



New Hampshire Department of
BUSINESS AND
ECONOMIC AFFAIRS

The Zoning Board of Adjustment in New Hampshire

A Handbook for Local Officials

Updated: 2023

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THE ZONING BOARD OF ADJUSTMENT IN NEW HAMPSHIRE

A HANDBOOK FOR LOCAL OFFICIALS

**Current Through
The 2023 Legislative Session**

**NH DEPARTMENT OF BUSINESS AND ECONOMIC AFFAIRS
OFFICE OF PLANNING AND DEVELOPMENT**

Permission is granted to reproduce this handbook and subsequent updates, citing the source as the NH Office of Planning and Development.

SUMMARY OF CHANGES

The following table summarizes the substantial changes that have been made in this 2023 version of the *Zoning Board of Adjustment in New Hampshire: A Handbook for Local Officials* since the 2022 Handbook update.

CHAPTER	IMPACTED PAGE #S	DESCRIPTION OF CHANGE
Global Changes	All	Year references on the cover page and in the footer. Updated links throughout.
Chapter II: <i>Powers and Duties of the Zoning Board of Adjustment</i>	II-8	<p>Deletion under section “Special Exceptions” of the information box about variances termination at the very end:</p> <p>In 2018, the legislature amended RSA 674:33, I-a and RSA 674:33, IV to allow municipalities to amend their zoning ordinance to provide for the termination of unexercised variances and special exceptions that were granted before August 19, 2013.</p> <p>The Planning Board must post a notice of termination in town hall for one year, stating that variances and special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice. Variances and special exceptions subject to these automatic termination provisions may still be extended by the ZBA for good cause.</p>
	II-11	<p>Deletion under section “Variances” of the information box about variances termination:</p> <p>In 2018, the legislature amended RSA 674:33, I-a and RSA 674:33, IV to allow municipalities to amend their zoning ordinance to provide for the termination of unexercised variances and special exceptions that were granted before August 19, 2013.</p> <p>The Planning Board must post a notice of termination in town hall for one year, stating that variances and special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice. Variances and special exceptions subject to these automatic termination provisions may still be extended by the ZBA for good cause.</p>
Chapter III: <i>Procedures</i>	III-9	<p>Revision to the section “Public Hearings”, 4th to last paragraph and deletion of the box after it:</p> <p>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, names of board members who made or seconded each motion and any final decisions.</p> <p>As of January 1, 2019, meeting minutes must also include the names of board members who made or seconded each motion. See RSA 91-A:2, II.</p>
	III-25	<p>Legislative-related addition to the section “Nonpublic Sessions” after the 1st paragraph:</p> <p><u>The decision to hold a nonpublic session must be included in the minutes of the open session. Minutes also must be kept of the nonpublic session. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes of nonpublic sessions shall include the names of members, persons appearing before the board, and a brief description of the subject matter discussed and final decisions.</u></p> <p><u>In 2023 paragraph IV was added to RSA 91-A:3, III, requiring public bodies to either develop their own process to review minutes or to follow a statutorily created process. Either way, public bodies are required to review all nonpublic minutes that</u></p>

CHAPTER	IMPACTED PAGE #S	DESCRIPTION OF CHANGE
		<p><u>were previously sealed and determine whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. That review process must take place within 10 years of October 3, 2023. Meeting minutes that were kept from the public that are not reviewed by the public body or agency on or before October 3, 2033 shall be subject to public disclosure without further action of the public body.</u></p>
<p>Chapter IV: <i>Appeal from A Board's Decision</i></p>	<p>IV- 4</p>	<p>Legislative-related additions under the section "Appeal to Superior Court" 2nd paragraph:</p> <p><u>RSA 677:5 Priority</u></p> <p>Any hearing by the superior court upon an appeal under RSA 677:4 shall be given priority on the court calendar.</p> <p><u>Beginning January 1, 2024 all land use related cases filed in superior court will be heard by the newly established Land Use Review Docket. The Land Use Review Docket has jurisdiction to hear appeals from decisions of local land use boards, including, but not limited to decisions of municipal planning boards, zoning boards, historic district commissions, and conservation commissions. The Land Use Review Docket is required to hold a structuring conference within 30 days of the Court receiving the notice of appeal. The court must then set a deadline for the filing of records related to the appeal and schedule a hearing on the merits within 60 days of receiving the certified record from the municipality. Decisions on the merits of land use appeals must then be made within 60 days of the hearing.</u></p>
<p>Appendix A: <i>Suggested Rules of Procedure for Local Boards of Adjustment</i></p>	<p>A-3</p>	<p>Revision to the section "Records", 3rd paragraph:</p> <p>Minutes of all meetings including names of board members, <u>names of board members who made or seconded each motion</u>, 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. Approved minutes must also be posted on the website in a consistent and reasonably accessible location, or a notice must be posted and maintained on the website stating where minutes may be reviewed and copies requested. RSA 91-A:2 II</p>
	<p>A-6</p>	<p>Practice pointer addition at the very end:</p> <p><u>Practice Pointer - OPD recommends that you review board Rules Of Procedure with the municipal attorney before finalizing them. OPD also recommends that the board hold at least one public hearing before the board formally adopts the rules.</u></p>
<p>Appendix C <i>Suggested Forms</i></p>	<p>C-11, 12, 14, 15</p>	<p>Practice pointer addition to the "Individual Board Member Variance Worksheet", "Findings of Fact Template", "Notice of Decision – Granted Template", and "Notice of Decision – Denied Template" at the very end:</p> <p><u>Practice Pointer-OPD suggests boards review this worksheet with the municipal attorney for what would work best for your board.</u></p>

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PREFACE

The Office of Planning and Development (NH OPD) – formerly the Office of Strategic Initiatives (and before that, the Office of Energy and Planning) – provides assistance to New Hampshire citizens and municipalities in their planning efforts. As part of that assistance, NH OPD 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 auspices 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 and 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 2002.¹ This edition incorporates statutory changes enacted through the 2023 legislative session. Starting in 2023 information on Planning and Zoning Case Law (formally Appendix D) is published in a separate document titled *Federal and State Planning and Zoning Case Law for New Hampshire Local Officials*.

