the minutes of the meeting at which the vote was taken, must be on file for public inspection within 5 business days 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. *"While there is no express statutory provision permitting a zoning board to place conditions on the granting of a variance, we have previously held that a board's extensive powers include the authority to attach reasonable conditions where they are necessary to preserve the spirit of the ordinance." Michelle J. Robinson v. Town of Hudson*, No. 2005-687 [December 20, 2006]

A zoning board of adjustment has the ability to attach conditions to any relief that is within its jurisdiction in accordance with decisions of the New Hampshire Supreme Court. The conditions must be reasonable, and relate to the spirit of the ordinance in question and the actual use of the land, and not to the person who is to be using the land. See *Wentworth Hotel v. New Castle*, 112 N. H. 21 [1972] and *Peabody v. Windham*, 142 N.H. 488 [1997]. The exception to this rule is found at RSA 674:33, V, relating to approving reasonable accommodations to persons with physical disabilities, which can be conditioned to expire only as long as the named person has a need to use the premises.[21]

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 N.H. 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.

> The following excerpt was taken from *Attaching "Conditions" to Approvals in Land Use Boards*, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.
>
> Since the land use boards clearly have the ability to add conditions to their decisions, what is the difference between a "conditional approval" and a "final approval?" The supreme court has indicated that the purpose of allowing conditional approvals is to avoid a requirement that any impediment to full approval must result in a formal disapproval of the application and the wasteful necessity of starting all over again. *Sklar Realty v. Merrimack*, 125 N.H. 321 [1984]

[21] From Attaching "Conditions" to Approvals in Land Use Boards, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.

Therefore, "conditional approval" is an *interim step* in the process of the board's consideration of the application. A "final approval" cannot be given to the applicant until all of the "conditions precedent" have been met by the applicant. *Simpson Development Corp. v. Lebanon*, 153 N.H. 506 [2006]

What is the difference between a "condition precedent" and a "condition subsequent?" The Court has defined it this way. A "condition precedent" is some action that has to be taken by the applicant in order to remove an impediment to "final approval." These are the things that need to be done before the town will take the additional step of granting "final approval." A "condition subsequent" defines an action or behavior that binds the applicant, but does not need to be accomplished before "final approval" is granted. *Property Portfolio Group, LLC v. Derry*, 154 N.H. 610 [2006].

A subdivision plan or site plan cannot be recorded at the Registry of Deeds, and land cannot be conveyed by reference to such a plan, until "final approval" has been granted. When economic conditions are good, and demand for the new product is high, there is generally a short period between the entry of a "conditional approval" and the achievement of "conditions precedent." When economic conditions are less favorable, the gap may extend over a period of years, and on occasion are never achieved. For this reason, many boards now impose time limits upon applicants to achieve conditions precedent to final approval, and require applicants to return to them in the event the time limits are not achieved.

There is also a potential need to schedule a further public hearing in the Planning Board prior to issuance of a "final approval." The Planning Board must hold an additional public hearing on the matter unless the conditions precedent are "minor," "administrative," or involve "possession of permits and approvals granted by other boards or agencies." It is not unusual for the permits or approvals granted by other agencies to require some substantive change in the plans conditionally approved by the Planning Board or Zoning Board of Adjustment. If plans must change substantively in order to comply with these other approvals, a public hearing on the changes must be held with appropriate notice to all interested parties. RSA 676:4, I(i).

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, they must be recorded with or on the plat (RSA 676:3, III SB189 [2009]). 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 N.H. 629 [1996].) 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. RSA 674:33 was amended in 2013 to provide a 2-year window within which a variance or special exception remains valid unless treated differently by local ordinance or the specific decision. See the Special Exception and Variances sections of Chapter II.

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:1, 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 applicants 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 member 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, provided the basis for the decision is clear and complete.

INTEGRATED LAND DEVELOPMENT PERMIT

In 2013, RSA 674:21 was amended to add an "integrated land development permit option" as an optional land use control to allow a project to proceed, in whole or in part, as permitted by the NH Department of Environmental Services (DES) under RSA 489.

An applicant for approvals or permits under two or more programs within the DES may apply for an integrated land development permit in lieu of all individual permits such as wetlands, shoreland, and alteration of terrain permits. The amended statute allows municipalities to participate in the process with the consent of the applicant and/or at the invitation of DES. The new law also authorizes a municipality to adopt an innovative land use control ordinance allowing the planning board to approve a project that does not fully conform to the local zoning ordinance if it has been approved by DES under the integrated land development program. Municipalities interested in enacting a local provision to participate in this program should check with DES to determine when the program will be fully operational.

Municipalities may adopt an innovative land use control ordinance pursuant to RSA 674:21, authorizing the planning board to allow a project that does not fully conform to the local zoning ordinance to proceed as approved by the department under this chapter, provided the planning board makes a finding that such a project meets the criteria of paragraph I. (RSA 489:9, V).

SB267 (Chapter Law 156 of 2014) changed the effective date of the establishment of the Integrated Land Development Permit from January 1, 2015, to July 1, 2017. [November 2014]

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 checklist:

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?

Is the application 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 N.H. 761 [1988] [22]

Is the application a request for a variance?
If so...

- Would granting the variance not be contrary to the public interest?
- Could the variance be granted without violating the spirit of the ordinance?
- Would granting the variance do substantial justice?
- Could the variance be granted without diminishing the value of abutting properties?
- Would denial of the variance result in unnecessary hardship to the owner?

[22] The Pit & The Pendulum, Attorneys Bates and Mitchell, New Hampshire Municipal Association, Municipal Law Lecture Series, Lecture #3, 1995, pg. 16.

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.

Is the application 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.

CHAPTER IV: 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 therefore 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 5 business days after 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 zoning 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 a 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 for 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).

Absent a provision in the Rules of Procedure to the contrary, a Motion for Rehearing must be filed during normal business hours in the office of the board. (See *Cardinal Development v. Town of Winchester*, October 2008.)

However, if it can be shown that the minutes and written decision were not filed within 5 business days 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 filed. Therefore, it is most important for the board to make sure that the minutes and decision of every case are timely filed 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.

If the last day for filing an appeal falls on a Saturday, Sunday or legal holiday, they will be deemed timely filed if received by the next business day. See *Steve Trefethen & a. v. Town of Derry* Submitted: February 7, 2013, Opinion Issued: April 12, 2013, and RSA 21:35, II which allows filing at the "next business day" if the deadline falls on a weekend or legal holiday.

The board may reconsider their decisions provided it is done within the statutory 30-day appeal period of the original decision. *"…we believe that municipal boards, like courts, have the power to reverse themselves at any time prior to final decision if the interests of justice so require. We hold that belief because the statutory scheme established in RSA chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its own decisions so that the court may have the benefit of the board's judgment in hearing the appeal."* *74 Cox St., LLC v. City of Nashua*, [September 21, 2007]. It is recommended that the board include a by-law provision allowing for board-initiated reconsiderations.

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, 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), and the Board of Selectmen all have standing to appeal a ZBA decision. (See *Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment*, 149 N.H. 63 [2003].) 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 N.H. 541 [1979].)

When a Motion for Rehearing is received, the board must decide to either grant the rehearing or deny it within 30 days. (RSA 677:3, II)

Since this is a board decision, the board must meet to consider the motion and act to grant or deny it. This is a public meeting subject to the minimum posting requirements of the Right to Know Law but is not necessarily a public hearing and no formal notice is required to either the applicant or abutters (or the moving party) unless required by the board's Rules of Procedure.

If the board decides to grant the rehearing, a new public hearing is scheduled with new notice to everyone and the process moves forward. If the board decides not to grant the rehearing, their work is done. All they must do is inform the petitioner that the rehearing was denied and the petitioner then has 30 days to challenge that decision by appealing to superior court. [RSA 677:4]

Once the board decides to grant a rehearing, they must set the date for the new hearing. It is recommended that the rehearing be held within 30 days of the decision to grant the rehearing provided notice fees and an updated abutters list have been received from the party requesting the rehearing and that the Rules of Procedure outline the rehearing process. (See the draft Rules of Procedure in Appendix A.)

There is no statutory requirement that the petitioner actually attend the rehearing. In the event someone requests a rehearing, then asks that it be delayed or postponed, the board may honor that request at their discretion. However, if the petitioner continually asks for delays and postponements, the board may proceed with the hearing (after proper notice to all) even if the petitioner does not attend. The chair of the ZBA also has the authority to compel witnesses to attend. (See RSA 673:15 Power to Compel Witness Attendance and Administer Oaths.)

If in its review of the motion for rehearing the board feels compelled to add additional reasons for denial beyond those issues raised in the motion, they should grant the motion, hold a new hearing, and include their additional reasons in a new denial decision. This would allow the moving party to file a new motion for rehearing and, if appealed to superior court, bring forth all the reasons the ZBA denied the application. (See *McDonald v. Town of Effingham ZBA*, 152 N.H. 171 [2005].)

It is recommended that the meeting to consider a Motion for Rehearing not be a *public hearing* and that no testimony is taken. It is a *public meeting* and anyone has the right to attend but all the board is acting on is the motion in front of them (what has been submitted) and should not involve comments by the applicant, petitioner or abutters. If the board believes there are sufficient grounds to reconsider their original decision, the motion should be granted; if not, the motion should be denied.

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 N.H. 438 [1981]

Colla v. Town of Hanover, No. 2005-217, January 27, 2006, examines the issue of what satisfies the requirement of RSA 677:3, I - with regard to a party's obligation to "set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable" when applying to the zoning board of adjustment for rehearing. *Colla* was denied a variance and they motioned for a rehearing stating: 1) the decision was unreasonable; 2) the decision denied them their constitutional rights to due process and equal protection of the laws; 3) the decision was contrary to *Michael Boccia v. City of Portsmouth*, 151 N.H. 85, 104 [2004]; and 4) the decision was contrary to the ordinance. The ZBA denied the motion and was upheld by the superior court. *Colla* appealed to the supreme court who overruled the lower court ruling stating that the motion "satisfied the spirit and letter of RSA 677:3."

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." 9 v. City of Manchester*, 118 N.H. 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].) [23]

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 N.H. 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 motion 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.

[23] Peter J. Loughlin, Esq., 15 New Hampshire Practice: Land Use Planning and Zoning, 3rd Ed., § 21.17.

Before appealing to superior court, parties must exhaust their administrative remedies first, meaning that they must pursue an appeal to the ZBA first and a motion for rehearing in order to allow the local board an opportunity to correct its mistakes or reach a new decision based on new information from the petitioner. This does not apply when the ZBA does not have jurisdictional authority over the appeal such as the question of an equitable estoppel claim. Because the ZBA does not have the authority to adjudicate an equitable estoppel claim, administrative remedies need not be exhausted before bringing suit.

(See Daryl Dembiec & a. v. Town of Holderness, November 13, 2014, and a summary of the case on the OEP website http://www.nh.gov/oep/resource-library/laws-rules-cases/index.htm Selected Supreme Court Decisions 2015.)

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 5 business days after 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

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, this action 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. City of Manchester*, 120 N.H. 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 court re-emphasized this point in *Olszak v. Town of New Hampton*, 139 N.H. 723, 661 A.2d 968 [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. *"Furthermore, since the board members were acting in a judicial capacity they may not be required to answer inquiries into the mental processes by which their decisions were reached." Merriam v. Town of Salem,* 112 N.H. 267, 268 [1972]

"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 NH 267 (1972)**

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.

APPEAL OF PLANNING BOARD DECISION

RSA 677:15 was amended in 2013 (SB49, Ch. Law 179:1, 2013) to clarify that any portion of a planning board decision that is appealable to the ZBA must go to the ZBA first and that any appeal of a planning board decision in superior court is stayed until such time as the matters appealable to the ZBA have concluded. In addition, if a planning board decision is appealed to the superior court and it is later discovered that matters of the decision should have been appealed to the ZBA, the court can stay the proceedings to allow an opportunity for the petitioner to appeal to the ZBA.

677:15 Court Review

I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

APPENDIX A
SUGGESTED RULES OF PROCEDURE FOR LOCAL BOARDS 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 chairperson** shall be elected annually by a majority vote of the board in the month of _____. The chairperson 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-chairperson** shall be elected annually by a majority vote of the board in the month of _____. The vice-chairperson shall preside in the absence of the chairperson and shall have the full powers of the chairperson on matters which come before the board during the absence of the chairperson.

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. At meetings of the ZBA, alternates who are not activated to fill the seat of an absent or recused member or who have not been appointed by the chair to temporarily fill the unexpired term of a vacancy, may participate with the board in a limited capacity. During a public hearing, alternates may sit at the table with the regular members and may view documents, listen to testimony, ask questions and interact with other board members, the applicant, abutters and the public. Alternates shall not be allowed to make or second motions. Once the board moves into deliberations, alternates shall remove themselves from the table and no longer participate with the board. During work sessions or portions of meetings that do not include a public hearing, alternates may fully participate, exclusive of any motions or votes that may be made. At all times, the chair shall fully inform the public of the status of any alternate present and identify the members who shall be voting on the application.

3. 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 chairperson as soon as possible. Members, including the chairperson and all officers, shall participate in the decision-making process and vote to approve or disapprove all motions under consideration.

