

A New Hampshire Planner's Review of Recent Legislation and Court Decisions

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Recent Court Decisions

Zoning Cases: Variances

- *Simplex Technologies, Inc. v. Newington*, 145 N.H. 727 (2001)
- *Boccia v. Portsmouth*, 151 N.H. 85 (2004)
- *Vigeant v. Hudson*, 151 N.H. 747 (2005)
- *Harrington v. Warner*, 152 N.H. 74 (2005)
- *Garrison V. Henniker*, 154 N.H. 26 (2006)
- *Boulders at Strafford v. Strafford*, __ N.H. __ (2006)
- *Malachy Glen Associates, Inc. v. Chichester*, __ N.H. __ (2007)
- *Community Resources for Justice, Inc. v. Manchester*, __ N.H. __ (2007)

What's a Variance? RSA 674:33

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.
4. Substantial justice is done.
5. The value of surrounding properties will not be diminished. (this one is not statutory, but included by the Court)

What's "Unnecessary Hardship"?

- Use variance - *Simplex* analysis
 - The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.
 - No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
 - The variance would not injure the public or private rights of others.
- Area (dimensional) variance - *Boccia* analysis
 - An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.
 - The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

Zoning Cases: Use Variances

- *Garrison V. Henniker*, 154 N.H. 26 (2006)
 - ZBA granted use variance for explosives facility in a "rural residential" zone
 - Trial court reverses; Supreme Court upholds reversal
 - Site may be ideal for the proposed use, but...
 - Property not "unique"—applicant's burden must arise from the property and not from the individual plight of the landowner
 - Must be distinguishable from surrounding property

Zoning Cases: Area Variances

- *Malachy Glen Associates, Inc. v. Chichester*, ___ N.H. ___ (2007)
 - Area variance for wetland buffer encroachment denied
 - Trial court reverses, Supreme Court upholds reversal
 - "Not contrary to public interest" related to "spirit of the ordinance"—so what's the difference?
 - Mere conclusory statement by ZBA insufficient in the face of contrary expert evidence
 - Use is presumed reasonable if it is a permitted use
 - Scaled-back alternative uses not relevant without an analysis of the financial impact to the applicant

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Zoning Cases: Variances & Constitution

- *Boulders at Strafford v. Strafford*, ___ N.H. ___ (2006)
 - Open space subdivision—variances from wetland setbacks for septic systems; ZBA denial
 - Applicant challenges constitutionality of ordinance—substantive due process (legitimacy and rationality, not individual impact)
 - Trial court reverses, citing *Metzger v. Brentwood* (1977) "least restrictive means" test; Supreme Court overturns *Metzger* and upholds denial of variance
 - New constitutional test for substantive due process: rational basis—legislation must be rationally related to a legitimate governmental interest; individual impact is irrelevant
 - An invitation by the Court to do more...

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Zoning Cases: Variances

- *Community Resources for Justice, Inc. v. Manchester*, ___ N.H. ___ (2007)
 - Litigants' response to Court's invitation in *Boulders*
 - Use variance for "halfway house"—residential transitional facility for criminal offenders; not permitted in *any district*
 - CRJ invokes *Britton v. Chester* (1991) general welfare interpretation of RSA 674:16—trial court didn't address this, so neither did Supreme Court (but seemed to like the idea)
 - CRJ also alleges equal protection violation; 3 tiers of review
 - NH recognizes "enjoyment of property" as an important substantive right, intermediate scrutiny-- legislation be substantially related to an important governmental objective
 - Burden is on the government

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Planning Cases

- *Residents Defending Their Homes v. Lone Pine Hunter's Club*, ___ N.H. ___ (2007)
- *Property Portfolio Group, LLC v. Derry*, ___ N.H. ___ (2007)
- *Weare Land Use Association v. Weare*, 153 N.H. 510 (2006)
- *Thomas v. Hooksett*, ___ N.H. ___ (2006)

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Planning Cases

- *Residents Defending Their Homes v. Lone Pine Hunter's Club*, ___ N.H. ___ (2007)
 - 1966: Club established—ZBA says no variance required for building permit (no meeting, either); various expansions in ensuing years, with and without permits and approvals
 - 1999: Zoning applies to all sporting clubs—special exception and site plan review
 - Planning board deems RSA 159-B to preempt its authority
 - Supreme Court concludes that RSA 159-B only relates to noise
 - "...the statute does not preclude the requirement that the Club obtain a variance, because the town's original zoning ordinance prohibiting the Club's use was enacted years before the Club purchased its property."