Throughout this book, state statutes are presented in 10 pt. Arial font and citations are provided for New Hampshire Supreme Court decisions.

Information regarding this handbook, *Federal and State Planning and Zoning Case Law for New Hampshire Local Officials*, as well as other related resources and publications are available to download for no charge from NH OPD's website at: <https://www.nheconomy.com/office-of-planning-and-development/what-we-do/municipal-and-regional-planning-assistance/planning-an-zoning-publications>.

¹ Special recognition and appreciation is given to all who have assisted in the preparation of this publication over time, including but not limited 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 herein.

CAUTION

This handbook is designed to serve as an introduction to the organization, powers, duties and procedures of boards of adjustment in New Hampshire. 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 only 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, amended, or whether they are even applicable to the unique parcel under consideration.

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.

It is strongly suggested that your board always seek legal counsel whenever there are any procedural or substantive legal questions.

INTRODUCTION

Zoning boards of adjustment have played a vital, 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*](#) 104 N.H. 249 (1962).

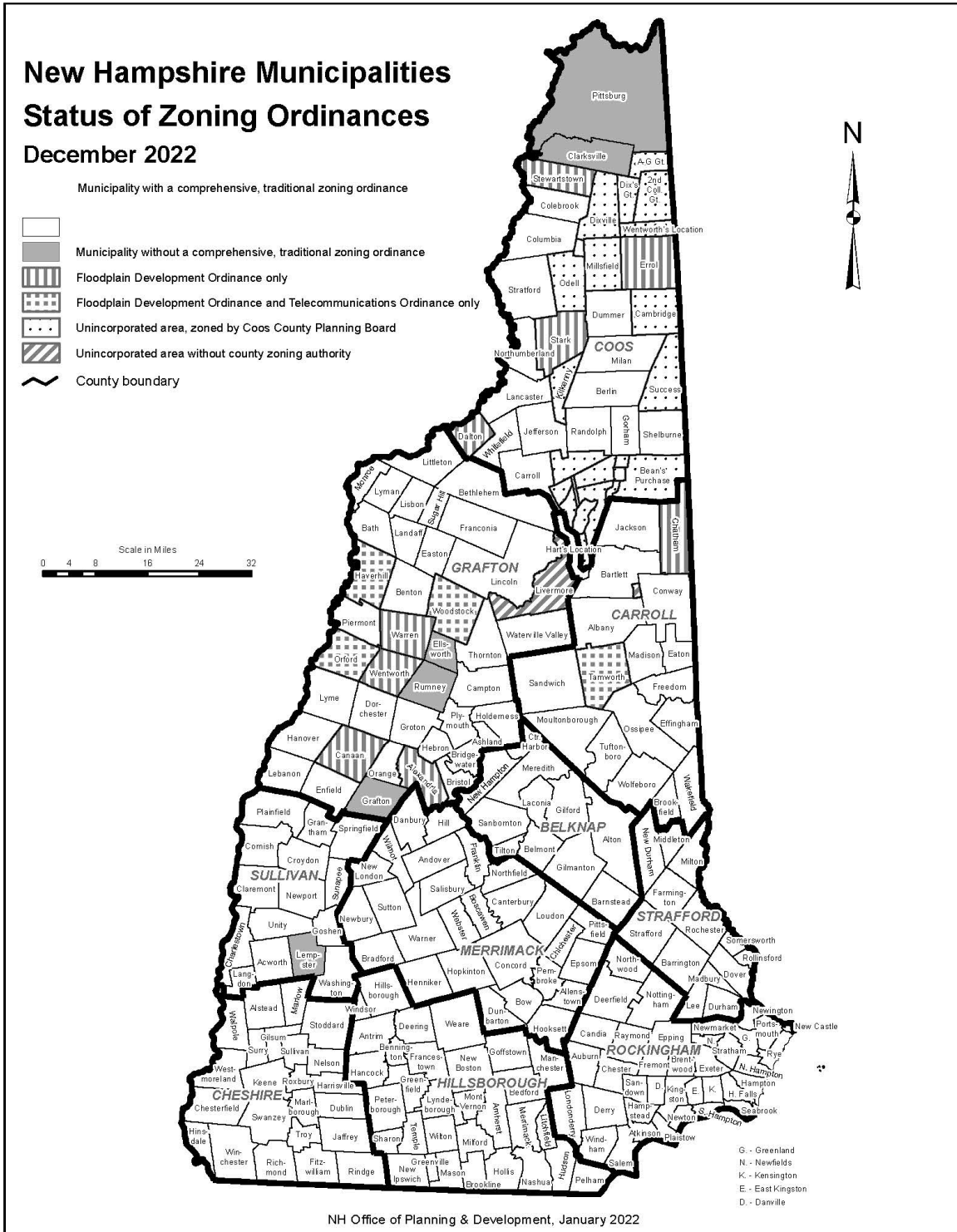
New Hampshire’s planning-enabling legislation, Revised Statutes Annotated (RSA) 672-678, and the local zoning ordinance and map, provide the legal basis for the board of adjustment’s work. Each board member should be completely familiar with them. While zoning ordinances can and should be tailored to 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 is applied equitably to all property.

In addition to statutory law, there is also “case law,” which is the courts’ interpretation of statutes and ordinances as applied to specific cases. In theory, case law clarifies the provision contained in both state and local regulations. That said, statutes are amended by the legislature and courts regularly issue new case law involving different sets of facts. So, while hard and fast rules that cover all situations are virtually impossible to state, 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.

Planning boards, which have the task of formulating the zoning ordinance and zoning map, may 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.

New Hampshire Municipalities Without a Zoning Ordinance



NEW HAMPSHIRE VILLAGE DISTRICTS WITH ZONING ORDINANCES

This table includes those village districts identified by NH OPD as of December 2022 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.

