

# **Roles of the Zoning Board of Adjustment**

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## Why is a ZBA established?

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA.
- Failure to include provision for a ZBA will render a zoning ordinance invalid.
  - *Jaffrey v. Heffernan*, 104 NH 249 (1962)

## The ZBA Has No Legislative Powers

- Zoning ordinance or building code created by planning board, citizen petition, or governing body, and adopted by town meeting or the city or town council
- The Master Plan, Subdivision & Site Review regulations created by the Planning Board
- The ZBA takes these documents as they exist, and does not change them

# The ZBA Has No Executive Powers

- Building permits and code decisions are issued by the Building Inspector or the Selectmen, not the ZBA
- Enforcement decisions made by administrative officials, not the ZBA
- Road classification decided by legislative body, not the ZBA

# The ZBA is a Quasi-Judicial Body

- The ZBA receives **evidence**, finds the facts, and applies legal tests to determine if relief from the ordinance should be granted.
- It **interprets** the ordinance and has the final say on the *meaning* of the language.
- It **guides administration** of the ordinance through its power to **overrule or modify** decisions of administrative officials.

# Jurisdiction

- RSA 674:33:
  - Administrative appeals
  - Special Exceptions
  - Variances
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:34: Building Code Appeals
- RSA 674:41: Class VI or private road

## Administrative Appeals, RSA 674:33, I (a)

To resolve claims of *error* in the decisions of:

- “Administrative Officials” RSA 676:5, I
- Planning Board, RSA 676:5, III
- Historic District Commission, RSA 677:17

# Administrative Appeals

- “Administrative official”: official or board who
  - Issues permits and certificates under ordinance
  - Enforces ordinance
- Typically building inspector or board of selectmen

# Administrative Appeals

- “Decision of administrative officer”:
  - “Construction”
  - “Interpretation”
  - “Application of terms of” zoning ordinance
- Typically building permit or enforcement order

# Administrative Appeals

- **Administrative Officials, exception:**
  - Cannot review “discretionary decision” to take or not take enforcement action. RSA 676:5, II (b)
- **Planning Board, exception:**
  - Cannot review decisions involving “innovative land use control” issues. RSA 676:5, III

# Administrative Appeals

- Appeal may be taken by:
  - Any person “aggrieved” (abutter or other property owner directly affected)
  - Any officer, department, board of municipality

RSA 676:5, I

# Administrative Appeals

- Notice of appeal must be filed within a “reasonable time, as provided by the rules” RSA 676:5, I
- Compliance is required. *Daniel v. B & J Realty*, 134 NH 174 (1991)
- Exception: Rules may allow waiver by ZBA. 47 *Residents of Deering v. Deering*, 151 NH 795 (2005)
- Exception: Period runs from when appealing party knows or should know about decision. *Tausanovitch v. Lyme*, 143 NH 144 (1998)

# Administrative Appeals

- Appeal “maintains the status quo” RSA 676:6
- No construction, alteration or change of use under permit or certificate that is appealed
- Enforcement proceedings stayed unless administrative official certifies it would cause “imminent peril” to life, health, safety, property or environment

## Special Exceptions, RSA 674:33, IV

- A use that is **permitted** by the ordinance, subject to specified criteria or standards
- All of the criteria must be met; no waivers  
*Tidd v. Alton*, 148 NH 424 (2002)
- May be subject to additional conditions to ensure compliance with criteria. *Nestor v. Meredith*, 138 NH 632 (1994)
- Runs with the land

# What is a Variance?

- A variance allows use of property in a way that otherwise would violate the zoning ordinance
- Constitutional “safety valve” to prevent “taking”
- Cannot be granted unless **all five** elements are met
- Runs with the land
- By ordinance, may lapse if not implemented
- Reasonable conditions of approval

# The Five Elements

- No diminution in the value of surrounding properties
- Not contrary to the public interest
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship
- Spirit of the ordinance will be observed
- Substantial justice will be done

# Disability Exception

- A variance may be granted for reasonable accommodations necessary for a physically disabled person to use a property.
- The “hardship” element does not apply
- The variance may be limited to a person, and does **not** run with the land.
  - RSA 674:33, V

# 1. Value Not Diminished

- Expert opinion useful but not required.
- Board members can accept or reject what they hear from the experts, and can consider their own knowledge and experience of the area. *Vannah v. Bedford*, 111 NH 105 (1971)
- If expert evidence not contested, can't be ignored. *Malachy Glen Associates Inc. v. Chichester*, 155 NH 102 (2007)

## 2. Unnecessary Hardship

- Former test: some aspect of the land itself means that literal enforcement of the ordinance would deny the owner all reasonable use of the property. *Grey Rocks Land Trust v. Hebron* (1992)
- So difficult to obtain that ordinances came close to an unconstitutional taking of property rights without compensation.