Meetings

1. **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 chairperson provided public notice and notice to each member is given in 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.

   a. The chairperson shall make every effort to ensure that all five members, and one or two alternates, are present for the consideration of any appeal or application.

   b. If any regular board member is absent from any meeting or hearing, or disqualifies himself from sitting on a particular case, the chairperson 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.

   c. Alternates shall be activated on a rotating basis from those present at a particular meeting. When an alternate is needed, the chair shall select the alternate who has not been activated for the longest time and if there are two or more alternates who meet that criteria, the alternate who has served the longest shall be activated. If two or more alternates still both meet that criteria, the selection shall be made by the flip of a coin.

   d. If there are less than five members (including alternates) present, the chair shall give the option to proceed or not to the applicant. Should the applicant choose to proceed with less than five members present, that shall not solely constitute grounds for a rehearing should the application fail.

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 chairperson 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.

   Determining the threshold of disqualification can be difficult. To assist a member in determining whether or not they should step down (recuse themselves) board members should review the questions which are asked of potential jurors to determine qualification (RSA 500-A:12). A potential juror may be asked whether he or she:

   a. Expects to gain or lose upon the disposition of the case;
   b. Is related to either party;
   c. Has advised or assisted either party;
   d. Has directly or indirectly given an opinion or formed an opinion;
   e. Is employed by or employs any party in the case;
   f. Is prejudiced to any degree regarding the case; or
   g. Employs any of the counsel appearing in the case in any action then pending in the court.

Either the chairperson or the member disqualifying himself/herself before the beginning of the public hearing on the case shall announce the disqualification. The disqualified member shall exit the meeting room 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 chairperson.
   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 ___ days (30 days recommended) of the decision or when such decision becomes known or reasonably could have been known by the petitioner as determined by the board.

      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. **Forms:** All forms prescribed herein and revisions thereof shall be adopted by resolution of the Board and shall become part of these rules of procedure.

3. **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 (5) days 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 notice costs in advance.

4. **Public Hearing**

The conduct of public hearings shall be governed by the following rules:

a. The chairperson 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 chairperson, 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 chairperson.

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 chairperson 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 chairperson 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.

5. **Decisions:** The board shall decide all cases within ____ days (30 recommended) 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 5 business days, 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).

6. **Voting:** The chairperson may assign the task of drafting a motion to a board member who shall bring a draft motion to the board at the continuation of the deliberative portion of the meeting for the consideration of the board. Should a motion result in a tie vote or not receive the

necessary 3 votes to decide in favor of the applicant, the opposite of the failed motion does not automatically prevail. The board must put forth a new motion to affirmatively set forth a decision.

7. **Reconsideration by the Board:** The board may reconsider a decision to grant or deny an application or grant or deny a motion for rehearing provided such reconsideration is within the appeal period of the original decision as per *74 Cox Street, LLC v. City of Nashua* [September 21, 2007]. Motions for Rehearing can only be received in the office of the board during normal business hours. (See *Cardinal Development v. Town of Winchester* [October 2008].)

8. **Motions for Rehearing:** If the board grants a motion for rehearing, the new public hearing shall be held within 30 days of the decision to grant the rehearing provided all notice fees are paid and an updated abutters list is submitted by the party requesting the rehearing. Notification of the rehearing shall follow the procedures set forth in RSA 676:7. [October 2012]

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 5 business days 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 5 business days of the public meeting. RSA 91-A:2 II

Amendments

Rules of procedure shall be adopted or amended by a majority vote at a regular meeting of the board provided that such new rules or amendments are proposed and discussed prior to the meeting at which the vote is to be taken and shall be placed on file with the city or town clerk and be available for public inspection pursuant to RSA 676:1.

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 a 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 chairperson 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 chairperson shall chair the joint hearing. If the other board is not the planning board, then the board of adjustment chairperson 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.

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- 678, 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:

1. Granting the variance must not be contrary to the **public interest**.
2. The proposed use is not contrary to the **spirit of the ordinance**.
3. Granting the variance would do **substantial justice**.
4. The proposed use would not diminish surrounding **property values**.
5. 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. RSA 674:33, I(b)(5) provides the criteria for establishing unnecessary hardship:

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

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

   (ii) The proposed use is a reasonable one.

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

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 _____ 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.

1. 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.
2. The nonconformity was not an outcome of ignorance of the law or bad faith, but was instead caused by a good faith error in measurement or calculation.

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

3. 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
4. The cost of correction would far outweigh any public benefit to be gained.

In lieu of the requirements in paragraphs (1) and (2), 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 the property is 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 of the decision 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
- Variance
- Equitable Waiver of Dimensional Requirements

NEWSPAPER NOTICE

PERSONAL NOTICE

INDIVIDUAL BOARD MEMBER VARIANCE WORKSHEET

FINDINGS OF FACTS

NOTICE OF DECISION: GRANTED

NOTICE OF DECISION: DENIED

APPEAL FROM AN ADMINISTRATIVE DECISION

Do not write in this space.

Case No. _____

Date Filed _____

_____

(signed - ZBA)

To: Zoning Board of Adjustment,

City/Town of _____

Name of Applicant _____

Address _____

Owner _____

(if same as applicant, write "same")

Location of Property _____

(street, number, sub-division and 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: Zoning Board of Adjustment,

City/Town of _____

Name of Applicant _____

Address _____

Owner _____
(if same as applicant, write "same")

Location of Property _____
(street, number, sub-division and 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 - _____

_____

Criteria 4 - _____

_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR A VARIANCE

Do not write in this space.

Case No. _____

Date Filed _____

_____

(signed - ZBA)

To: Zoning Board of Adjustment,

City/Town of _____

Name of Applicant _____

Address _____

Owner _____

(if same as applicant, write "same")

Location of Property _____

(street, number, sub-division and 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 Variance

A variance is requested from article _____ section _____ of the zoning ordinance to permit _____

_____

_____

Facts in support of granting the variance:

1. Granting the variance would not be contrary to the public **interest** because:

_____

_____

_____

_____

2. If the variance were granted, the **spirit** of the ordinance would be observed because:

_____

_____

_____

_____

3. Granting the variance would do substantial **justice** because:

_____

_____

_____

_____

4. If the variance were granted, the **values** of the surrounding properties would not be diminished because:

_____

_____

_____

_____

5. Unnecessary Hardship

   a. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in **unnecessary hardship** because:

      i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

_____

_____

_____

- and -

      ii. The proposed use is a reasonable one because:

_____

_____

_____

_____

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

_____

_____

_____

_____

Applicant _____ Date _____
(Signature)

APPLICATION FOR AN EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

Do not write in this space.
Case No. _____
Date Filed _____
_____
(signed - ZBA)

To: Zoning Board of Adjustment,

City/Town of _____

Name of Applicant _____

Address _____

Owner _____
(if same as applicant, write "same")

Location of Property _____
(street, number, sub-division and 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 good faith error in measurement or calculation. _____

_____

_____

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

Zoning Board of Adjustment,

City/Town of _____

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

_____

(time) (date) (location)

concerning a request by_____

(applicant's name)

for _____

(type of appeal)

concerning article _____ section _____of the zoning ordinance.

Applicant proposes to _____

_____

on the property located at_____

in the _____ zone.

Signed _____

Chairperson, Zoning Board of Adjustment

PERSONAL NOTICE

Zoning Board of Adjustment,

City/Town of _____

Dear _____,

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

_____

(time) (date) (location)

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 _____

Chairperson, Zoning Board of Adjustment

INDIVIDUAL BOARD MEMBER VARIANCE WORKSHEET

The purpose of this worksheet is to assist individual board members in reviewing all five variance criteria. After reviewing the petition, considering all of the evidence, hearing all of the testimony, and by taking into consideration members' personal knowledge of the property in question, the board should vote on a motion that approves, approves with conditions, or disapproves with reasons, the application under consideration. All five variance criteria must be met to grant a variance.

Petition for a variance of _____

For property located at_____

1. Granting the variance (would/would not) be contrary to the **public interest** because:

_____

_____

2. The **spirit of the ordinance** (would/would not) be observed because:

_____

_____

3. Granting the variance (would/would not) do **substantial justice** because:

_____

_____

4. For the following reasons, the **values of the surrounding properties** (would/would not) be diminished:

_____

_____

5. **Unnecessary Hardship**

   a. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

      (i) There (is/is not) a fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property because: _____

      _____

      (ii) The proposed use (is/is not) a reasonable one because: _____

      _____

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

FINDINGS OF FACTS

Zoning Board of Adjustment,

City/Town of _____

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

concerning a request by _____
(applicant's name)

for _____
(type of appeal)

concerning 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. _____

NOTICE OF DECISION - GRANTED

Zoning Board of Adjustment,

City/Town of _____

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. _____

_____
Chairperson, Zoning Board of Adjustment

_____
Date

This approval shall be valid if exercised within (insert 2 years or timeframe as provided by local ordinance) from the date of final approval, and shall not expire within 6 months after the resolution of a planning application filed in reliance upon this decision, as per RSA 674:33, IV.

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 - DENIED

Zoning Board of Adjustment,

City/Town of _____

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 Zoning Board of Adjustment.

Reasons/Facts Supporting the Denial:

1. _____

2. _____

3. _____

4. _____

5. _____

_____
Chairperson, Zoning 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

Many of the following are summaries of cases cited throughout 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*, Office of State Planning, June 1994, updated and revised by Susan D. Bielski, Esq. in 1995. Additional case summaries can 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, and subsequent lectures from which many of the following summaries have been compiled.

***Gelinas v. Portsmouth*, 97 N.H. 248 [1952]** (See page D-14.)
The court first stated the present five 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*, 101 N.H. 76 [1957]** (See page II-4.)
The 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 III-2.)
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*, 104 N.H. 249 [1962]** (See page xviii.)
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 II-17.)
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 IV-4.)
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 IV-6.)
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 others 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 N.H. 491 [1974]** (See page III-13.)
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 N.H. 131 [1975]** (See page III-13.)
No meaningful review if no specific findings of facts are made.

***Hanson v. Manning*, 115 N.H. 367 [1975]** (See page E-2.)
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 NH Forests v. Site Evaluation Committee*, 115 N.H. 163 [1975]**
(See page III-13.)
The Society for the Protection of NH 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 N.H. 145 [1976]** (See page III-13.)
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 New Hampshire 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 N.H. 148 [1977]** (See page II-3.)
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 N.H. 158 [1978]** (See pages D-4, D-8.)
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 N.H. 292 [1979]** (See page E-1.)
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 N.H. 541 [1979]** (See pages II-4, IV-2, D-32, D-42.)
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*, 120 N.H. 641 [1980]** (See page II-8.)
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 N.H. 187 [1980]** (See page III-4.)
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 a 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. City of Manchester*, 120 N.H. 529 [1980]** (See page IV-6.)
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 reasonably. Therefore, the court's examination of evidence relevant to possible traffic problems was not in error."

***Barry v. Town of Amherst*, 121 N.H. 335 [1981]** (See page III-7.)
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.

***Barrington East Cluster Unit I Owner's Association v. Barrington*, 121 N.H. 627 [1981]**
(See page II-6.)
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. The New Hampshire 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 N.H. 438 [1981]** (See pages IV-3, IV-4.)
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 re-heard 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.

***Governor's Island Club v. Town of Gilford*, 124 N.H. 126 [1983]** (See pages II-9, II-13, E-1.)
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 N.H. 321 [1984]** (See pages II-7, III-17.)
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 of 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 N.H. 262 [1984]** (See page III-12.)
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 N.H. 202 [l985]** (See page III-18.)
The planning board denied an eight-unit condominium subdivision approval citing six reasons. After review by a master, the court agreed with his finding that two of the six stated reasons for denial were valid and that was all that was needed to deny the application.

***New London Land Use Assoc. v. New London*, 130 N.H. 510 [1988]** (See page II-21.)
Lakeside Lodge consists of 17 housekeeping units on a 17 acre parcel in a residential district that requires two 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 N.H. 761 [1988]** (See page III-23.)
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 N.H. 302 [1989]** (See page II-21.)
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 N.H. 688 [1982]; *New London v. Leskiewicz*, 110 N.H. 462 [1970].)

***Crossley v. Town of Pelham*, 133 N.H. 215 [1990]** (See page E-2.)
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 N.H. 408 [1991]** (See page II-21.)
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 N.H. 239 [1992]** (See pages D-18, E-1, E-2.)
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. The decision of the ZBA granting a variance to a nonconforming marina for construction of an 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 II-12, III-15.)
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 pages IV-4, D-24.)
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 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 filed 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 II-3.)
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 E-2.)
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 intervener 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. The supreme court affirmed.

***Healey v. New Durham ZBA*, 140 N.H. 232, 665 A.2d 360 [1995]** (See page III-20.)
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 effect 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 II-21.)
Interveners appealed 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 II-17.)
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. The 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 filed 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 pages IV-3, D-31.)
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 IV-6, E-1.)

***Geiss v. Bourassa*, 140 NH 629 [1996]** (See page III-20.)
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 II-21.)
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 were not a permissible expansion of the nonconforming use as a movie theater.

***Peabody v. Town of Windham*, 142 N.H. 488 [December 29, 1997]** (See pages II-22, III-19.)
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 three 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.[24]

***Cormier v. Town of Danville ZBA*, 142 N.H. 775 [May 14, 1998]** (See page II-7.)
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.[25]

***Tausanovitch v. Town of Lyme*, 143 N.H. 144 [November 9, 1998]** (See page III-2.)
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 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 II-9.)
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."