VILLAGE DISTRICT	TOWN	REGIONAL PLANNING COMMISSION	COUNTY	ADOPTION DATE
Haverhill Corner Precinct	Haverhill	North Country Council	Grafton	2/27/89
Hopkinton Village Precinct	Hopkinton	Central New Hampshire Regional Planning Commission	Merrimack	2/29/60
Kearsarge Lighting Precinct	Conway	North Country Council	Carroll	2/13/73
Little Boar's Head	North Hampton	Rockingham Planning Commission	Rockingham	9/7/37
Lower Bartlett Water Precinct	Bartlett	North Country Council	Carroll	4/1/80
Mountain Lakes Village District	Haverhill	North Country Council	Grafton	3/16/96
North Walpole Village District	Walpole	Southwest Regional Planning Commission	Cheshire	10/6/36
Rye Beach Village District	Rye Beach	Rockingham Planning Commission	Rockingham	9/24/37
Seabrook Beach Village District	Seabrook	Rockingham Planning Commission	Rockingham	3/30/77

CHAPTER I: ORGANIZATION

State law establishes certain requirements that 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 OF ADJUSTMENT

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.

The term "local land use board" is used throughout this book and is defined by statute (RSA 672:7) as meaning:

"a planning board, historic district commission, inspector of buildings, building code board of appeals, zoning board of adjustment, or other board or commission authorized under RSA 673 established by a local legislative body."

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.

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 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 ([RSAs 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.

AUTHORITY OF THE BOARD OF ADJUSTMENT

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

1. Appeal from Administrative Decision;
2. Approval of Special Exception;
3. Grant of Variance; and
4. Grants of Equitable Waivers of Dimensional Requirement.

The distinction between a Variance and a Special Exception is important to understand.

- 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.

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

RSA 674:33 Powers of Zoning Board of Adjustment

I(a) The zoning board of adjustment shall have the power to:

- (1) 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
- (2)

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.” *Trottier v. City of Lebanon*, 117 N.H. 148 (1977) (citations omitted).

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.

Notwithstanding technical differences between an administrative “opinion” and a “decision”, cautious applicants (and their attorneys) may file their administrative appeal following an administrative “opinion,” in order to protect their appeal rights.

Pursuant to [RSA 676:5, I](#), administrative appeals to the board of adjustment must be filed within a “reasonable time.” What is, and what is not, reasonable will depend on the specific facts of each case.

“In determining what constitutes a reasonable time, the interests of the party benefitting from the administrative officer’s of town’s determination will be balanced against the interests of the

aggrieved party who filed the appeal with the ZBA. The factors that are considered in determining the reasonableness of a time period include “the knowledge of the parties, their conduct, their interests, the possibility of prejudice to any party, and any reason for delay in appealing.”

Peter J. Loughlin, Esq., 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of the ZBA, § 22.02 (LexisNexis Matthew Bender) (internal footnotes omitted). It is strongly suggested an appeal window be identified in the board’s rules of procedure. NH OPD suggests 30 days, which is a common deadline in the state.

In order to bring an appeal of an administrative decision, a person must also 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 acceptance 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).

For further 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.

SPECIAL EXCEPTIONS

RSA 674:33 Powers of Zoning Board of Adjustment

IV. (a) 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.

(b) 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.

(c) The zoning ordinance may be amended to provide for the termination of all special exceptions that were authorized under this paragraph before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

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.

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.

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. 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 **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 setback 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 non-conforming 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) (holding that ZBA did not err in ruling that 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. See [*Tidd v. Town of Alton*](#), 148 N.H. 424 (2002); [*Mudge v. Precinct of Haverhill Corner*](#), 133 N.H. 881 (1991); and [*New London Land Use Assoc. v. New London Zoning Board*](#), 130 N.H. 510 (1988). 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) (noting 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).

The Zoning Board of Adjustment in New Hampshire, NH OSI Spring Planning & Zoning Conference, April 2018; presented by Christopher L. Boldt, Esq., Donahue, Tucker, & Ciandella, PLLC.

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.

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?

“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).

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, “[w]e 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 (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.”

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

In *Avanru Development v. Town of Swanzy*, Case No. 2021-0015 (2022) the New Hampshire Supreme Court ruled that special exception provisions that permit additional uses in certain zoning districts in effect declare such special exception uses to be essentially desirable subject to a determination that the proposed location must be considered in light of special restrictions or conditions tailored to fit the unique problems which the use may present. The proposed special exception use in some places or in some respects might be incompatible with the uses permitted as of right in the particular district.

A special exception is 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 six-month window within which the special exception remains valid following the resolution of a planning application filed in reliance upon the special exception. See [RSA 674:33, IV](#).

Variations from the Terms of a Special Exception

The question sometimes arises as to whether an applicant for a particular land use can obtain a variance from one of the terms of a special exception in order to qualify for a special exception. Clearly, where a use is allowed by special exception provided certain criteria are met, the special exception could not be granted if any one of the criteria is not satisfied. Similarly, the board could not first grant a variance for the unsatisfied criteria, then turn around and grant the special exception even if all other criteria are met.

When a board is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth within the zoning ordinance. *Tidd v. Town of Alton*, 148 N.H. 424, 427 (2002) (Landowner not entitled to establish a campground by special exception since a requirement for the special exception was that there be no hazards created by automobile traffic and the evidence before the board was that there would be a hazard.) And while the board may grant a special exception, it

cannot waive the requirement for a special exception. *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881, 886 (1991) (The abutter alleged that a special exception was needed before the particular land use was permitted. Two of the Zoning Board of Adjustment members concluded that a special exception was needed. However, those members voted to waive the need for a special exception without addressing the need for or ability of a variance. The court ruled that the Zoning Board improperly “waived” the requirement for a special exception for the construction of 22 additional mobile home sites on a 42-acre tract of land.)