# Simplex v. Newington, 2001-2004

- The old rule was abandoned, and became:
  - 1. Zoning restriction as applied interferes with reasonable use of the property, “considering the unique setting . . . in its environment”
  - 2. No fair and substantial relationship between restriction and purpose of ordinance
  - 3. Variance would not injure the public or private rights of others.
  - *Simplex v. Newington*, 145 NH 727 (2001)

# Simplex “First Prong”

- “Critical inquiry” for hardship
- “Reasonable use” includes reasonable return on investment-- requires “actual proof, often in the form of dollars and cents evidence.”
- “Unique setting in environment” includes
  - Specific conditions of property
  - Distinct burden on property by zoning restriction
  - Impact of proposed use on neighborhood

## Simplex “First Prong” key cases

- *Community Resources for Justice v. Manchester*, 154 NH 748 (2007)
- *Garrison v. Henniker*, 154 NH 26 (2006)
- *Harrington v. Warner*, 152 NH 74 (2005)

# Self-created hardship

- Purchase of land with knowledge of zoning restrictions is “self-created hardship”
- “Nondispositive” factor to be considered under the “first prong” of Simplex
- Landowner can show “good faith”: lack of knowledge, attempt to use alternatives, reliance on officials

*Harrington v. Warner, Hill v. Chester*, 146 NH 291 (2001)

## Boccia v. Portsmouth, 2004

- Court recognizes a distinction between limits on use of property and restrictions arising out of area or dimensional standards
- Simplex remains the unnecessary hardship test for **use** variances
- A new, more lenient, test is created for **area** variances

# The Boccia “Area Variance” Test

1. An area variance is needed to enable the use given the special conditions of the property
2. The benefit sought by applicant cannot be achieved by some other method reasonably feasible, other than the area variance

*Boccia v. Portsmouth*, 151 NH 85 (2004)

## Boccia Test (continued)

- “Special conditions of the property”
  - Proposed use deemed reasonable as presented
  - Physical conditions: e.g., lot configuration and wetlands coverage
- “Other method reasonably feasible”
  - Project considered as proposed
  - “Undue financial burden” of compliance

*Boccia; Malachy Glen Assoc., Inc. v. Chichester*, 155 NH 102 (2007)

## Telling the Difference: “Use” or “Area” Variance?

- Determined by purpose of specific restriction from which variance is sought
- If preserves character of surrounding area—**use** variance
- If incidental physical limitation on permitted use – **area** variance
- Case-by-case determination

*Harrington v. Warner*, 152 NH 74 (2005)

## 3. Public Interest

- Related to “spirit of the ordinance”
- Contrary to public interest if variance “unduly and in a marked degree” conflicts with zoning ordinance so as to “violate basic zoning objectives”
  - Alter essential character of locality
  - Threaten public health, safety, welfare

*Chester Rod & Gun Club v. Chester*, 152 NH 577 (2005); *Malachy Glen Assoc., Inc. v. Chichester*, 155 NH 102 (2007)

## 4. Spirit of the Ordinance

- Related to “public interest”
  - Consistency of use with permitted uses
  - Consistency with established uses of area
- Harrington v. Warner*, 152 NH 74 (2005)

## 5. Substantial Justice

- Will denial of relief cause a loss to the applicant that outweighs the gain to the public?
- Consistency of development with present use of area

*Malachy Glen Assoc., Inc. v. Chichester*, 155 NH 102 (2007)

# Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- Dimensional only, not “use” violations
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

# Equitable Waiver, Elements

- 1. Violation not discovered until after substantial completion
- 2. A “good faith error”, by owner or building official, not ignorance, misrepresentation
- 3. Does not create a “public or private nuisance”
- 4. Cost of correction outweighs public benefit, and thus unfair.

## Building on Class VI or Private Roads

- RSA 674:41 prohibits building on lots with no frontage on Class V or street on approved plan unless
  - Selectmen authorize building permit, or
  - ZBA, after public hearing, finds “practical difficulty or unnecessary hardship”

# Building Code Board of Appeals

- ZBA may be given powers and duties of building code board of appeals under RSA 674:34
- May vary the building code:
  - To prevent “manifest injustice”
  - When not contrary to spirit and purpose of code and public interest
- NB: Local code, not state building code under RSA 155-A

# For More Information

- State of NH Office of Energy and Planning
  - [www.nh.gov/oep](http://www.nh.gov/oep)
- The annual Municipal Law Lecture Series sponsored by the NH Local Government Center in the fall of every year typically concentrates on land use legal issues
- Contact LGC Staff Attorneys at:
  - 1-800-852-3358 ext. 384
  - E-mail LGC at: [legalinquiries@nhlgc.org](mailto:legalinquiries@nhlgc.org)