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[24] 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.
[25] 1998 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

***Hurley, et al v. Hollis*, 143 N.H. 567 [May 25, 1999]** (See page II-22.)
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 that 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.)[26] 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*, 145 N.H. 727 [January 29, 2001]**
(See pages II-9, II-10, II-12, II-13, II-14, II-16, D-13, D-14, D-16, D-17, D-18, D-19, D-20, D-21, D-22, D-23, D-25, D-28, D-29, D-30, D-38, D-39, E-1, E-3.)
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 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*, 147 N.H. 328 [December 27, 2001]** (See page III-13.)
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 aquifer 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).

[26] 2000 Land Use Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 6, 2000.

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 re-litigated 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 RSA 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*, 149 N.H. 51, 54 [2003]** Submitted: November 21, 2002. Opinion issued: January 10, 2003. (See pages II-14, II-16, D-14, D-17, D-18, D-29, D-30.) 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 <u>reasonable</u> use of the property, considering the unique setting of the property in its environment.**

Rather than having to demonstrate that there is not any <u>reasonable use of the land</u>, landowners must now demonstrate that the restriction <u>interferes with their reasonable use of the property</u> 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. (Benjamin Frost, Esq., 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.
(See pages IV-2, D-15, D-16.)
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:

1. **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.
2. **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).
3. **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." (Benjamin Frost, Esq., NH OEP, January 2003)

***Maureen Bacon v. Town of Enfield*, No. 2002-591, N.H. [January 20, 2004]** Argued: June 12, 2003. Opinion issued: January 30, 2004. (See pages II-10, D-17.)
The New Hampshire Supreme Court recently handed down a deliciously complex opinion in *Bacon v. Enfield* 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 with 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 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 concurrence, 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 U.S. 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."* Duggan 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 N.H. or U.S. 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 okay 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. [Benjamin Frost, Esq., NH OEP, February 2004]

***Michael Boccia & a. v. City of Portsmouth & a.*, 151 N.H., 85, 104 [2004]** (See pages II-9, II-12, II-14, IV-3, D-19, D-20, D-21, D-26, D-27, D-34.)

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 [February 23, 2005]**

In May 2004, with its *Boccia* 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 trial court's 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 be 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)

Purpose of zoning regulation key to distinguishing use and area variances.

***John R. Harrington & a. v. Town of Warner*, No. 2003-687 [April 4, 2005]** (See pages II-14, II-16, D-28, D-29, D-38.)
This case is another in a series of decisions from the New Hampshire Supreme Court concerning unnecessary hardship and the distinction between use and area variances. The applicant owned a 46-acre parcel in a medium density residential zone in which manufactured housing parks were permitted. There were 33 manufactured home sites and 54 campground sites located on 26 acres of the property. The owner wanted to add 26 manufactured home sites on the remaining 20 acres. Under the zoning ordinance, a minimum of 10 acres was required for manufactured housing parks and the number of sites was limited to 25. Town officials were uncertain whether the ordinance limited the number of sites to 25 per 10 acres, or 25 regardless of the size of the parcel, as long as the parcel was at least 10 acres. Because the parcel lacked required road frontage, the property owner was unable to subdivide it, which would have given him two additional 10-acre parcels on which he could locate 25 sites each. Therefore, he applied for a variance.

The zoning board of adjustment granted the variance but limited the number of additional sites to 25, to be developed at no more than five sites per year. The abutters, the Harrington's, appealed to the superior court which affirmed the ZBA's decision, and then appealed to the supreme court, arguing that the applicant failed to show unnecessary hardship; created his own financial hardship because he purchased the property with knowledge of the zoning restrictions; and failed to prove other variance criteria, including that the variance was consistent with the spirit and intent of the zoning ordinance and that granting the variance would do substantial justice.

Distinguishing between a use or area variance isn't always simple, which didn't matter until the court's decision in *Boccia* establishing separate unnecessary hardship factors to apply to area variances while limiting the *Simplex* unnecessary hardship test to use variances.

In this case, the ZBA granted the variance before *Boccia* was decided and, therefore, the *Simplex* test applied regardless of whether the applicant sought a use or area variance. However, the case reached the supreme court after *Boccia*. The applicant sought a variance from the 25-site limitation and the court began its analysis by first determining whether to apply the *Boccia* factors or the *Simplex* test to the unnecessary hardship criterion.

"A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits," the court wrote, while "[a]n area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such, an area variance does not alter the character of the surrounding area as much as a use not permitted by the zoning ordinance."

The court said, "The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use

variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue."

The court compared the manufactured housing park provision to another provision of the ordinance that permitted manufactured housing subdivisions on a minimum 12-acre lot. According to that provision, the maximum number of lots "in any manufactured housing subdivision shall not exceed 25." The court emphasized the word "any" in this provision and interpreted it to mean that regardless of the size of a parcel, as long as it was a minimum of 12 acres, it was limited to 25 manufactured housing sites. "Thus, unlike an area restriction, the limitation on the number of manufactured housing sites is not related to the acreage or other physical attributes of the property," the court wrote. "Rather, the restriction limits the intensity of the use in order to preserve the character of the area."

In fact, the court added, the town's overall zoning scheme, with three residential districts, segregates land by types of uses as well as by intensity of use. For example, two-family dwellings were permitted uses in the village and medium density districts, but permitted only by special exception in the low-density district. "[G]iven the language and purpose of the zoning ordinance," the court concluded that "the provision limiting the number of sites to 25 lots is a use restriction."

The court then applied the *Simplex* unnecessary hardship factors: "1) the zoning restriction as applied interferes with the applicant's 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."

The court said a use variance generally "requires a greater showing of hardship than an area variance because of the potential impact on the overall zoning scheme" and said the first prong of the *Simplex* standard "is the critical inquiry for determining whether unnecessary hardship has been established." Determining whether the zoning restriction as applied interferes with a landowner's reasonable use of the property, the court stated, "includes consideration of the landowner's ability to receive a reasonable return on his or her investment." The court said a "reasonable return on investment" is not a maximum return, but requires more than a "mere inconvenience." It "does not require the landowner to show he or she has been deprived of all beneficial use of the land." In addition, "reasonable return" requires "actual proof, often in the form of dollars and cents evidence," the court stated, citing a Missouri case.

Simplex also "requires a determination of whether the hardship is a result of the unique setting of the property," which, the court said, "requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property," but it "does not require that the property be the only such burdened property. [T]he burden must arise from the property and not from the plight of the individual landowner."

Consideration of the surrounding environment is also required under the *Simplex* test. "This includes evaluating whether the landowner's proposed use would alter the essential character of the neighborhood. Indeed, because the fundamental premise of zoning laws is the segregation of land according to uses, the impact on the character of the neighborhood is central to the analysis of a use variance."

The court said the evidence was sufficient to establish that the applicant met the *Simplex* unnecessary hardship standard. The fact that manufactured housing parks were a permitted use in the zoning district was "most significant" in supporting the conclusion that the 25-site limit per parcel

interfaced with the applicant's reasonable use of the property, according to the court. Evidence supporting the conclusion that unique conditions of the property created a hardship included the fact that the applicant could not subdivide the parcel because of insufficient road frontage; the current location of the existing mobile homes; campground sites and swamp land made construction of a road with sufficient frontage "almost impossible;" and improvements to the park's private road would not remedy the road frontage problem.

"[T]he ZBA implicitly found that the expansion of the park would not adversely affect the character of the area," the court said, noting that the impact on schools, traffic and the availability of affordable housing were considered and that the ZBA limited the expansion to five new sites per year to lessen the impact on schools.

The abutters had also argued that because the zoning regulation was in place before the applicant purchased the property, any hardship experienced was self-created. The court cited its previous decision in *Hill v. Town of Chester*, 146 N.H. 291 [2001], which held that "purchase with knowledge" of the zoning restrictions does not preclude the landowner from obtaining a variance, but should be a factor considered under the first prong of the *Simplex* test.

According to the court, "To counter the fact that the hardship was self-created because the landowner had actual or constructive knowledge of the zoning restrictions, the landowner can introduce evidence of good faith." Among the ways an applicant can show good faith, the court said, are: compliance with rules and procedures of the ordinance; use of other alternatives to relieve the hardship before requesting a variance; reliance upon the representations of zoning authorities or builders; no actual or constructive knowledge of the zoning requirement.

In this case, the court said, the applicant was advised in writing by the selectmen before purchasing the property that the mobile home park could be expanded subject to planning board approval and compliance with the building code. Also, the court said, the ZBA was uncertain whether the 25-site limitation for mobile home parks applied per 10 acres or was an absolute maximum and, therefore, the applicant acted in good faith in applying for a variance.

The abutters also argued that the applicant did not prove that the variance was consistent with the spirit and intent of the zoning ordinance and would do substantial justice. The court disagreed, noting that mobile home parks are a permitted use under the ordinance, that a mobile home park already existed, and that the property owner could have established a second mobile home park if he had been able to subdivide the property.

The ZBA should not add new reasons for original denial when the board votes to deny a motion for rehearing.

***McDonald v. Town of Effingham ZBA*, 152 N.H. 171 [May 6, 2005]** (See page IV-3.)
Vicki McDonald sought an area variance to allow her to develop her quarter-acre, nonconforming lot. After a public hearing, the ZBA denied the application and McDonald filed a timely motion for rehearing, which the ZBA denied. In denying the motion for rehearing, the ZBA added an additional, independent reason for denying the requested variance (that McDonald had not filed a protective well radii form with her variance application to demonstrate that her proposed septic system was lawful).

McDonald filed an appeal to the superior court and the ZBA moved to dismiss the case, arguing that McDonald should have filed a second motion for rehearing and that because she had not, the superior court lacked jurisdiction to hear the appeal. The supreme court disagreed, ruling that if the

ZBA's argument were correct, it would mean that someone in McDonald's position would have to appeal to superior court from the initial variance denial once the rehearing request was rejected, and also file a second motion for rehearing to challenge the issue that was newly raised by the ZBA in its decision denying the initial request for rehearing. The supreme court held that such an application of the appeal statutes would lead to absurd and wasteful results.

The court strongly suggested that if a ZBA just has that incredible itch to add new reasons for denying the application when it gets a motion for rehearing, it should grant the motion for rehearing, not deny it as the Effingham ZBA did in this case. Then, following the rehearing, the ZBA can issue its new decision and the applicant clearly will have an obligation to file a second motion for rehearing as to all the grounds relied upon by the ZBA to support its new denial of the application. (See *Dziama v. City of Portsmouth*, 140 N.H. 542, 669 A.2d 217 [1995].)

From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Spring Conference

Court defines "public interest."

***Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 [September 2, 2005]**
(See pages II-10, II-11, D-34, D-37.)
One of the four tests other than "unnecessary hardship" that is applicable to both use and area variances is the requirement that granting the variance "will not be contrary to the public interest." In this decision, the supreme court gave us some guidance on how "public interest" is defined.

At a special meeting in September 2001, the Chester Town Meeting approved a warrant article to authorize the selectmen to enter into a lease to allow a telecommunications tower to be located on the town's transfer station property. In January 2003, AT&T Wireless and a tower builder applied for a use variance to construct a 150-foot tower on the Rod and Gun Club's property which is located in a residential district where telecommunications towers are not a permitted use. Before the ZBA held a hearing on the variance application, AT&T Wireless negotiated a contract with the town to construct a tower at the transfer station. On July 1, 2003 the ZBA heard the variance application submitted by the Rod and Gun Club, and denied the variance. The ZBA's reasons for the denial were as follows:

1. **Public Interest**: The Board of Selectmen appeared before the ZBA and presented convincing evidence that the public interest of the town was expressed by the citizens at the town meeting when they previously voted to locate a telecommunications facility on the town transfer station property. The town warrant and the existence of a lease agreement with the town for a telecommunications facility are both relevant to the question of public interest. The legislative body of a town is the ultimate law and policy making body and when the citizens vote as a legislative body, they express the public interest of the town. In light of the co-location requirements of the ordinance, the granting of a variance would frustrate the ability of the town to fulfill its pending lease agreement for a telecommunications facility on the town transfer station property, and would frustrate the public interest established by the town warrant article.
2. **Hardship**: The applicant has not shown that the granting of the variance would not injure the public or private rights of others. The town warrant and the subsequent lease agreement establish public rights of the town which will be injured by granting this variance.

The town and AT&T Wireless subsequently sought a variance to build a telecommunications tower on the town's transfer station property which, like the property of the Chester Rod and Gun Club, is located in a residential district. The ZBA granted this variance!

The Chester Rod and Gun Club appealed the denial of its variance to the superior court, which ruled that the ZBA improperly relied upon the warrant article to conclude that granting the variance would be contrary to the public interest and would injure the public rights of others. The superior court reasoned that the town's "contract for the construction of a similar tower on its property is not a basis for the Board finding that it was not in the public interest to grant the variance" to the Rod and Gun Club.

The town appealed to the New Hampshire Supreme Court, which began its analysis by noting that the requirement that the variance not be "contrary to the public interest" (an independent constituent of the five-part variance test) is "coextensive" with the requirement that granting the variance "will not injure the public rights of others" (which is part of the third piece of the *Simplex* test for "unnecessary hardship" for a use variance (that granting the variance "will not injure the public or private rights of others")). Moreover, both of those requirements "are related to the requirement that the variance be consistent with the spirit of the ordinance." The supreme court offered some explanation of these principles by quoting the following text from a well-known treatise, Anderson's American Law of Zoning.