The fact that a landowner does not qualify for a special exception does not mean that approval could not be obtained to achieve the same goal. The landowner could apply for whatever variance relief was necessary to allow the use without applying for a special exception. In [*New London Land Use Association v. New London Zoning Board of Adjustment & a*](#), for example, the court noted as follows:

“Denial of Lakeside’s request for a special exception, because it did not conform to the density requirement of the zoning ordinance, does not restrict its vested right to continue its motel operation, nor does it require Lakeside to change, in any way, the manner in which the motel units are now situated upon the land. A special exception is a use permitted upon certain conditions as set forth in a town’s zoning ordinance. 3 Rathkopf, *Law of Zoning and Planning* § 41.02 (1987). It is generally recognized in this State that, in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements as set forth within the zoning ordinance. [*Shell Oil Company v. Manchester*](#), 101 N.H. 76, 78, 133 A.2d 501, 502 (1957); [*Stone v. Cray*](#), 89 N.H. 483, 487, 200 A.2d 517, 521 (1938). A zoning ordinance is not discriminatory because it permits the continuation of existing structures and conditions while prohibiting the creation of new structures or conditions of the same type. *Stone, supra* at 485, 200 A.2d at 520. If Lakeside seeks permission to act outside the ordinance, it may apply for a variance from the density requirements of the ordinance. *New London v. Leiskiewicz*, 110 N.H. [462], 466, 272 A.2d [856], 859 (1970).

New London Land Use Association v. New London Zoning Board of Adjustment et al., 130 N.H. 510, 517-18 (1988).

VARIANCES

RSA 674:33 Powers of Zoning Board of Adjustment

I(a) The zoning board of adjustment shall have the power to:

- (1)
- (2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
 - (A) The variance will not be contrary to the public interest;
 - (B) The spirit of the ordinance is observed;
 - (C) Substantial justice is done;
 - (D) The values of surrounding properties are not diminished; and
 - (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

I(b)(1) For purposes of subparagraph I(a)(2)(E), “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) 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

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) 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.

(3) The definition of “unnecessary hardship” set forth in subparagraphs (1) and (2) 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.

(c) The board shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.

I-a. (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.

(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

II.

III. The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

IV.

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.

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.

A variance is 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).

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.

In the 2013 case of [Stephen Bartlett & a. v. City of Manchester](#), 164 N.H. 634, 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. 2015 NHMA Law Lecture #1 - Grandfathering: The law of Non-Conforming Uses & Vested Rights by Bernie Waugh, Esq., and Adele Fulton, Esq.

A variance is 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.

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].”

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.

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.

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.

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).

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 may include a review of the master plan upon which the ordinance was based.

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. Again, the board cannot change the ordinance.

In *Maureen Bacon v. Town of Enfield*, 150 N.H. 468 (2004), the ZBA denied a variance for a small propane boiler shed attached to the outside of a lakefront house because (1) it did not satisfy the *Simplex* “hardship” standard; (2) it would violate the spirit of the ordinance; and (3) it would not be in the public interest. The supreme court noted that there were three grounds for the superior court’s decision and explained, “In order to affirm the trial court’s decision, we need only find that the court did not err in its review concerning at least one of these factors.”

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

In *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 NH 102 (2007), the supreme court stated that “[t]he 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. . . . [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.” (Internal citations and quotations omitted.)

In *Perreault v. New Hampton*, 171 NH 183 (2018), the “cumulative effect” or “cumulative impact” theory was again in play, in context of a denial of a side setback variance needed for a permanent shed. In part, the superior court found that the ZBA was reasonable in considering the cumulative effect that these types of variances may have on the area. Such theory has never been officially adopted by the supreme court; however, because it was not objected to in *Perreault*, the Court determined, without deciding, that it was a proper consideration in context of a variance.

Through that lens, the Court concluded that the superior court’s decision was not unlawful or unreasonable. It found that preventing overcrowding is a legitimate purpose of zoning and found no error in the superior court’s conclusion that the ZBA was not unlawful in focusing on the neighborhood’s aesthetics and the desire to avoid the appearance of overcrowding. The Court also upheld the lower court’s determination that the existence of other outbuildings in the area did not require the ZBA to grant the variance at issue. In doing so, the Court cited the ZBA’s findings that distinguished the existing structures from the proposed shed. This included the fact that some were allowed by variance granted under a prior legal standard; some were on land that was distinguishable from the applicant’s property; and the majority were either pre-existing, nonconforming structures (i.e., existed prior to the enactment of the setback requirement) or were not actually in a setback.

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).²

4. The values of surrounding properties are not diminished.

Perhaps Attorney Timothy Bates says it best in an 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.”³

Also, in *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632 (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(1994). Moreover, evolution in the law on “hardship” creates further confusion on the issue.⁴

² 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.

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

⁴ In 2001, the New Hampshire Supreme Court issued an opinion in *Simplex Technologies, Inc. v. Town of Newington & a*, which dramatically changed the then-existing standard for granting zoning variances. See Appendix E for background information on *Simplex*. In 2004, the New Hampshire Supreme Court further refined the law when it issued *Michael*

RSA 674:33, I(b)(1) Powers of Zoning Board of Adjustment

For purposes of subparagraph I(a)(2)(E), “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) 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 (referred to by some as the relationship test)

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.⁵

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:

- (B) The proposed use is a reasonable one. (referred to by some as the reasonable use test)

The applicant must establish that, because of the special conditions of the property, the proposed use is reasonable.

RSA 674:33 does not require 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. 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.” *John R. Harrington & a. v. Town of Warner*, 152 N.H. 74, 81 (2005); see also *Farrar v. City of Keene*, 158 N.H. 684 (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).

Boccia & a. v. City of Portsmouth & a. For a detailed analysis of the evolution in variance case law, see “The Five Variance Criteria in the 21st Century” NHMA Law Lecture #2, Fall 2009 (available at <https://www.nh.gov/osi/resource-library/zoning/documents/the-five-variance-criteria-in-the-21st-century.pdf>).

⁵ 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.’”

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.

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

In the context of sign variances, for example, the size of a building may constitute the “special conditions” that form the basis for “unnecessary hardship.” See [Harborside Associates, LP v. Parade Residence Hotel, LLC](#), 162 N.H. 508 (2011).