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Planning Cases

- *Property Portfolio Group, LLC v. Derry*, ___ N.H. ___ (2007)
 - RSA 676:4 provision for "technical review" by staff team
 - No formal site plan review (conversion of fire station to restaurant)
 - Adequate notice provided
 - Appeal five months after "determination" made
 - Conditions "precedent" vs. "subsequent"
 - Precedent: contemplate additional action on the part of the town—no final approval until condition is met
 - Subsequent: approval valid as long as condition is met or continues to be met

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Planning Cases

- *Thomas v. Hooksett*, ___ N.H. ___ (2006)
 - 2001 site plan approval for gas station/convenience store; later zoning amendment—groundwater conservation district—no gas stations within 1,000 feet of another
 - Approval challenged by Conservation Commission; Supreme Court finds that CC doesn't have standing (2003)
 - Staff tells applicant he has a year from 2003 decision to get a building permit; he does so; five months later permit is revoked by town, citing RSA 674:39
 - "active and substantial development" within a year of approval to vest against local regulatory changes
 - ZBA reversed revocation; trial court reverses ZBA; Supreme Court agrees: revocation was valid; applicants are required to know the law

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Recent Statutory Changes

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Community Revitalization

- RSA 79-E (Ch. 167, Laws of 2006)
 - Enabling legislation
 - Limited time relief from increased property taxes attributable to substantial rehabilitation
 - "Downtown" areas, as locally defined
 - Up to 5 years
 - Longer for new housing, affordable housing, historic structures

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Pre-Application Vesting

- RSA 676:12 (Ch. 285, Laws of 2006)
 - "Design review" protection of plans; doesn't apply to "preliminary conceptual consultation"—see RSA 676:4, II(a) and (b)
 - Up to a year from the completion of the design review process

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Shoreland Protection

- RSA 483-B (Ch. 267 & 269, Laws of 2007)
 - Statute will require a DES permit (Ch. 269)
 - New standards for impervious surfaces
 - 20% maximum coverage within protected shoreland area; development constraint, opportunity for deployment of Low Impact Development techniques
 - Natural woodland buffer "rewrite"—DES administrative rules undergoing "rewrite", too!
 - Relationship with local regulation clarified—all local permits required (but who goes first?)
 - But local variances do not exempt property from state law!

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2008 Legislative Preview

- Retained bills
 - HB 255: growth management
 - HB 310: home wind energy production
 - HB 331: pre-application vesting
 - HB 335: variance hardship standards
- New bills
 - LSR 2267: impact fees and state highways
 - LSR 2275: vernal pools and the shoreland protection act
 - LSR 2433: municipal housing commissions
 - LSR 2434: growth management ordinances

Among *many* others...

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Legislative Tracking

- Local Government Center (NHMA)
- New Hampshire Planners Association
 - www.nhplanners.org

Explanations below: Enacted Interim Study/Referend TLKilled

Bill	LSR	Sponsor	Description	House Action	Date	Time	Room	Sen Action	Date	Time	Room	Gov's Action
HOUSE												
SB 133	133	Lockwood	Relating to the appropriation of certain revenues. Providing that the scope of appropriations from certain revenues shall be ascertained.	FN	TL							
SB 42	132	Lockwood	New city needs to resource protection sections of local master plans.	M&CG	Enrolled			P&MA	Enrolled			Big 5/21 aft 7:00-8:30
SB 31	282	Plym	Creating an environmental policy for New Hampshire.	E&A	Retained							

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New Hampshire Charitable Foundation Growth and Development Roundtable

- Broad coalition of diverse interests—conservation, housing, business, developers, municipalities
- Convened and facilitated by NH Charitable Foundation
- Found “Common Ground”
 - Large lot zoning and other regulations are a significant problem for both conservation and housing affordability
- Primary Strategy: planning assistance for municipalities

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Housing and Conservation Planning Program (HCPP)

SB 217 (Chapter 348, Laws of 2007)

- Incentive-based approach
- Technical support for municipalities
- Treats housing development, economic planning, historic preservation, and conservation as part of a unified “growth and development” strategy

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HCPP (cont'd)

- Administered by OEP
- \$400,000 appropriation for the biennium
- Multi-disciplinary advisory committee



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HCPP (cont'd)

Four stages:

- Study housing and natural resources
- Develop a Growth and Development strategy
- Amend local master plan
- Update zoning and regulations

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Stage One

- Review and map housing, income and demographic data
- Review and map essential natural resource systems
- Develop a build-out analysis
- Map historic resources
- Draft a report
- Share information with the community

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Stage Two

- Develop a Growth and Development Strategy
- Public outreach process
- Identify areas to be conserved and developed
- Identify ways to:
 - Use land more efficiently
 - Reuse existing and historic structures

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Stage Three

- Audit the Master Plan
- Amend, write or rewrite specific Master Plan chapters
- Seek adoption of amended Master Plan

...All to be consistent with the Growth and Development Strategy

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Stage Four

- Audit municipal land use regulations
- Amend existing land use regulations
- Draft new land use regulation articles
- Seek adoption of regulations

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HCPP Grant Details

- All grants require a community match
- Match requirements to be set in rules
- DRAFT Recommendations for rules:

Stage	Maximum Grant Award		Minimum Local Match
	% Total Cost	Up To	
1	95%	\$20,000	5%
2	50%	\$15,000	50%
3	50%	\$20,000	50%
4	75%	\$30,000	25%

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Eligible Applicants

- MUNICIPALITIES only
- Apply independently or with other municipalities
- Application may be prepared by a consultant
- Must be signed by the community

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Application Scoring

- Point based system in rules
- Conformance with 10 principles
- Priority status for:
 - Repeat customers
 - Less access to planning staff
 - Demonstrated community support
 - Regional perspective

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HCPP (cont'd)

- Rulemaking in progress
- Notice by OEP at least 60 days before grant round
- First grant round in early 2008
- www.nh.gov/oep/programs/hcpp

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