> *The standards which limit the power of administrative boards to vary the application of the zoning regulations in specific cases are intended to provide administrative relief in individual cases of unnecessary hardship without injury to the rights of landowners other than the applicant, and without substantial interference with the community's plan for the efficient development of its land. Accordingly, an applicant for a variance must prove not only that a literal application of the ordinance will result in unnecessary hardship, but also that the variance he seeks will not harm landowners in the vicinity of his proposed site or prevent the accomplishment of the purposes of the zoning scheme. The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest.*

The court went on to explain that the first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the zoning ordinance itself. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary to that public interest. Thus, to be contrary to the public interest or injurious to the public rights of others so as to justify the denial of the variance, the variance must unduly, and in a marked degree, conflict with the ordinance such that the variance violates the ordinance's basic zoning objectives.

The court then explained that one way to judge whether granting the variance would violate basic zoning objectives is to examine whether the variance would alter the essential character of the neighborhood. This is because the fundamental premise of traditional zoning restrictions is to segregate the land according to uses. Thus, the variance must be denied if the proposed use will alter the essential character of the neighborhood. Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety, or welfare, because the dominant design of any zoning act is to promote the general welfare.

The court concluded that the ZBA erred by looking to the vote upon the September 2001 warrant article as a declaration of the public interest. The relevant public interest is set forth in the applicable zoning ordinance. The record shows that the purpose of the ordinance creating the residential zone in which the plaintiff's property is located is to "recognize the unique scenic, historic, rural and natural characteristics" of this part of the town "while encouraging

development… in a manner which will protect these important characteristics." Rather than examining whether the variance would unduly conflict with basic zoning objectives by altering the essential character of the neighborhood or by threatening the public health, safety, and welfare, the ZBA relied upon the effect that the variance would have upon the town's incipient plan to build a telecommunications tower elsewhere. This was also a mistake. Thus, the supreme court agreed with the trial court that the ZBA incorrectly defined the relevant public interest when it denied the variance. However, rather than order the ZBA to issue the variance as the trial court had done, the supreme court remanded the case back to the trial court with instructions that the variance case be sent back to the ZBA for further proceedings so that, presumably, the ZBA could rehear the case using the correct analysis of what constitutes "public interest" and the "public rights of others." From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Spring Conference.

Rehearing motion satisfies statute's requirement.

***Colla v. Town of Hanover*, No. 2005-217 [January 27, 2006]** (See pages IV-3, D-32.)
This case examines the issue of what satisfies the requirement of RSA 677:3, I with regard to a party's obligation to "set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable" when applying to the zoning board of adjustment for rehearing.

The plaintiff property owners initially applied to the ZBA for three variances to build an addition to their existing residence. The ZBA granted two of the variances but denied the third request, which was for an area variance to the side setback requirements so that the plaintiffs could build a screened deck on the north side of their home. The ZBA denied this variance on the grounds that there were "feasible alternatives" for achieving the desired benefit without a variance, including constructing an unroofed deck or by locating the deck in the front. The ZBA maintained that these changes would not create a substantial hardship on the plaintiffs.

The plaintiffs motioned for rehearing. RSA 677:3 requires a motion for rehearing to the ZBA to "set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable." Additionally, no appeal of a ZBA decision may be taken without first making an application for rehearing and, according to RSA 677:4, no ground not set forth in the application for rehearing will be considered by a court unless the court for good cause shown shall allow the introduction of additional grounds. In their motion for rehearing, the plaintiffs stated that the ZBA denied their request for a variance of the zoning setback requirements to allow for a screened deck for their home. They included the reason given by the ZBA in its denial: that there were reasonable alternatives, and also gave the following grounds for rehearing: 1) the decision is unreasonable; 2) the decision denies them their constitutional rights to due process and equal protection of the laws; 3) the decision is contrary to *Boccia v. City of Portsmouth*, 151 N.H. 85, 104 [2004]; and 4) the decision is contrary to the ordinance.

The ZBA denied the motion for rehearing and the plaintiffs appealed to superior court pursuant to RSA 677:4. In their appeal to superior court, the plaintiffs identified that they were appealing the ZBA decision to deny the variance and subsequent denial of their motion for reconsideration and stated that the denials were "illegal and unreasonable" for the reasons set forth in their attached motion for rehearing to the ZBA. The town first answered by stating that the ZBA found no unnecessary hardship under *Boccia* because it found that feasible alternatives existed for the plaintiff to achieve the desired results without the benefit of a variance. The town later moved to dismiss the plaintiffs' appeal on two grounds: 1) the motion for reconsideration to the ZBA failed to comply with RSA 677:3 in that it was so broad and non-specific that it was impossible for the ZBA to understand what errors it may have made and to address those errors; and 2) the appeal to superior

court failed to comply with RSA 677:4 in that it merely incorporated, by reference, the insufficient motion for reconsideration. The superior court agreed with the town on both grounds and dismissed the appeal.

In deciding this case, the New Hampshire Supreme Court pointed out that the rehearing process is designed to give the ZBA an opportunity to correct any mistakes it may have made before an appeal to court is filed. This goal is accomplished by requiring applicants for rehearing to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In this case, the court found that the plaintiffs' motion directly listed the grounds upon which it was based. The court wrote, "If nothing else, the plaintiffs' motion put the ZBA on notice that the plaintiff believed that the ZBA has misinterpreted *Boccia* when it found that there were feasible alternatives to the screened deck they sought to build." The court held that the motion for rehearing satisfied the spirit and letter of RSA 677:3.

The town next argued that the trial court decision should be affirmed because the court dismissed the plaintiffs' appeal on the alternative ground that it did not comply with RSA 677:4 which governs appeals of ZBA decisions to superior court. The court disagreed, pointing out that the only reason the trial court found that the motion did not comply with RSA 677:4 was because it found that it did not comply with RSA 677:3. The court pointed out that the trial court ruled that incorporating the motion for reconsideration to the ZBA "is an acceptable means of informing the trial court in an RSA 677:4 appeal of the specific grounds upon which the decision is alleged to be unreasonable or illegal." Therefore, having previously resolved the question of whether the plaintiffs complied with RSA 677:3 in favor of the plaintiffs, the court concluded that the plaintiffs were also in compliance with RSA 677:4. The trial court's dismissal of plaintiffs' appeal was reversed and remanded.

The supreme court puts some teeth back into the "uniqueness" aspect of the unnecessary hardship test (two decisions).

Garrison v. Town of Henniker **[August 2, 2006]** (See page D-34)
In this case, Green Mountain Explosives (GME), an enterprise which manufactures explosives for use in mining, quarrying, and construction, proposed to establish an explosives storage and blending facility on 20 acres centrally located in a parcel consisting of over 1,600 acres so as to provide the buffer zone required by the Bureau of Alcohol, Tobacco and Firearms (ATF). GME sought and received two use variances: one to allow a commercial use in a residential zone, and one to allow the storage and blending of explosive material where injurious or obnoxious uses are prohibited.

The angry abutters requested a rehearing before the ZBA, then appealed to the superior court when their request was denied. The superior court reversed the grant of the variances by the ZBA, finding that:

"The problem with GME's application and the record in this case is that, while they support a conclusion that the zoning restrictions interfere with GME's proposed use of the property, they do not support a finding that the restrictions interfere with the reasonable use of the property. That is, there is no evidence in the record that the property at issue is different from other property zoned rural residential. ***While its size may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."*** (emphasis added)

GME appealed to the New Hampshire Supreme Court, which upheld the superior court's decision to reverse the grant of the variances. For starters, the supreme court repeated that under the first prong of the three-pronged *Simplex* standard to show unnecessary hardship, GME had to demonstrate to the ZBA that the zoning restriction, as applied to its property, interferes with their reasonable use of the property, considering the unique setting of the property in its environment.

GME argued several points on appeal but the most important, for our purposes, was its claim that the evidence before the ZBA demonstrated that the property was unique. The court rejected this argument after setting forth the burden that GME had to meet:

> As discussed above, to demonstrate "unnecessary hardship" applicants must show that "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." *Simplex*, 145 N.H. at 731-32. The reasonable use factor "is the critical inquiry for determining whether unnecessary hardship has been established." *Harrington*, 152 N.H. at 80. The reasonable use factor "requires a determination of whether the hardship is a result of the unique setting of the property." Id. at 81. The applicant must show that "the hardship is a result of specific conditions of the property and not the area in general." Id. The property must be "burdened by the zoning restriction in a manner that is distinct from other similarly situated property." Id. While this does not require that the property be the only such burdened property, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." Id. The burden must "arise from the property and not from the individual plight of the landowner." Id.

The court went on to note that the following evidence had been introduced to the ZBA regarding the unnecessary hardship test:

> The current residential zoning interferes with GME's proposed reasonable use for the property. Under current zoning, GME is unable to use the property to conduct its business in any way. The unique characteristics of this property make the proposed use reasonable. The fact that this parcel is extremely large and uninhabited makes it ideal for use by GME. GME must maintain its storage facilities a significant distance from any occupied structures according to [ATF] regulations. The size of the parcel at issue permits GME to meet this legal obligation. For the same reason, the proposed use of the property for storage and blending of explosives is reasonable. The central location of the facility within the proposed [site] will permit the facility to be both a safe distance from any other structures and out of view from any neighbors or the roadway.

Moreover, the court noted that GME's professional engineer stated to the ZBA that the property was unique in its environment and that the denial of the variances would result in unnecessary hardship. Also, the chair of the ZBA (who had driven through the site earlier in the day of the ZBA's public hearing), and the ZBA's town-planning expert, testified that the site would be difficult to develop as a residential subdivision.

In spite of the evidence presented, the superior court concluded that the record did not support the ZBA's decision on unnecessary hardship because the record did not demonstrate that the proposed site was unique. The supreme court agreed:

> After reviewing the certified record, we agree that the record reasonably supports the superior court's conclusion that the evidence did not demonstrate uniqueness. GME directs us to no evidence in the record that would demonstrate that the proposed site was different from any other property in the rural residential district. Rather, the record merely demonstrates that the proposed site was large, difficult to develop because of its topography and relatively isolated location, and ideally suited to GME's needs because it could provide a buffer zone as required by the applicable ATF regulations. These factors alone, however, do not distinguish GME's proposed site from any other rural land in the area.

GME argued that this case should have the same result as in *Bonnita Rancourt & a. v. City of Manchester*, 149 N.H. 51 [2003] (reported in these materials, above). In *Rancourt,* the supreme court upheld the grant of a variance which allowed the landowners to stable two horses on its residential property although the zoning ordinance prohibited the keeping of livestock in that district. In responding to GME's argument the court quoted from *Rancourt*, as follows:

"Evidence before the [zoning board] showed that the intervenors' lot was located in a country setting. Evidence before the [zoning board] also showed that the lot was larger than most of the surrounding lots and was uniquely configured in that the rear portion of the lot was considerably larger than the front. The [zoning board] also had evidence that there was a "thick wooded buffer" around the proposed [stables] area. Further, the area in which the intervenors proposed to keep the two horses constituted an acre and a half which, according to the city's zoning laws, was more land than required to keep two livestock animals."

In rejecting GME's arguments, the supreme court simply offered the conclusion that in *Rancourt*, the size, configuration, location, and buffer made the property unique, as compared to the surrounding lots. But the evidence presented by GME "simply did not demonstrate that its proposed site was similarly unique in its setting."

EDITORIAL COMMENT: Although like most folks I would not be overjoyed at the prospect of living next to an explosives blending and storage facility, I do not believe that the supreme court's decision explains as well as it should have done why the property in Rancourt passed the uniqueness test and the property in this case did not. We can't say that the large size of GME's parcel simply doesn't count because the size of the parcel in Rancourt did count. It seems to me that the size of GME's parcel did make it unique, "as compared to the surrounding lots," but it is true that there did not seem to be any other factors that could also be said to contribute to uniqueness as there were in the Rancourt case. Perhaps what we are essentially taught by this case is expressed in the statement of the superior court about the parcel: "While its size may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."

In *Community Resources For Justice, Inc. v. City of Manchester* [January 24, 2007], as in the *Garrison* case reported above, the New Hampshire Supreme Court found that the landowner failed to meet the first prong of the *Simplex* unnecessary hardship test, and upheld the denial of a use variance by the Manchester ZBA. A brief description of the case follows.

The landowner, Community Resources For Justice, Inc. (CRJ) is a private organization that operates residential transition centers or "halfway houses" under contracts with the Federal Bureau of Prisons. CRJ purchased a building in the central business district on Elm Street in Manchester which houses both commercial and residential uses, intending to renovate part of the second floor and the entire third floor for the halfway house, leaving the rest of the building undisturbed. The building permit was denied because the building commissioner determined that the proposed use was for a "correctional facility" which is not a permitted use in any of the city's zoning districts.