“Use” and “Area” Variances and “Spot Zoning”

New Hampshire law has not distinguished between a “use” or “area” variance since RSA 674:33’s amendment in 2009. Since then, all variances require the existence of unnecessary hardship, whether it is for a use not allowed in a particular zone or a deviation from a dimensional requirement. If they have not already done so, municipalities should 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.

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(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 (1995).

Granting Variances for the Disabled

[RSA 674:33](#) 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. RSA 674:33, V states:

- V. Notwithstanding subparagraph I(a)(2), 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.

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, including in 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. 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) (citations omitted).⁶

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
- 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

⁶ “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.

Supreme Court from cases such as [New London Land Use Association v. New London Zoning Board of Adjustment & a](#), 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 (1995).

In [Conforti v. City of Manchester](#), 141 N.H. 78 (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.⁷

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 (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

⁷ 1997 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 31, 1997.

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."⁸

In *Hurley, et al v. Hollis*, 143 N.H. 567 (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.⁹ 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*, 160 N.H. 259 (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.

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

⁸ 1998 Land Use Case Law Update, Timothy Bates, Esq., OSP Annual Planning and Zoning Conference, May 30, 1998.

⁹ 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

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.¹⁰

Zoning Ordinance “Use It or Lose It” Clauses¹¹

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:

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.](#))

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”).

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

¹⁰ *New Hampshire Town and City*, NHMA, July/August 2010.

¹¹ *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.

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 OF THE BOARD OF ADJUSTMENT

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.

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.

“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.

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 OF ADJUSTMENT 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.

CHAPTER III: PROCEDURES

Boards of Adjustment **must** follow certain steps 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:

1. Application;
2. Notification;
3. Public Hearing;
4. Findings of Facts;
5. Statement of Reasons; and
6. 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.

1. 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 as much doubt as possible, a limit should be established.

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

RSA 674:33, VI prohibits 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.

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 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](#).

It is a general 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.” *Stephen Bartlett & a. v. City of Manchester*, 164 NH 634 (2013) (citations omitted).

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.

PREVIOUS APPLICATIONS (THE *FISHER* DOCTRINE)

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. If there has not been a significant change in circumstances, then the board should reject the application and end further consideration. This determination must, of course, be made at a meeting of the board following submission of the application and notice to the applicant, abutters and the public of a public hearing on the application. The board should review the previous applications and compare them to the current application to determine any differences and make the decision to proceed or not as soon as possible.

“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).

In [*Transformations, Inc. v. Town of Amherst*](#), Case No. 2021-0214 the New Hampshire Supreme Court reiterated that when a denial identifies a lack of information as the deficiency in the initial application, the court has held that a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher* if the new application provides the information missing from the prior application.

PLOT PLAN REQUIREMENTS

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 or for planning board approval, the plan can serve multiple 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 as different requests may warrant different levels of detail.

A completed plot plan is not always sufficient to show the situation. An engineer or land surveyor may need to appear as a witness in a zoning appeal, particularly if technical aspects are integral to the application. Local police, fire, or highway officials may also be asked to testify (or to provide written comments), 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.

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.

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.

2. NOTIFICATION

A public hearing is required before the board of adjustment can take action on any application, whether it deals with an administrative appeal 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 verified mail, as defined in RSA 451-C:1, VII, 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 45 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.
- V. If the board of adjustment finds that it cannot conclude the public hearing within the time available, it may vote to continue the hearing to a specified time and place with no additional notice required.

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.

This statute was amended in 2017 such that the notice must be sent by so-called verified mail (rather than certified mail), as such term is defined in RSA 451-C:1, VII, not less than five days before the date set for the hearing. The term “verified mail” is defined in RSA 451-C:1 to mean “any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides evidence of mailing.” Verified mail includes, but is not limited to, certified mail.

The 2017 amendment also added RSA 676:7, V, which allows a board of adjustment to continue a hearing to a specified time and place without requiring any additional notice, if the ZBA finds that it cannot conclude the public hearing within the available time. This amendment codified an existing practice of many zoning boards.

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. To help ensure fairness and consistency, 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 contained within the notice 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.

RSA 676:7, II requires the hearing to be held within 45 days of receipt of the notice of appeal. This statute does not include a specific remedy (or penalty) for a board’s failure to hold a hearing within such deadline. Case law (issued before the recent change from 30 to 45 days) indicates that the board’s failure to hold a hearing within the statutory deadline 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).

3. 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 (not to mention the validity of its decision, if appealed).

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.

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 legitimate interest in whether or not the petitioner has a steady job or how many children s/he has, for example. 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.

Remember that this is a public meeting and the public has a right to attend and even record or video tape the meeting without the board's permission. However, the public does not have a right to disrupt the proceedings so if they wish to record or tape the meeting, the chair has the authority to ensure that it is not done in a disruptive manner and could, for example, require a camera to be set up off to one side so it does not block the view of the board from other members of the public in the audience. See [*The State of New Hampshire v. John Dominic*](#), 117 N.H. 573 (1977).

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.

Following the roll call, the chair may make a brief statement of the general principles involved in the appeal process and explain the purpose of the public hearing. The chair 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 chair may wish to summarize the case. 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 chair to swear in witnesses, it is not mandatory. Using this formal procedure may 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.

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, names of board members who made or seconded each motion 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.

Public bodies (all boards, commissions, committees, etc.) must either post its meeting notices on its internet website, if it maintains a website, "in a consistent and reasonably accessible location" or post and maintain a notice on the website stating where meeting notices are posted. Approved minutes must also be posted on the website in a consistent and reasonably accessible location, or a notice must be posted and maintained on the website stating where minutes may be reviewed and copies requested.

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

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.

In [Continental Paving v. Town of Litchfield](#), 158 N.H. 570 (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. The court reasoned:

“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.”

(Internal quotations and citations omitted.)

COLLECTION AND EXPENDITURE OF FEES BY THE BOARD OF ADJUSTMENT

RSA 673:16 Staff; Finances; Fees

- 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, non-lapsing 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.
- III. Any fee which a city or town imposes on an applicant pursuant to this title shall be published in a location accessible to the public during normal business hours. Any fee not published in accordance with this paragraph at the time an applicant submits an application shall be considered waived for purposes of that application. A city or town may comply with the requirements of this section by publicly posting a list of fees at the city or town hall or by publishing a list of fees on the city or town’s Internet website.

A separate document labeled as “Notice of Land Use Board Fees under RSA 673:16, III” should be created that provides a complete listing of fees charged for land use board applicants before the planning board, zoning board of adjustment, historic district commission, building inspector, and building code board of appeals.

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?

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. A recused member may wish to leave the meeting room for the duration of the public hearing and deliberations to quell even the notion of participation by the disqualified member.

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

The New Hampshire Supreme Court, in a discussion of the test for disqualification of board of adjustment members, said "...they (must) meet the standards that would be required of jurors in the trial of the same matter... A juror may be disqualified if it appears that he or she is 'not indifferent.'" [Winslow v. Town of Holderness Planning Board](#), 125 N.H. 262 (1984) (citations omitted). In that case 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." *Id.*

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.

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.

4. FINDINGS OF FACTS

RSA 676:3, I Written Findings of Fact

- 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. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. 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.

The degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulations and checklist requirements for the findings of fact portion of the approval. Findings of fact should not replace conditions of approval. For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board. The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact.

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 (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.

5. 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.

6. DECISION

RSA 674:33 Powers of Zoning Board of Adjustment

III. The concurring vote of any 3 members of the board shall be necessary to take any action 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.

Prior decisions of the ZBA are not precedent and do not bind future boards to reach the same conclusions on similar applications. Every application to the board is unique and should be reviewed on its own merits given the particular circumstances of the property in question. This is particularly true for variance applications. Variances require a finding of hardship, and hardship depends (among other things) on the uniqueness of the property, which is a factual determination. It would be a contradiction to determine a property is unique based on the precedent of the “uniqueness” of a different property.

On the other hand, some other aspects of a variance determination have more to do with interpreting the zoning ordinance. For example, if the board finds that a particular kind of use is reasonable in a particular district (another element of the hardship determination) it would raise questions if the board found that the same kind of use was not reasonable in the same area in a later case.

Appeals of administrative decision tend to be more about what the ordinance means as it applies to a particular property, and once the board has decided what a particular word, sentence, or paragraph means, it may be inappropriate to decide differently in the future. Part of the point of an administrative appeal is not just to resolve a particular dispute, but to provide guidance to the administrative official in the future.

Special exceptions are specific uses allowed in a district provided they meet the criteria specified in the ordinance and the nature of one proposed use may not be exactly the same as another use which may meet the review criteria. Therefore, it is important that the board review each application individually on its own merits and come to a decision based on the specific facts of that application.

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 legislature codified this principle in 2018 with revisions to RSA 674:33, III. Whereas the prior version of the statute required three votes to reverse an administrative action or to approve an application, it was silent on denials. As now drafted, three concurring votes are required “to take any action on any matter on which it is required to pass.”

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 such a 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.

Since three votes are necessary to take any action, if there is not a full board, even with alternates serving, the chair should give the applicant the option of postponing the hearing until five members are present and available to vote. 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.

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 (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.

SPECIAL CONSIDERATIONS WHEN VOTING ON A VARIANCE

When considering the language of variance votes, it is suggested to mimic the language of the statute (RSA 674:33) as closely as possible and structure each prong – whether the board is voting on them individually or as a group – such that a “yes” vote will be a vote in favor of the variance and a “no” vote is for denial.

For example: Will granting the variance...

1. Not be contrary to the public interest?
2. Observe the spirit of the ordinance?
3. Do substantial justice?
4. Not diminish the values of surrounding properties?
5. Prevent unnecessary hardship that would be caused by literal enforcement of the ordinance?

The more the board strays from the language of the statute, the more the board might get it wrong and end up having a decision reversed on appeal. In [Gray v. Seidel](#), 143 N.H. 327 (1999), the board denied the variance request because the plaintiffs failed to show that “[g]ranting the variance would be of benefit to the public interest.” The New Hampshire Supreme Court rejected that language because the statute only requires a demonstration that the variance **will not be contrary** to the public interest, not that the variance **would be of benefit** to the public interest (meaning that even if the variance would be only neutral on the question, then it should be granted). The court concluded that the board was placing a higher burden on the applicant than was required by statute.

When voting on the 5 variance criteria, different boards utilize different voting methods. Some vote on each of the five criteria separately and if one fails to pass, then the variance is denied. Others vote on the entire block in one vote. Neither is right or wrong, but, as a practical matter, they may yield differing results.

The legislature addressed this concern in 2018 with the addition of RSA 674:33, I(c), which requires that the ZBA

“shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.”

RECOMMENDATION ON THE TIMING, THE WRITING, AND THE VOTE

674:33 90-Day Timeline

VIII. Upon receipt of any application for action pursuant to this section, the zoning board of adjustment shall begin formal consideration and shall approve or disapprove such application within 90 days of the date of receipt, provided that the applicant may waive this requirement and consent to such extension as may be mutually agreeable. If a zoning board of adjustment determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may, in its discretion, deny the application without prejudice, in which case the applicant may submit a new application for the same or substantially similar request for relief.

[RSA 674:33, VIII](#) stipulates that a upon receipt of an application a ZBA has 90 days to begin formal consideration and approve or disapprove of an application, unless the applicant agrees to an extension. If the ZBA determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may deny the application without prejudice, allowing the applicant to reapply for the same relief.

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. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. 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. 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).

By statute, the board should also provide written findings of fact for approval. The degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulation and checklist requirements for the findings of fact portion of the 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](#). Findings of fact should not replace conditions of approval.

For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board.

The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, unless other grounds exist for disapproval.

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 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.

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.

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. "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*](#), 149 N.H. 255 (2003). Note that 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.

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."