After some legal maneuvering, the ZBA denied CRJ's application for a use variance. The superior court reversed the ZBA and the city appealed to the New Hampshire Supreme Court. On appeal, the supreme court found that the record did not show that CRJ had met the first prong of the unnecessary hardship test, which it articulated as follows:

> As our cases since *Simplex* have emphasized, the first prong of the *Simplex* standard is the critical inquiry for determining whether unnecessary hardship has been established. (*John R. Harrington & a. v. Town of Warner*, 152 N.H. 74, 80 [2005]) To meet its burden of proof under this part of the *Simplex* test, the applicant must demonstrate, among other things, that the

> hardship is a result of the property's unique setting in its environment. This requires that the zoning restriction burden the property in a manner that is distinct from other similarly situated property. While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the landowner. Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. As we explained in *Bonnita Rancourt & a. v. City of Manchester*, 149 N.H. 51, 54 [2003], *"hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable'."*

The court found that the evidence CRJ presented did not demonstrate that its proposed site was unique, as compared to the surrounding lots. While there was evidence that the property was located near public transportation and treatment facilities, as well as other city services that the residents of the halfway house might need, there was no evidence that CRJ's property was unique in this respect. "Presumably," the supreme court noted, "all of the buildings in this location share these characteristics."

Finally, the court concluded the discussion of the use variance by noting that because CRJ had failed to demonstrate it met the first prong of the *Simplex* unnecessary hardship standard, it was not necessary to determine if the evidence supported a finding that CRJ met the other prongs of the test – the familiar rule here is that "[i]f any one of the ZBA's reasons supported its denial of a variance, CRJ's appeal of that decision fails."

From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Spring Conference.

Citizen has no standing to seek court enforcement of zoning ordinance.

Goldstein v. Town of Bedford **[November 22, 2006]** (See page II-4.)
Mr. Goldstein was upset because he believed that a Mr. Evans had violated the town's zoning ordinance governing the merger of two nonconforming lots. The town's zoning administrator looked into the matter, contacted the town's legal counsel, and decided not to pursue an enforcement action.

Mr. Goldstein filed an appeal with the ZBA challenging the decision of the zoning administrator. At the public hearing, Mr. Goldstein acknowledged that he had no interest in the zoning enforcement matter different from any other citizen in the town and that he was "just a Bedford resident who would like to see the zoning ordinance enforced."

Even before he got to the ZBA, Mr. Goldstein filed a petition in the superior court seeking a Writ of Mandamus against the town (such a writ is simply an order of the court that orders the town officials to carry out a mandatory duty that is imposed upon them by law, thus mandamus). The town filed a motion to dismiss the case, claiming that Mr. Goldstein had no standing to seek such relief from the court.

The superior court granted the motion to dismiss, and the NH Supreme Court agreed. The court reasoned that if Mr. Goldstein didn't have the right to appeal the ZBA decision to the courts, he also would lack the right to seek a Writ of Mandamus, so the court first considered whether he had standing under the statutes to appeal from the ZBA. The court explained its reasoning as follows:

> Pursuant to RSA 676:5, I, "any person aggrieved" by any decision of an administrative officer may appeal to the ZBA. "[T]he selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing" within thirty days after a decision

> of the ZBA (RSA 677:2). An appeal from the ZBA's decision on the motion for rehearing may then be brought in the superior court within thirty days by "[a]ny person aggrieved" by the order or decision of the ZBA. RSA 677:4 [Supp. 2006]. The same statute defines "person aggrieved" as "any party entitled to request a rehearing under RSA 677:2." To demonstrate that he is a "person aggrieved," the plaintiff must show some "direct definite interest in the outcome of the proceedings." *Caspersen v. Town of Lyme*, 139 N.H. 637, 640 [1995]. "[S]tanding will not be extended to all persons in the community who might feel that they are hurt by" a local administrator's decision. *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450, 452 [1995] (quotation and ellipsis omitted). "Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case." *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 54445 [1979]. The pertinent statutes plainly limit standing to appeal a decision of an administrative official concerning enforcement of a zoning ordinance either to the ZBA (RSA 676:5) or to the superior court (RSA 677:4) to "persons aggrieved." At oral argument, the plaintiff conceded that under the *Nautilus* decision, he did not qualify as an aggrieved person under the statutory scheme. He argues, however, that he has standing as a town resident and taxpayer to seek mandamus relief to require the town to enforce its zoning ordinance. We disagree.

The court went on to find that because Mr. Goldstein was not a "person aggrieved" under the statutes, he lacks standing to appeal to the ZBA and he therefore also lacks standing to bring a mandamus action in the superior court. To hold otherwise would allow him to circumvent the clear intent of the legislature to limit standing for zoning appeals to persons aggrieved.

2007 Land Use Law Update, Timothy Bates, Esq., OEP Spring Conference, April 28, 2007.

Court upholds variance conditions.

***Michelle J. Robinson v. Town of Hudson*, No. 2005-687 [December 20, 2006]** (See page III-18.) The petitioner owned a lot in a six-lot subdivision approved in 1970. The approved subdivision plan indicated that an existing cul-de-sac would be extended (the Mark Street Extension) to Wason Road. The Mark Street Extension was roughed out but never paved. The petitioner's lot had only 50 feet of frontage on Wason Road, but the town had a 150-foot frontage requirement. The plaintiff applied for and was granted a frontage variance to which the ZBA attached four conditions.

The petitioner challenged two of the conditions, known as the "cost condition" and the "liability condition." The cost condition required the property owner of record to pay a pro rata share of the cost of constructing the Mark Street Extension "[i]f and when" it is built. The liability condition required the petitioner to record at the registry of deeds a notice of the limits of municipal liability, specifically that the town did not assume responsibility for the maintenance of the Mark Street Extension or liability for damages resulting from its use.

The ZBA denied the petitioner's motion for rehearing, and she appealed to the superior court claiming that the cost condition was arbitrary because the terms "pro rata share," "cost" and "built" were not defined. The petitioner also argued that the cost condition was unreasonable because she was the only lot owner required to contribute to the cost of Mark Street Extension and because it applied to the land owner, rather than the land, thus exceeding the ZBA's authority. The petitioner also challenged the liability condition as unreasonable.

The superior court dismissed the petitioner's argument that the cost condition was arbitrary for lack of defined terms because she had failed to raise the issue in her motion for rehearing before the ZBA. The lower court had found that the ZBA was concerned about potential safety issues if Mark

Street Extension is never built because other lot owners might use the petitioner's driveway to access their lots via the unfinished road. The lower court held that the cost condition was reasonable in that it was intended to encourage the owners of the subdivision property to construct Mark Street Extension. The lower court also held that the liability condition was reasonable and similar to one of the conditions upheld in *Wentworth Hotel v. Town of New Castle*, 112 N.H. 21, 28 [1972].

The petitioner appealed to the New Hampshire Supreme Court, which affirmed the lower court ruling. The court reiterated previous case law holding that despite the fact that there is no express statutory provision permitting the ZBA to attach conditions to the grant of a variance, "reasonable conditions necessary to preserve the spirit of the ordinance" will be upheld and that "[c]onditions are reasonable when they relate to the use of the land and not to the person by whom such use is to be exercised."

On the petitioner's argument that terms of the condition were not defined, the court agreed with the lower court's dismissal of this claim, noting that RSA 677:3 requires the motion for rehearing to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable" and prohibits a party from appealing a ZBA decision on grounds that were not set forth in the rehearing motion "unless the court for good cause shown shall allow the appellant to specify additional grounds." The court held that the petitioner's argument that the cost condition imposed an "unspecified" penalty on the lot owner is "not the same as arguing that the specific terms used in the condition are vague." The court held that the petitioner's case was different from *Colla v. Town of Hanover*, 153 N.H. 206, 208-209 [2006], in which the court held that the plaintiff in that case had met the statute's requirements even though he submitted to the superior court identical questions raised in the ZBA motion for rehearing.

The court dispensed with the petitioner's argument that the cost condition was unreasonable because she alone was required to pay a pro rata share of constructing the road while other lot owners were not. The court noted that the petitioner was not required to pay for the entire road, but only her share of the cost of construction if the road were built. The court added that it was reasonable for the ZBA to consider the petitioner's lot as part of a six-lot subdivision in which four of the lots were not buildable for lack of street frontage and that, but for the variance, her lot too would be unbuildable for lack of adequate frontage. The court noted that the ZBA was concerned about safety, in that other lot owners could access their lots by way of the petitioner's driveway rather than a completed Mark Street Extension, that the petitioner's lot was unbuildable prior to the granting of the variance, and that the cost condition did not render the lot worthless or drastically reduce its sale price. Therefore, the court held, it was reasonable for the ZBA to impose on the petitioner her pro rata share of the cost of construction of the road.

The petitioner also argued that the cost condition was an impermissible monetary penalty aimed at her rather than designed to regulate the use of the property. The court disagreed, noting that the condition runs with the land and the requirement to pay a pro rata share of construction applied to "the owner of the lot at the time the road is constructed, whether the owner is the petitioner or another individual."

Regarding the liability condition, the court agreed with the town's argument that requiring the property owner to record an acknowledgment of limited municipal liability for Mark Street Extension mirrors the requirement of RSA 674:41 and was a reasonable condition based on the town's concerns for safety. The court further noted that the requirement protects the town from liability for damages resulting from the use of Mark Street Extension. However, the court said it would not express an opinion now about whether the condition would continue to be reasonable if

construction of Mark Street Extension is completed.

Please be advised that the foregoing case summary is based upon a supreme court slip opinion. Slip opinions are subject to change following motions for rehearing and/or motions for reconsideration. The court may also modify the opinion without motion. The final version of the court's opinion is that which appears in the *New Hampshire Reports*.

Court addresses "public interest," "spirit of the ordinance," unnecessary hardship," and "substantial justice."

Malachy Glen Associates, Inc. v. Town of Chichester **[March 20, 2007]** (See pages II-11, D-36, D-37, D-38, D-39.)
Here's an area variance case with something for everyone! Ignoring the rather convoluted procedural background and wrangling, the applicant proposed to construct a self-storage facility and applied for variances to place the paved access road and the storage unit structures within the 100-foot wetlands buffer zone established in the Chichester Zoning Ordinance. The ZBA granted a variance to allow the access road but denied the variance to allow the storage unit structures. The superior court reversed the denial of the second variance and the New Hampshire Supreme Court agreed with the trial court that the ZBA should have granted the area variance. Let's explore how it all happened.

Public interest and spirit of the ordinance are related.

In a classic but by no means unique example of circular reasoning to which other ZBAs have fallen prey, the Chichester ZBA found that the variance would be contrary to the public interest and to the spirit of the ordinance (two of the five variance criteria) because the project would "encroach on the wetland buffer." Well, if the construction didn't encroach into the wetlands buffer, the landowner wouldn't need to apply for a variance, right?

To begin, the New Hampshire Supreme Court, citing the *Chester Rod and Gun Club* case that is reported below in these materials, stated that the requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance. Here are some guidelines the court cited from *Chester* that address the question of whether a variance would or would not be contrary to the public interest:

> [T]o be contrary to the public interest… the variance **must unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's basic zoning objectives**. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine **whether it would alter the essential character of the locality**… Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine **whether granting the variance would threaten the public health, safety or welfare**. (emphasis added)

The superior court found on the record and the supreme court agreed that:

1. The self-storage facility is a conforming commercial project in a commercial area;
2. The project did not violate the zoning ordinance's basic objectives because the project would not alter the essential character of the locality (the record showed that the properties in the area consist of a fire station, a gas station, and a telephone company); and
3. The project will not injure the health, safety, or welfare of the public because: (a) the ZBA granted a variance for access to the property, which will encroach more into the wetlands buffer than the structures would; and (b) the ZBA had before it "credible and uncontroverted

> evidence" from the applicant's consultant that this project will not injure the wetlands. (The project includes a closed drainage system, a detention pond, and an open drainage system – all designed to protect the wetlands, and the applicant's expert certified that the wetlands would not be adversely affected.)

Based upon the evidence in the record, the supreme court concluded that no reasonable ZBA could have concluded that the proposed project did not satisfy the public interest and spirit of the ordinance factors.

Unnecessary hardship – two factors.

1. Special Conditions of the Property

In considering the first prong or factor of the *Boccia* test for unnecessary hardship for an area variance, the *Malachy Glen* court stated flatly (quoting from *Garrison v. Town of Henniker*, a USE variance case reported above in these materials) that "Special conditions requires that the applicant demonstrate that its property is unique in its surroundings."

The court noted that nearly 65% of the property consists of wetlands or the 100-foot wetlands buffer, and that the configuration of the wetlands further reduces the buildable area. The court found that this evidence was sufficient to show that "special conditions" exist on the property that satisfy the first factor for an area variance.

2. Other Reasonably Feasible Methods

Under the second prong or factor for an area variance, the applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use without the variance. That analysis includes a consideration of whether the area variance is required to avoid an undue financial burden on the applicant, which includes examination of the relative expense of alternative methods. The court further explained this requirement as follows:

> If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost prohibitive. Under this factor, **the ZBA may consider the feasibility of a scaled-down version of the proposed use, but must be sure to also consider whether the scaled-down version would impose a financial burden on the landowner**.

The supreme court had no trouble agreeing with the trial court that absent the variance, *Malachy Glen* "would have to reduce its project by more than 50% and that this would result in financial hardship." Thus, there was no other reasonably feasible method of effectuating the proposed use without the area variance.

Substantial justice.