In [*Sklar Realty, Inc. v. Merrimack and Agway, Inc.*](#), 125 N.H. 321 (1984), the New Hampshire Supreme Court 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, "[i]n 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]

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 (1995). If conditions are included as part of an approval, they must be recorded with or on the plat. RSA 676:3, III. 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.

RSA 674:33, I-a provides a 2-year window within which a variance remains valid (unless further extended by the local ordinance or by the board of adjustment for good cause). Recognizing that variances are often part of a larger development plan, this statute further provides that no variance will expire within six months after the resolution of a planning board application that is filed in reliance on the variance.

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 (ideally 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.

NONPUBLIC SESSIONS

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 meet, take testimony, deliberate, or make its decisions in nonpublic sessions. The board may only enter into nonpublic session for those reasons contained in [RSA 91-A:3, II](#). The board would rarely, if ever, need to consider or act on any of the matters that would warrant entering into nonpublic session with the exception of the need to consider legal advice provided by legal counsel, either in writing or orally, to one or more members of the board, even where legal counsel is not present.

The application of the Right to Know Law to Local Land Use Boards can create thorny legal questions. Remember to consult with your municipal attorney when legal issues arise.

The decision to hold a nonpublic session must be included in the minutes of the open session. Minutes also must be kept of the nonpublic session. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes of nonpublic sessions shall include the names of members, persons appearing before the board, and a brief description of the subject matter discussed and final decisions.

In 2023 paragraph IV was added to RSA 91-A:3, III, requiring public bodies to either develop their own process to review minutes or to follow a statutorily created process. Either way, public bodies are required to review all nonpublic minutes that were previously sealed and determine whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. That review process must take place within 10 years of October 3, 2023. Meeting minutes that were kept from the public that are not reviewed by the public body or agency on or before October 3, 2033 shall be subject to public disclosure without further action of the public body.

The board may meet at any time to discuss legal matters with their legal counsel physically present or by electronic, contemporaneous means (conference or video call, etc.) and this is not considered a "meeting" subject to the provisions of the Right to Know Law. This is often referred to as a "non-meeting" and there are no posting or notice requirements, minutes need not be kept, and the public has no right to attend.

In 2017, RSA 91-A:2, II-a was amended to give a member of a public body the right to object to a discussion in a meeting of the body, including nonpublic sessions, if the member believes the discussion violates the Right to Know Law. Upon request of the member who is objecting to the discussion, the public body shall record the member's objection in its minutes of the meeting. The member may then continue to participate in the meeting without being subject to penalties under the law.

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 board of adjustment 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).

After being suspended from 2014 to 2017, in 2017 the integrated land development permit program was again suspended for the biennium ending June 30, 2019.

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).¹²

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?

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?

¹² The Pit & The Pendulum, Attorneys Bates and Mitchell, New Hampshire Municipal Association, Municipal Law Lecture Series, Lecture #3, 1995, pg. 16.

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 A 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. The 30-day window within which a motion for rehearing must be submitted is mandatory and strictly enforced. The 30-day period will be counted in calendar days beginning with the date *following* the date of the board vote. 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*](#), 157 N.H. 710 (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. See RSA 677:3, II.

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](#), 164 N.H. 754 (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](#), 156 N.H. 228 (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.

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](#).

If 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 board 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 (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. Boscamen](#), 121 N.H. 438 (1981).

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

If the board reverses a decision at a rehearing, a new aggrieved party results and that party then has 30 days in which to appeal for a rehearing on the new decision. "This triggered the need for plaintiff to apply for a rehearing as a precondition to appeal. This does not mean, as defendants suggest, that boards of adjustment will be forced to consider an endless series of rehearing applications, for it is only when the board reverses itself at a rehearing - thus creating new aggrieved parties - that the statute comes into play." *9 v. City of Manchester*, 118 N.H. 158 (1978). See [Dzjama v. City of Portsmouth](#), 140 N.H. 542 (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.” Peter J. Loughlin, Esq., 15 New Hampshire Practice: Land Use Planning and Zoning, 4th Ed., § 21.19 (citing [Bourassa v. Keene](#), 108 N.H. 261 (1967)).

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. Boscamven*, 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 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 a certified copy of its records and may become a party to the proceedings.

APPEAL TO SUPERIOR COURT

RSA 677:4 Appeal from Decision on Motion for Rehearing

Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 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.

Beginning January 1, 2024 all land use related cases filed in superior court will be heard by the newly established Land Use Review Docket. The Land Use Review Docket has jurisdiction to hear appeals from decisions of local land use boards, including, but not limited to decisions of municipal planning boards, zoning boards, historic district commissions, and conservation commissions. The Land Use Review Docket is required to hold a structuring conference within 30 days of the Court receiving the notice of appeal. The court must then set a deadline for the filing of records related to the appeal and

schedule a hearing on the merits within 60 days of receiving the certified record from the municipality. Decisions on the merits of land use appeals must then be made within 60 days of the hearing.

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.¹³ On appeal to the superior court, 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.

This point was emphasized in *Olszak v. Town of New Hampton*, 139 N.H. 723 (1995) when the supreme court held 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).

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.

¹³ This may not be the case when the ZBA has no 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*, 167 N.H. 130 (2014).

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 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.

RSA 677:20 Fee Shifting and Posting of Bond

I. Whenever an appeal to the superior court is initiated under this chapter, the court may in its discretion require the person or persons appealing to file a bond with sufficient surety for such a sum as shall be fixed by the court to indemnify and save harmless the person or persons in whose favor the decision was rendered from damages and costs which he or she may sustain in case the decision being appealed is affirmed.

II. In any appeal initiated under this chapter the court may, subject to the provisions of this paragraph or any other provision of law, award attorney's fees and costs to the prevailing party. Costs and attorney's fees shall not be allowed against a local land use board unless it shall appear to the court that the board, in making the decision from which the appeal arose, acted with gross negligence, in bad faith, or with malice. Costs and attorney's fees shall not be allowed against the party appealing from the decision of a local land use board unless it shall appear to the court that said party acted in bad faith or with malice in appealing to court.