The court quoted with approval Attorney Peter Loughlin's formulation of the squishy "substantial justice" criteria, that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." The court also noted that in an earlier case, "we also looked at whether the proposed development was consistent with the area's present use." Combining these elements, the New Hampshire Supreme Court quoted the superior court's decision on this point with approval:

> [T]he project is a storage facility in a commercial area that poses no further threat to the wetlands in the area. Since the project is appropriate for the area and does not harm its abutters or the nearby wetlands, the general public will realize no appreciable gain from denying this variance.

The supreme court summed up the "substantial justice" inquiry by noting that "there was uncontroverted evidence that the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district. Accordingly, the trial court did not err in finding the plaintiff had established [the substantial justice] factor."

From *2007 Land Use Law Update* by Timothy Bates, Esq., OEP Conference.

Land use boards can reconsider their decisions.[27]

***74 Cox Street, LLC v. City of Nashua*, 156 N.H. 228 [September 21, 2007]** (See pages IV-2, A-5.)
In a decision issued on September 21, 2007, the New Hampshire Supreme Court ruled that land use boards have the inherent authority to reconsider their decisions within the statutory time period for appeal to the superior court. Although the decision concerned the Nashua ZBA, the breadth of the court's reasoning logically extends this authority to reconsider decisions to all land use boards.

In *74 Cox Street, LLC*, the Nashua ZBA had granted a variance in September of 2005, and aggrieved abutters filed a timely motion for rehearing. On December 6, 2005, the Nashua ZBA denied the rehearing motion. On December 13, 2005, the Nashua ZBA received a letter from aggrieved abutters complaining that the Board had not received documents that accompanied their original motion for rehearing, and they asked the ZBA to reconsider its decision. At its meeting on December 13, 2005, the ZBA voted to reconsider the denial of the motion for rehearing and scheduled a hearing for January 10, 2006 where the ZBA would consider whether to grant or deny the original motion for rehearing. In effect, the ZBA revived the original motion for rehearing. At its meeting of January 10, 2006, the ZBA voted to grant the motion for rehearing and scheduled a date for the rehearing hearing. Before that rehearing hearing could be held, the party that had been originally granted the variance appealed to the superior court.

The New Hampshire Supreme Court held that it was proper for the Nashua ZBA to reconsider its decision because it had acted to grant the reconsideration request before the 30 day appeal period had expired. In so doing, the court again reaffirmed that a local land use board should have the first opportunity to correct any errors in its decisions before any appeal is heard in the superior court.

Practice pointers:

1. The ability to reconsider a decision must be exercised before the statutory appeal period has run. For a ZBA, that means within the 30 days after the day of the ZBA's decision on the motion for rehearing. For the Planning Board that means within 30 days from the date the Board approved or denied a plat or plan.
2. The ZBA should adopt a bylaw prescribing the period of time when a motion to reconsider can be filed. The Planning Board could either adopt a bylaw or insert a reconsideration provision in the subdivision and site plan regulations.

***Naser*, use of conservation easement space in yield plan, and analysis of the "public interest" and "spirit of the ordinance" criteria.**[28]

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[27] From Municipal Law Lecture #3, Fall 2007, "Legal Issues for Land Use Board Members," Edmund J. Boutin, Esq., Boutin & Altieri, PLLC and Stephen C. Buckley, Esq., Hodes, Buckley, McGrath & LeFevre, PA
[28] From The Five Variance Criteria in the 21st Century, Municipal Law Lecture Series, 2009, by Cordell A. Johnston, Esq., New Hampshire Municipal Association and Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC.

In *Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment*, 157 N.H. 322 [2008], the supreme court affirmed in part, reversed in part, and remanded the trial court's decision which upheld the ZBA. The ZBA decision denied a variance and also found that the open space subdivision application did not comply with the zoning ordinance. At issue was the applicant's usage in its yield plan of approximately fifty acres previously burdened by a conservation easement given to the town. The planning board had determined that this usage was improper, and the applicant appealed that decision to the ZBA and applied for a variance to allow the usage in the yield plan.

In first analyzing the yield plan issue, the supreme court looked to the zoning ordinance's definitions of "buildable area" and "yield plan:" respectively, "the area of a site that does not include slopes of 25% or more, submerged areas, utility right-of-ways, wetlands and their buffers" and "a plan submitted… showing a feasible conventional subdivision under the requirements of the specific zoning district..." The court agreed with the town that under these definitions, the yield plan showing development of lots within the Conservation Easement Area was neither "feasible" nor "realistic" since such land could not be developed. Thus, the court found that there was no error in finding that the yield plan did not comply with the ordinance.

However, in examining the denial of the variance, the supreme court noted that the ZBA found that the applicant failed to meet all but the "diminution in value" criterion and that the trial court focused only upon the "public interest" and "spirit of the ordinance" criteria. Relying heavily on its *Malachy Glen* decision, the court looked to the objectives listed under the relevant portion of the zoning ordinance, which included conservation of agricultural and forestlands, maintenance of rural character, assurance of permanent open space and encouragement of less sprawling development.

Since the applicant was seeking to develop 14 lots on the remaining 27 acres, the court stated that "We fail to see how permitting the plaintiff to use the conservation land in this manner would unduly, and in a marked degree *conflict* with the ordinance" (citing *Malachy Glen*, 155 N.H. at 105 (quotations omitted; emphasis added)). The court continued by holding "as a matter of law, that this in no way *conflicts* with the ordinance's basic zoning objectives to conserve and preserve open space." Thus, the trial court's decision on the variance was reversed and remanded for consideration of the unnecessary hardship and substantial justice criteria.

Note two additional points of import in this case: (1) the supreme court effectively merged the "public interest" and "spirit of the ordinance" criteria into one discussion and implicitly found that these two prongs had been met (since they were not the subject of the remand); and (2) the court did not state whether this was a "use" or "area" variance. This first point could be viewed as the continuation of a trend started with *Chester Rod & Gun Club*, supra. Indeed, in one recent "3JX" decision, (i.e., one decided by a panel of three justices and thereby not considered "binding precedent") Justices Dalianis, Duggan and Galway remanded a case back to the ZBA in part because the board found that the request did not conflict with the public interest so that it "could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance." *Zannini v. Town of Atkinson*, (Docket No. 2006-0806; issued July 20, 2007)

***Nine A*, area and use variances associated with replacement of non-conforming use.[29]**

In *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 [2008], the supreme court upheld the denial of both area and use variances for a lakefront development. The parcel in question totaled

[29] Id.

approximately 86 acres bifurcated by Route 9A: six acres bordering the lake in the Spofford Lake Overlay District (which allows single family dwellings only and imposes two-acre minimum lot size and building and impermeable coverage limitations), and 80 acres in the Residential District (which allows duplexes and cluster developments). The applicant sought various area and use variances to develop the six acres into either seven single-family lots (with the 80 acres remaining undeveloped) or a condominium cluster development of seven detached homes (together with three duplexes on 24 of the 80 acres). In either case, the applicant argued that it was benefiting the area by removing the vacant, non-conforming 90,000 square foot rehabilitation facility on the six-acre parcel.

In affirming the denials, the supreme court noted with favor the lower court's finding that the number of pre-existing, nonconforming lots around the lake was not a basis for bypassing the zoning ordinance requirements. Additionally, the court stated that the spirit of the ordinance was to "limit density and address issues of over-development and overcrowding on the lake." Once again, the court relied heavily upon its decision in *Malachy Glen* and stated that the factors of "alter the essential character of the locality" or "threaten public health, safety or welfare" are not exclusive. In combining its analysis of the "public interest" and "spirit of the ordinance" criteria, the court addressed the applicant's argument that its replacement of a nonconforming use with a "less intensive, more conforming use" is consistent with the public interest and spirit of the ordinance: "We recognize that there may be situations where sufficient evidence exists for a zoning board to find that the spirit of the ordinance is not violated when a party seeks to replace a nonconforming use with another nonconforming use that would not substantially enlarge or extend the present use." However, this was not such a case. The court also noted (with an erroneous reading that *Malachy Glen* did not involve a change in the ordinance) that the town had the ability to change its ordinance to take the current character of the neighborhood into account, including the unique natural resource of the lake.

Daniels **and the impact of the Telecommunications Act on use and area variances.**[30]

In *Daniels v. Londonderry*, 157 N.H. 519 [2008], the supreme court upheld the grant of use and area variances for the construction of a cell tower on a 13-acre parcel in the town's agricultural-residential zone. Public hearings included testimony from the applicant's attorney, project manager, site acquisition specialist, two radio frequency engineers (as well as the ZBA's own radio frequency engineer) concerning the necessity of the tower to fill a gap in coverage, as well as two competing property appraisers. Thereafter, the ZBA granted the three variances with conditions including placement of the tower on the site, placement of the driveway, and maintenance of the existing tree canopy.

The court rejected the abutters' contentions that the ZBA unlawfully and unreasonably allowed the Telecommunications Act of 1996 ("the TCA") to preempt its own findings regarding the statutory criteria. The supreme court noted that the ZBA correctly treated the TCA as an "umbrella" that preempts local law under certain circumstances but which still requires the application of the five variance criteria in this instance. The court commented that the applicant had shown that the unnecessary hardship resulting from specific conditions of the property, since it was this property that filled the significant gap in coverage: "that there are no feasible alternatives to the proposed site may also make it unique." Additionally, the court found no error in the trial court's failure to explicitly address each of the *Simplex* factors in light of the "generalized conclusions applicable to these factors."

[30] Id.

Concerning the "diminution in value" criterion, the court held that the ZBA is "not bound to accept the conclusion" of the tower company's site specific impact study or of any witness (but the court did not specifically address its contrary ruling in *Malachy Glen* where the uncontroverted evidence of the expert was erroneously ignored by the board). Rather, the court looked at the "substantial evidence" on property values tendered in the form of numerous studies, testimony of at least one expert, "the lack of abatement requests in comparable areas," and the members' own knowledge of the area and personal observations to uphold the decision. Finally, in one paragraph, the court addressed the remaining criteria relying heavily on the fact that this tower would fill the existing coverage gap.

***Farrar*, unnecessary hardship for mixed use and "substantial justice."** [31]

The court's most recent analysis of the variance criteria prior to these materials going to press is *Farrar v. City of Keene*, No. 2008-500, N.H. [May 7, 2009]. Here, the city's ZBA granted both use and area variances to allow for the mixed residential and office usage of a historic 7000 sq. ft. single-family home located on a 0.44-acre lot in the city's office district, which abutted the central business district. The use variance was needed since the district allowed both multi-family and commercial offices, but did not clearly allow the proposed mixed use. The area variance was to address a lower number of on-site parking spaces based on that configuration. (The ordinance would have required 23, the applicant wanted only 10. The ZBA granted the variance with a requirement to create 14 spaces.)

The abutters appealed. The superior court affirmed the area variance but vacated the use variance based on a finding that the applicant had failed to submit sufficient evidence on the first prong of the *Simplex* unnecessary hardship criteria - that the zoning restriction as applied interferes with the applicant's reasonable use of the property considering its unique setting in the environment. The applicant and the city appealed, contending that the trial court had overlooked the evidence - particularly the large size of the house and the lot size compared with the number of available parking spaces and the usual layout of the district - and that the trial court did not give sufficient deference to the ZBA and its members' personal knowledge. The abutters in turn argued that the applicant's financial hardship in retaining the property as a single-family residence was personal, unrelated to any unique characteristic of the property, and unsupported by any "actual proof."

In addressing the first prong of the *Simplex* unnecessary hardship criteria, the supreme court noted that this issue is "the critical inquiry" for determining whether such hardship exists. The court pointed to the *Harrington v. Warner* decision for several "non-dispositive factors:" first, whether the zoning restriction as applied interferes with the owner's reasonable use of the property; second, whether the hardship is the result of the unique setting of the property; and third, whether the proposed use would alter the essential character of the neighborhood. The supreme court reviewed the evidence, including the size of the lot, the size of the house, the allowed uses in the district, and the fact that the adjacent historic homes had been turned into professional offices with their commensurate higher traffic volume than the proposed use, and held that "the ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, the zoning restriction still interferes with [the applicant]'s reasonable use of the property as his residence." The court noted that the applicant's minimal evidence of a reasonable return on his investment was sufficient since that issue was only one of the nondispositive factors for the ZBA to consider. In closing its analysis of this first prong of the *Simplex* unnecessary hardship test, the court acknowledged that this is a "close case" and that in such instances "where some evidence in

[31] Id.

the record supports the ZBA's decision, the superior court must afford deference to the ZBA" whose members have knowledge and understanding of the area.

In addressing the second prong of the *Simplex* unnecessary hardship test, the supreme court affirmed the lower court's reasoning that the criteria had been met since the desired mixed use was allowed in the adjoining district and that the variance would not alter the composition of the neighborhood. As to the third prong - that the variance would not injure the public or private rights of others - the supreme court again noted that "this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance" - namely that the variance would not be contrary to the public interest and the variance is consistent with the spirit of the ordinance. In making its analysis of these issues, the court looked to the purpose statement in the city's zoning ordinance for the office district, which included references to "low intensity" uses and serving as a buffer between higher density commercial areas and lower density residential areas. The court upheld the lower court's finding that the proposed use would be of lower intensity than a full-office use allowed in the district, that such office use would have more traffic, and that the abutters' concerns were over a commercial use of the property.

Finally, the supreme court addressed the "substantial justice" criteria and cited the *Malachy Glen* decision, above, for the standard that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (1) the use would not alter the character of the neighborhood, injure the rights of others or undermine public interest; (2) the applicant currently resides at the property and wished to remain; (3) the applicant had made substantial renovations to the historic structure; (4) the structure would not be economically sustained as a single family residence; (5) the residential appearance of the building would not change; (6) adjoining buildings are currently offices; and (7) if the property was used entirely as offices, the traffic and intensity of usage would be greater.

Appeal period from planning board to ZBA begins to run at conditional approval.

***Atwater v. Plainfield*, No. 2009-199 [July 20, 2010]** (See pages III-2, D-46.)
Occasionally, during subdivision or site plan review, a planning board makes a decision "based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance..." Appeals from such decisions must be taken to the zoning board of adjustment. This opinion and *Saunders v. Kingston* (discussed below) both addressed the time at which the appeal period from a planning board to a ZBA begins to run.

In this case, the planning board conditionally approved an application for site plan review. Final approval was granted 14 days later. The petitioners filed an appeal to the ZBA 28 days after the original conditional approval had been issued. The ZBA denied the appeal, finding that it had been filed 13 days late. The superior court upheld this decision and the petitioners appealed to the supreme court. The supreme court agreed, holding that the 15-day appeal period found in the local zoning ordinance began to run as soon as the conditional approval was issued.

The confusion stemmed from the fact that there are two avenues of appeal from a decision of a planning board with two different appeal periods, depending upon the nature of the claim. One appeal is directly to the superior court under RSA 677:15, I, for "any decision of the planning board concerning a plat or subdivision..." That appeal period is 30 days from the issuance of the planning board's decision, and only begins to run after the planning board has issued a final approval. If the board issues a conditional approval, an appeal to the superior court cannot be filed until the

conditional approval is converted into a final approval. (The petitioners in this case had filed such an appeal, and that case was resolved in an earlier opinion found at 156 N.H. 265 [2007].)

The other course of appeal, which was under consideration in this case, is to the ZBA under RSA 676:5, III. These appeals must be filed "within a reasonable time, as provided by the rules of the board…" RSA 676:5, I.

In this case, the zoning ordinance provided that the appeal period to the ZBA was 15 days. The court was asked to determine when it began to run. The petitioners argued this appeal was just like a direct appeal to the superior court under RSA 677:15, I, and that the appeal period did not begin to run until the planning board issued its final approval. The court disagreed, noting there was no indication in previous cases or in the statute that the parties must wait for final approval of a site plan before they bring an appeal to the ZBA challenging the planning board's interpretation or application of a zoning ordinance. On the contrary, "allowing or requiring parties to wait until a final vote of the board before challenging zoning determinations would be inefficient, and would impose significant hardship on applicants seeking site plan approval. As a practical matter, it makes far more sense to resolve the question of whether a planning board's interpretation or application of the zoning ordinance is accurate as early as possible in the application review process." [32]

Determining whether non-abutter has standing to appeal administrative decision to the ZBA.

***Golf Course Investors of NH, LLC v. Jaffrey*, No. 2010-167 [April 12, 2011]** (See page II-4.)
In order to appeal an administrative decision to the zoning board of adjustment, a person must have standing to appeal; that is to say, the person must be "aggrieved" by that decision (RSA 676:5, I). This case examines the factors to be considered when determining whether applicants have standing as "persons aggrieved" for purposes of an appeal to the ZBA. The ZBA cannot exercise jurisdiction over an appeal unless it finds that the appealing party is aggrieved according to RSA 676:5, I.

The property owner, Golf Course Investors of NH (GCI) sought subdivision and site plan approval to allow conversion of an existing building into a four-unit condominium with two detached garages. The planning board voted that a special exception was not required to allow the proposed four-unit condominium.

Seven residents appealed the planning board's decision to the ZBA, contending that the planning board allowed a smaller lot than was required by the zoning ordinance and, also, that a special exception was required. None of the seven applicants was an abutter as defined by RSA 672:3. At the ZBA public hearing, the applicants did not address the issue of how their property would be affected by the proposal. Instead, they discussed their concerns that the planning board had erroneously allowed "too much housing, being four condominium units, on too little land, being 1.75 acres, within the rural/mountain zone." In fact, they were actually in favor of the project, with the exception of the size of the proposed lot. During deliberations, it was noted that none of the applicants qualified as abutters and that only one had even attended the planning board hearing on the matter now being appealed. Nevertheless, the ZBA ultimately voted that the applicants were "aggrieved" and granted the appeal, finding that the special exception was required to allow the multi-family use. GCI appealed the ZBA's decision to superior court. The trial court ruled that the residents lacked standing to bring their appeal before the ZBA and vacated the ZBA's decision. The town appealed to the supreme court.

[32] From *New Hampshire Town and City*, September 2010

To establish standing, an appealing party must show "some direct, definite interest in the outcome of the action or proceeding." Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party's property to the property for which approval is sought; (2) the type of change being proposed; (3) the immediacy of the injury claimed; and (4) the appealing party's participation in the administrative hearings (*Weeks Restaurant Corp. v. Dover*, 119 N.H. 541 [1979]). Applying the four factors to the residents, the court found that the residents failed to demonstrate that they were aggrieved. With regard to proximity, the residents' properties ranged from 450 feet to 2,400 feet from the GCI property. The type of change being proposed was not dramatic in that the footprint of the building was not being changed, and, importantly, the residents expressed their approval of the improvements proposed for the building. With regard to the immediacy of the injury claimed, the residents did not identify any injury they might face as a result of the planning board's approval. And only one of the residents even attended the planning board proceedings, and that participation was minimal.

This case illustrates the importance of findings of facts. The court is obligated to accept the ZBA's factual findings as prima facie lawful and reasonable, "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." Here, the court pointed out that the ZBA did not include any discussion of how they arrived at the conclusion that the residents were "aggrieved" and, thus, the court was not obligated to defer to the ZBA's findings.

Doctrine of expansion of nonconforming use not applicable to use by special exception.

Applicant may ask for a variance from one or more special exception requirements.

***1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 [April 26, 2011]** (See page II-6.)
A property owner was granted a special exception and a variance to use some of his existing building as office space and the remaining part of the building as storage space. Nearly 10 years later, he sought site plan approval to utilize the entire building for office space. The planning board determined that the property owner would need ZBA approval to increase the space used for offices. The property owner appealed the planning board decision to the ZBA, claiming that the use of the building entirely as office space was within the original ZBA approvals or, if not, it was a permissible expansion of a nonconforming use.

The ZBA determined that its previous decision was specific concerning the use of part of the building as storage space, and any change from that would require additional approvals from the ZBA after notice and public hearing. The court upheld the ZBA's determination, pointing out that although the original ZBA approval did not contain an express limitation on the square footage to be used for office space, representations made at the public hearing, and recorded in the meeting minutes, show that the applicant intended to use only a certain area of the building for office space.

It is important to point out that the decisions by the ZBA and planning board were made prior to the amendment of RSA 676:3, II, which now requires that all conditions of approval be included in the written decision. Where an application does not specify the scope of a proposed project, it is risky for a land use board to rely on statements at the public hearing. Limitations should be made clear in the written decision.

Next, the court examined the applicant's contention that the ZBA should apply the doctrine of expansion of nonconforming uses to its plan to expand the use of office space within the building, which was originally permitted by special exception. Valid nonconforming uses are permitted to expand to some extent. The court pointed out that it has distinguished between nonconforming

uses and special exceptions, noting that "the review standard appropriate to the scope of variances or nonconforming uses" does not apply to special exceptions. The court rejected the applicant's claim, ruling that the doctrine of expansion of nonconforming uses does not apply to uses by special exception. *New Hampshire Town and City*, June 2011

Court examines the new hardship standard.

Harborside Associates, L.P. v Parade Residence Hotel, LLC, **162 N.H. 508 (No. 201-782)**
(See pages II-11, II-14.)
On September 22, 2011, the supreme court issued its opinion in *Harborside Associates, L.P. v Parade Residence Hotel, LLC*, 162 N.H. 508 (No. 201-782). Herein the court, for nearly the first time, examines a variance case applying the new hardship standard codified under SB147. The court also provides a useful discussion of the "spirit of the ordinance," "public interest," and "substantial justice" criteria.

In *Harborside*, Parade Residence Hotel ("Parade") obtained variances from the Portsmouth Zoning Board of Adjustment to install two parapet and two marquee signs on its hotel and conference center. Neither type of sign is permitted in the zoning district in which Parade's hotel is located. On appeal, the trial court upheld the ZBA's grant of a variance for the marquee signs. The trial court, however, reversed the parapet sign variances on the basis that "[t]he only apparent benefit to the public" from having the parapet signs installed "would be an ability to identify [Parade's] property from far away." This purpose, the trial court stated, "does not outweigh the clear provision of the ordinance." Both parties appealed to the supreme court seeking a partial reversal of the trial court's decision.

In analyzing the trial court's reversal of the parapet sign variances, the court interpreted the trial court's ruling that "[t]he only apparent benefit to the public would be an ability to identify [Parade's] property from far away; however that purpose does not outweigh the clear provision of the ordinance…" to mean that the trial court had found that the parapet variances do not meet the "spirit of the ordinance," "public interest," and "substantial justice" criteria.

The court noted that for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's "basic zoning objectives," and that there are two methods for ascertaining whether granting a variance would do this. One way is to examine whether granting the variance would "alter the essential character of the neighborhood," and the other "is to examine whether granting the variance would threaten the public health, safety or welfare." The trial court, however, erred by employing the wrong test: eschewing the "essential character of the neighborhood" and "threat to public safety" analysis, the trial court instead examined whether allowing the signs would serve the public interest and weighed that against the "clear provision of the zoning ordinance." (*Granite State Planner*, Timothy Corwin, Fall 2011.)

Applicant for a variance need not affirmatively plead the threshold question of whether variance is necessary; trial court must consider it when ruling on variance issues.

Stephen Bartlett & a. v. City of Manchester Argued: January 10, 2013; Opinion Issued: February 25, 2013 (See page III-3).
This case clarifies that a superior court may rule on whether a variance is necessary at all, even if the applicant doesn't ask the court that question. However, this may only be done if the record developed at the ZBA level contains enough facts on which the court can base its decision.

The applicant, a church ("Brookside"), sought a permit to allow a "work-based, self-help organization" to occupy a portion of the carriage house on the property. The City denied the application saying the proposed use violated a portion of the City's zoning ordinance. The denial letter noted that further action on the application could only be taken under RSA 674:33. (This is the statute giving the Zoning Board of Adjustment the authority to grant variances from the zoning ordinance.) Brookside applied for a variance from the ZBA, which was granted. Bartlett, an abutter, appealed the grant of the variance to the superior court.

The superior court reviewed the ZBA's approval of the variance and found that the evidence did not support the ZBA's conclusion that Brookside had satisfied all five of the criteria necessary to obtain a variance. In particular, the court ruled the ZBA had unlawfully found that literal enforcement of the provisions of the ordinance would cause Brookside unnecessary hardship (this is the fifth criteria for a variance). RSA 674:33, I(b).

This is where it gets interesting. The superior court then went on to find that the proposed use was actually a "lawful accessory use" under the City's zoning ordinance and the common-law accessory use doctrine. Based on this finding, the court ruled that no variance had been necessary in the first place. In essence, Brookside was free to obtain its permit and go ahead with the plan. Bartlett appealed that decision to the New Hampshire Supreme Court.

The supreme court had two questions to answer. First, did the superior court have "subject matter jurisdiction" to find that the variance wasn't necessary? The applicant had never raised that issue. Second, was the proposed use a lawful accessory use?

As to the first question, the court held that the superior court did have subject matter jurisdiction to consider whether the proposed use was permitted as a matter of right as an accessory use. Unnecessary hardship may only be found if literal enforcement of the ordinance would cause such a hardship. Therefore, in deciding whether the variance application satisfied the requirement for unnecessary hardship, the court correctly determined that the superior court had to consider the permissible uses of the property under the ordinance, including the accessory use provision. As a result, the superior court could rule on the necessity of the variance even if the applicant had not raised that specific question in its appeal.

On the second question, the court found that the record before the ZBA did not include enough facts for the superior court to have decided that the proposed use was a lawful accessory use. As a result, it remanded the case back to the superior court, with orders that it be sent down to the ZBA for a further hearing on the accessory use issue. This underscores the importance of the record developed during the initial proceedings before a ZBA or planning board. (NHMA summary)

Filing deadlines that fall on a weekend or legal holiday.

Steve Trefethen & a. v. Town of Derry Submitted: February 7, 2013, Opinion Issued: April 12, 2013 (See page IV-2.)
The Derry ZBA granted a special exception and the abutters, Trefethen, filed a motion for rehearing which the ZBA denied on January 6, 2011. Trefethen then filed an appeal in superior court on Monday, February 7, 2011, 32 days after the date the ZBA denied the motion for rehearing. The superior court rejected the appeal citing lack of jurisdiction because it was filed 32 days after the action of the ZBA, 2 days beyond the 30 day window set forth in RSA 677:4. Trefethen appealed to the supreme court.

The supreme court reversed the superior court and remanded the case back to the ZBA. In doing so, the court relied on the plain language of RSA 21:35, II which states, "If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day." Since the 30 day window for filing an appeal fell on Saturday, February 5th, an appeal filed on the next business day, Monday, February 7th, was timely filed.