This statute allows the superior court to require a bond from the appealing party whenever an appeal is filed and allows the court to award attorney’s fees and costs to the prevailing party. However, attorney’s fees and costs are not allowed against the party appealing the land use board’s decision or the local land use board unless that person or body acted with gross negligence, in bad faith, or with malice in either filing the appeal or making the decision.

APPEAL TO HOUSING APPEALS BOARD

Effective as of July 1, 2020, [RSA 679](#) established the New Hampshire Housing Appeals Board. This three-member body hears appeals from municipal board decisions involving questions of housing and housing development. RSA 679:5. Appeals must be filed within 30 days of the municipality’s final

decision. RSA 679:6, I. Nonattorneys are permitted to represent any party before the Housing Appeals Board. RSA 679:10. The Housing Appeals Board has concurrent, appellate jurisdiction with the superior court. RSA 679:7. A local decision may not be reversed or modified except for errors of law or if such decision is found, by the balance of probabilities, to be unreasonable. RSA 679:9, II.

RSA 679:5 Authority; Duties

I. It shall be the duty of the board and it shall have power and authority to hear and affirm, reverse, or modify, in whole or in part, appeals of final decisions of municipal boards, committees, and commissions regarding questions of housing and housing development. This includes, but is not limited to:

- (a) Planning board decisions on subdivisions or site plans.
- (b) Board of adjustment decisions on variances, special exceptions, administrative appeals, and ordinance administration.
- (c) The use of innovative land use controls.
- (d) Growth management controls and interim growth management controls.
- (e) Decisions of historic district commissions, heritage commissions, and conservation commissions.
- (f) Other municipal permits and fees applicable to housing and housing developments.
- (g) Matters subject to the board's authority may include mixed-use combinations of residential and nonresidential uses. Such different uses may occur on separate properties, provided such properties are all part of a common scheme of development.

II. In exercising its authority under this chapter, the board shall have the power to award all remedies available to the superior courts in similar cases, including permission to develop the proposed housing.

III. Relative to RSA 674:58 through RSA 674:61, the board shall have the power and authority to hear and determine appeals of decisions of local land use boards regarding proposals for workforce housing, including but not limited to whether the municipality's land use ordinances and regulations provide a reasonable and realistic opportunity for the development of workforce housing; whether the local land use board has imposed conditions of approval that render the proposal economically unviable; and whether a denial by a local land use board was unreasonable or unlawful.

IV. After local remedies have been exhausted, appeals may be brought before the board by an applicant to the municipal board, committee, or commission, or by any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15. The municipality shall be a party to the action. If the applicant is not the party initiating the action before the board, then the applicant shall automatically be an intervenor. The board shall grant intervenor status to abutters and to any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15.

APPEAL OF PLANNING BOARD DECISION

[RSA 677:15](#) was amended in 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.

RSA 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

1. These rules of procedure are adopted under the authority of New Hampshire Revised Statutes Annotated, [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.
 - e. If the applicant opts to postpone due to less than a full board present, the board shall announce the time, date, and location of the continued hearing. If the board cannot determine the time, date, and location of the continued hearing, the board shall provide new notice to all parties pursuant to [RSA 676:7](#).
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 manner prescribed in [RSA 676:7](#).
- b. The notice shall include a general description of the proposal which is the subject of the application and shall identify the applicant and the location of the proposal and shall also be

given to the planning board, city/town clerk, and other parties deemed by the board to have special interest.

- 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 90 days of receipt of application and shall approve, approve with conditions, or deny the application. 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. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in [RSA 677:5](#) or [RSA 677:15](#), unless the court determines that there are other factors warranting the disapproval. 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.
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 / Motions for Rehearing:** 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. Winchester](#), 157 NH 710 (2008).
8. **Rehearing Procedures:** 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](#).

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. The decision shall include specific written findings of fact that support the decision. [RSA 676:3](#)
3. Minutes of all meetings including names of board members, names of board members who made or seconded each motion, 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. Approved minutes must also be posted on the website in a consistent and reasonably accessible location, or a notice must be posted and maintained on the website stating where minutes may be reviewed and copies requested. [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.

Practice Pointer - OPD recommends that you review board Rules Of Procedure with the municipal attorney before finalizing them. OPD also recommends that the board hold at least one public hearing before the board formally adopts the rules.

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.

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.

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.

The following chart may be helpful in completing a variance application:

VARIANCE CRITERIA GUIDELINES

Statutory Requirements (RSA 674:33, I(b))	Explanation
<i>APPLICANT MUST SATISFY ALL OF THE FOLLOWING</i>	
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure “public rights.”
2. The spirit of the ordinance is observed.	
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
<p>5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways:</p> <p>First is to show that because of special condition of the property that distinguish it from other properties in the area:</p> <p>(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and</p> <p>(b) The proposed use is a reasonable one.</p> <p><i>Alternatively</i>, unnecessary hardship exists 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.</p>	<p>The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area.</p> <p>(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a “fair and substantial” way.</p> <p>(b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.</p> <p><i>Alternatively</i>, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</p>

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, depending on the particular facts of your case, presenting a site plan to the planning board may assist in relating the proposal to the overall zoning.

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 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

To: Zoning Board of Adjustment,
City/Town of _____

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

Name of Applicant _____
Address _____
Owner _____
(if same as applicant, write "same")
Location of Property _____
(street, number, sub-division 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).

Criterion 1 - _____

Criterion 2 - _____

Criterion 3 - _____

Criterion 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

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.

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

- 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

ABUTTER 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:

Practice Pointer - OPD suggests boards review this worksheet with the municipal attorney for what would work best for your board.

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. _____

Practice Pointer-OPD suggests boards review this worksheet with the municipal attorney for what would work best for your board.

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.

Findings of fact:

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

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

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). 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).

Practice Pointer-OPD suggests boards review this worksheet with the municipal attorney for what would work best for your board.

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).

Practice Pointer-OPD suggests boards review this worksheet with the municipal attorney for what would work best for your board.

APPENDIX D: 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.” *Quimette 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.