The town had relied, in part, on *Radziewicz v. Town of Hudson*, 159 N.H. 313 [2009], where the supreme court held that 30 days was 30 days as far as RSA 677:4 was concerned and if the 30th day fell on a weekend or holiday, there was no extension to the next business day. Radziewicz had relied on superior court Rule 12(l) which the court said did not apply to appeals under RSA 677:4. "*The trial court ruled that notwithstanding Rule 12(1), the plain language of RSA 677:4 does not allow for filing an appeal beyond thirty days when the thirtieth day falls on a Saturday. We agree.*" The second paragraph of RSA 21:35 was added by the legislature in 2008 and became effective on January 1, 2009, well after Radziewicz had filed their appeal.

The lesson: if the last day for "filing documents or paying fees" falls on a Saturday, Sunday or legal holiday, they will be deemed timely filed if received by the next business day.

Because the ZBA does not have authority to adjudicate an equitable estoppel claim, administrative remedies need not be exhausted before bringing suit.

Daryl Dembiec & a. v. Town of Holderness **[November 13, 2014]** (See page IV-5.)
The New Hampshire Supreme Court reversed the decision of the superior court and held that the petitioners were not required to exhaust administrative remedies before bringing their equitable estoppel claim in court.

Daryl and Mary Dembiec obtained a permit from the Town of Holderness to build a single-family home on their property which, at the time, consisted only of a two-story boathouse equipped with living quarters. When the home was substantially completed, the compliance officer informed the Dembiecs that he would not issue a certificate of compliance because the boathouse contained a dwelling unit, and the zoning ordinance allowed only one dwelling per lot. The compliance officer informed them that they would either need to remove the plumbing from the boathouse or obtain a variance.

The Dembiecs applied to the ZBA for an equitable waiver, which was originally granted and then denied on rehearing. The Dembiecs also applied for a variance, which was denied. At the same time, they filed suit in superior court seeking a declaration that the Town was estopped from enforcing the one dwelling unit-per-lot zoning restriction because the Town had previously issued a building permit. The Town moved to dismiss on the grounds that the Dembiecs had not raised this argument below and had failed to exhaust their administrative remedies. The superior court dismissed.

The Dembiecs appealed the New Hampshire Supreme Court. The court stated that the rule regarding exhaustion of administrative remedies was flexible and does not prohibit judicial relief in two circumstances. First, a petitioner does not need to exhaust administrative remedies and may bring a declaratory judgment action to challenge the decisions of municipal officers and boards when the action raises a question that is peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available. Such a situation often occurs where the constitutionality or validity of an ordinance is in question. Second, where further appeal would be

useless – including where the administrative board does not have the authority to resolve the issues presented – exhaustion of administrative remedies is not necessary.

The court held that exhaustion of administrative remedies was not required because the ZBA did not have the authority to take the requested action and, therefore, further administrative action was useless. A ZBA's authority is conferred by statute, which gives a ZBA authority to hear appeals from administrative decisions and to grant variances, special exceptions, and equitable waivers where particular statutory prerequisites are met. However, the statute does not give a ZBA general equitable jurisdiction. Therefore, the Holderness ZBA did not have the authority to adjudicate an equitable estoppel claim. Furthermore, this was not a question of construction, interpretation, or application of the zoning ordinance or of the compliance officer's refusal to issue the certificate of compliance: there was no dispute that the ordinance prohibited more than one dwelling unit on a lot. Instead, the Dembiecs claimed that even though the compliance officer correctly interpreted the zoning ordinance, it was inequitable for him to decline to issue a certificate of compliance because the Dembiecs reasonably relied upon the building permit issued by the Town. Therefore, their claim was an entirely new claim for relief and one which the ZBA was not empowered to hear. Consequently, the case was sent back to the superior court.

(From New Hampshire Municipal Association Court Updates, August 2015.)

ZBA did not exceed authority by "converting" appeal.

Accurate Transport, Inc. v. Town of Derry **[August 11, 2015]** (See pages II-4, III-2.)
Accurate Transport sought to operate a Dumpster Depot in the Town's Industrial III zoning district. On June 19, 2013, the planning board voted to accept jurisdiction of the site plan application, although the motion to approve the plan was continued until August 21. Prior to the June 19 hearing, a technical review committee had reviewed the proposed site plan, and the code enforcement officer, a member of the committee, had expressed his opinion at that time that the proposed use of the property was permitted.

On August 21, the application was approved and a written decision was issued on August 28. On September 13, an abutter filed an administrative appeal with the ZBA. The stated purpose of the appeal was to demonstrate that the code enforcement officer's decision that the use was permitted by zoning was in error. On October 31, the ZBA determined that an appeal from the code enforcement officer's decision was untimely. However, the ZBA determined that the substance of the appeal contained questions about the planning board's interpretation of the zoning ordinance – an appeal that would be timely – and therefore "converted" it to an appeal of the planning board's decision. In deciding that appeal on November 7, the ZBA determined that the planning board had erred and, therefore, Accurate Transport could not operate the Dumpster Depot. On appeal to the superior court, the judge ultimately determined that the appeal was meant to challenge the code enforcement officer's determination of June 19, which meant, pursuant to local ordinance, that the abutter was required to appeal within 20 days. Therefore, the judge decided that the appeal was untimely.

On appeal to the New Hampshire Supreme Court, the court first determined that the ZBA did have the power to "convert" the abutter's appeal of the code enforcement officer's decision to an appeal of the planning board's decision. RSA 674:33 gives the ZBA broad authority to hear and decide appeals on subjects within its jurisdiction. Despite the fact that the abutter's stated purpose was to appeal the code enforcement officer's decision, the body of the appeal referenced and challenged the planning board's determinations on June 19 and August 21 as well. Because such an appeal is within the ZBA's jurisdiction, it had the ability to consider it as an appeal of the planning board's decision,

including making a determination of whether the proposed use was permitted under any zoning provision, not just the provision referenced in the appeal. It was immaterial that the ZBA does not have the explicit statutory to "convert" an appeal.

Second, the court determined that the abutter's appeal was timely. Because the ZBA determined that the abutter's appeal was actually from the planning board's decision on August 21, the abutter had 20 days, per town ordinance, from the written decision, which was issued on August 28. Relying on RSA 676:5 and the case of *Atwater v. Town of Plainfield*, 160 N.H. 503 (2010), the court determined that the June 19 decision was not an appealable decision of the planning board under RSA 676:5, III because the board did not make a decision interpreting zoning at that hearing. Instead, the June 19 decision was merely a procedural decision to accept jurisdiction. Although there was some discussion about whether the proposed use was allowed, the ultimate discussion and decision was tabled until August 21, at which time the planning board voted to approve the application. Thus, when the August 28 decision was issued, the abutter had 20 days to appeal. Furthermore, the court stated that when the planning board accepted jurisdiction on June 19, it did not also "accept" the code enforcement officer's "decision" that the use was permitted. The code enforcement officer never made an administrative decision; he instead simply gave his opinion, as part of the technical review committee, that the use would comply with zoning.

Finally the court did not review the validity of the ZBA's decision because the petitioners did not properly challenge the merits of the ZBA's decision.

(From New Hampshire Municipal Association Court Updates, August 2015.)

APPENDIX E
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 Attorney Peter Loughlin, distributed at the Office of State Planning's 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.

1. **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 N.H. 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, 661 A.2d 968 [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 - page 247.)

2. **The statute authorizing variances.**

The New Hampshire Supreme Court created the definition of unnecessary hardship for this State and 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."

3. **Requirements continue to exist in order for a variance to be granted.**

   a. The granting of a variance cannot result in the diminution of value of surrounding properties.

   b. The variance cannot be contrary to the public interest.

   c. The granting of a variance will result in substantial justice remains in place.

   d. The use resulting from the variance must not be contrary to the spirit and intent of the ordinance.

4. **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 the unusual shape of a lot causes the setback requirements to eliminate any reasonable building envelope, (*Husnander v. Town of Barnstead*, 139 N.H. 476, 660 A.2d 447, [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).

5. **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 F
RSAs Referenced

RSA	TITLE	PAGE
21:35	Time, How Reckoned; Days Included and Excluded	IV-1, IV-2, D-44
36:54-58	Review of Developments of Regional Impact	II-26, III-3
41:9-a	Establishment of Fees	III-10, III-11
42:1	Oath Required	I-2
91-A	Access to Governmental Records and Meetings	III-6, III-9, III-17, III-21, III-22, IV-6, A-2, A-5, BIBL-2
155-A:1	New Hampshire Building Code; Definitions	II-25
155-A:2	New Hampshire Building Code; Definitions	II-25
155-A:7	New Hampshire Building Code; Enforcement Authority	II-25
155-A:10	New Hampshire Building Code; State Building Code Review Board	II-25
155-E:1	Local Regulation Excavations; Definitions	II-26, D-11
155-E:4	Local Regulation Excavations; Prohibited Projects	II-26
236:115	Motor Vehicle Recycling Yards and Junk Yards; Application for License and Certificate of Approval	II-26
310-A	Joint Board of Licensure and Certification	III-4
424:6-a	Airport Zoning; Application of Zoning and Planning Laws	II-27
489	Integrated Land Development Permit	III-22
500-A:12	Examination	III-13, A-2
541	Rehearings and Appeals in Certain Cases	III-13, D-3
672:3	Abutter	III-6, D-40
672:7	Local Land Use Board	I-3, III-10
673:1	Establishment of Local Land Use Boards	I-1, II-24, II-26
673:3	Zoning Board of Adjustment and Building Code Board of Appeals	I-1, I-2, II-24, II-26
673:5	Terms of Local Land Use Board Members	I-1, I-2, II-26
673:6	Appointment, Number and Terms of Alternate Members	I-2
673:7	Planning Board Members Serving on Other Local Boards	I-3
673:8	Appointment and Terms of Local Land Use Board Members; Organization	I-4
673:9	Term of Chairperson and Officers	I-4
673:10	Scheduling of Meetings	I-4
673:11	Designation of Alternate Members	I-3, III-11
673:12	Filling Vacancies in Membership	I-2, I-3
673:13	Removal of Members	I-4
673:14	Disqualification of Member	III-11, III-12, A-2
673:15	Power to Compel Witness Attendance and Administer Oaths	III-8, IV-3
673:16	Staff; Finances	III-10
673:17	Open Meetings; Records	III-21, A-5
674:13	Appeals Where There is a Zoning Ordinance	II-27
674:14	Appeals Where No Zoning Ordinance Exists	II-27
674:16	Grant of Power	II-1, II-2, II-3, II-10, II-18, II-19
674:17	Purposes of Zoning Ordinances	II-1, II-2

674:18 Adoption of Zoning Ordinance II-1, II-2
674:19 Applicability of Zoning Ordinance II-19, D-11
674:20 Districts II-2
674:21 Innovative Land Use Controls III-1, III-22
674:27 Commercial Exceptions Under Interim Zoning Ordinance II-27
674:32-c Agricultural Uses of Land – Other General Provisions II-28
674:33 Powers of Zoning Board of Adjustment ..... II-3, II-5, II-7, II-8, II-9, II-13, II-14, II-17, III-1 ..... III-2, III-8, III-14, III-15, III-18, III-19, III-20, B-1, C-12, D-2, D-10, D-13, D-43, D-45, E-2
674:33-a Equitable Waiver of Dimensional Requirement II-18
674:34 Powers of Building Code Board of Appeals II-25
674:39-aa Restoration of Involuntarily Merged Lots II-28
674:41 Erection of Buildings on Streets; Appeals II-27, D-32
674:51 Power to Amend State Building Code and Establish Enforcement Procedures II-25, II-26
674:51-a Local Adoption of Building Codes by Reference II-26
676:1 Method of Adopting Rules of Procedure I-2, I-3, I-5, III-11, A-1, A-5
676:2 Joint Meetings and Hearings III-21, A-5, A-6
676:3 Issuance of Decision III-18, III-20, IV-1, IV-2, IV-5, A-4, A-5, D-41
676:4 Board's Procedures on Plats II-28, III-7, III-10, III-19, III-20
676:5 Appeals to Board of Adjustment ..... I-5, II-3, II-4, II-19, II-20, II-28, III-1, III-10, IV-7 ..... A-3, D-15, D-30, D-31, D-40, D-46
676:6 Effect of Appeal to Board III-5
676:7 Public Hearing; Notice III-3, III-5, III-6, III-7, A-5
677:1-14 Rehearing and Appeal Procedures II-27
677:2-14 Motion for Rehearing II-19, IV-1, IV-5, D-15, D-31
677:3 Rehearing by Board of Adjustment II-23, IV-1, IV-2, IV-3, IV-7, D-7, D-26, D-27, D-32
677:4 Appeal from Decision on Motion for Rehearing ..... IV-2, IV-5, D-15, D-26, D-27, D-31, ... D-43, D-44
677:5 Appeal and Court Review of Board of Adjustment; Priority IV-5
677:6 Burden of Proof IV-5, D-12
677:9 Restraining Order IV-6
677:10 Evidence; How Considered IV-6
677:15 Appeal and Court Review of Planning Board Decisions III-1, IV-7, D-12, D-39, D-40
677:17 Appeal When Zoning Ordinance Exists II-27, II-28

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