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

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

***OPENING SUMMARY*.**

There are five basic functions of a Zoning Board of Adjustment in New Hampshire:

1. ***Interpreting*** the terms of the zoning ordinance, or the application of those terms to a particular set of facts.

2. Determining whether a proposed use or project, or some aspect thereof, is "***grandfathered***" from having to comply with the terms of the ordinance.

3. Determining whether to allow a legalized violation of the ordinance ("***variance***") is necessary to prevent the ordinance terms from being unconstitutional as applied.

4. Granting a ***special exception*** as specifically allowed by the ordinance if the criteria set out in the ordinance are met.

5. Granting an "***equitable waiver***" which would legalize a dimensional violation when it would be unfair to require correcting it.

Question: Whoa! What happened (you may ask) to Appeals of Administrative Decisions under 674:33, I? *Answer*: ***Every*** ZBA case is an appeal of an administrative decision, whether that decision was made by a code officer, board of selectmen, or even a planning board. (*See* RSA 676:5, I, indicating that "appeals" cover everything within the ZBA's powers under RSA 674:33.)

Furthermore in ***every*** case, the ZBA *"shall have all the powers of the administrative official from whom the appeal is taken"* and can *"make such order or decision as ought to be made"* (RSA 674:33, II). Therefore:

IMPORTANT LESSON TO TAKE HOME #1: A ZBA can ***always*** decide that the administrative official made a mistake. Don't be trapped by the label on a case. For example, if somebody applies for a variance, it's still open to the ZBA to decide that ***no*** variance is needed – for example, because (a) the ordinance has been interpreted wrong, or (b) the proposed use is "grandfathered."

WHAT IS THE ZBA'S OVERALL ROLE/ATTITUDE?

Are you a judge? Well, no. While your function is "quasi-judicial" in the sense that you must be ***personally*** unbiased, you aren't like a judge. Judges decide only controversies between adversaries. Many ZBA applications don't have adversaries or opponents. If that happens in Court, the party who comes wins by default. But that's *not* true with a ZBA.

Well then, whose interest do you represent? Is it the "public interest" as ***you*** see it? No. You may think some zoning provision is entirely stupid and even contrary to the public interest. But you ***cannot*** act on such feelings. You must assume the validity of the zoning ordinance.

Instead the ZBA represents ***the public interest as actually embodied in the zoning ordinance***. ***The overall integrity of your zoning ordinance is an invisible party in every case, and part of your function is to protect its interests!*** There are two major mistakes ZBA members make when they don't grasp this:

(a) They either treat a case like an ***election*** (number opposed versus number in favor). Or, almost as bad, they treat it like a ***trial*** (who made the cleverest arguments). The upshot is that if there is ***no*** opposition, the applicant automatically gets a permit. Unfortunately far too many boards operate this way. ***Wrong!*** If nobody there makes the argument on behalf of the ordinance, you've still got to make that argument yourself. This isn't a popularity contest.

(b) The second mistake is to have a "situation ethics" type of attitude. What do I mean by that? Situation ethics is when people treat every action in isolation, not as part of a public system of behavior. You ask "Who really gets hurt if I cheat on my taxes?" "Who really gets hurt if I steal these towels?" "Who really gets hurt if I tell this little white lie?" But that's not the morally-relevant question. The morally-relevant question is *"What if **everybody** felt free to do this, under similar circumstances?"* A violation of a moral rule like "Don't cheat" or "Don't steal" is not justified unless it's the kind of violation that could be made ***publicly allowable.***

Far too many ZBA members practice ***"situation zoning."*** Just like "situation ethics" they ask "Who really gets hurt because of this one little ordinance violation?" They don't ask "What if ***everybody*** in these circumstances felt free to do this same thing?"

That's especially important in the land use field, because usually the evils the ordinance is attempting to prevent are ***cumulative*** ones. For example filling in one small wetland may not make a big environmental difference, but filling in many wetlands clearly does. In short:

IMPORTANT LESSON TO TAKE HOME #2: The underlying issue in ***every*** case is the public interest embodied in the ordinance. Always ask "Could we allow ***EVERYBODY whose property is in these same circumstances*** to do the same thing, and still preserve the integrity of the zoning ordinance?" ***Don't do "situation zoning."***

1. ZBA BASIC FUNCTION #1 – INTERPRETING AND APPLYING THE ORDINANCE.

Expect Some Subjectivity Here! People from science or engineering backgrounds expect zoning interpretation to be a mathematical, tight exercise. They expect there is some set of binding rules somewhere — some "master dictionary" in the sky (or in state law, or in some master zoning encyclopedia) that will define all terms. ***Wrong!*** Instead:

(a) A word can mean different things in different ordinances. The trick is to look at ***your*** ordinance. If there's a definition there, use it. Otherwise, the relevant question is ***what did the drafters (and voters) think they meant?*** Use the ***whole ordinance*** for clues.

(b) Interpretation is an issue of law. But that doesn't mean you should necessarily ask your lawyer. Ask an English teacher too. Courts do give ***some*** deference to the ZBA's own interpreation. (They don't give any to a lawyer!)

(c) In fact, there's a doctrine called *"**administrative gloss"*** **-** a long-standing interpretation of an ambiguous term or clause in the ordinance, applied consistently enough that it raises the presumption that if the legislative body didn't like it, they would have changed it, can may be binding on the Board.

(d) It's OK to use the regular dictionary. That's what courts do.

(e) There's a big difference between appealing an administrative ***interpretation*** and appealing a ***decision whether or not to enforce (676:5, II(b)).*** The latter is ***not*** appealable. Thus, if the administrator issues a decision that Joe Jones's property is in violation of the ordinance, that can be appealed. But a decision that Joe Jones's violation, if any, is so minor that it's not worth spending City money to enforce it, that is ***not*** an appealable decision.

(f) Also the board can only hear ***actual appeals*** from someone who is ***aggrieved*** by a decision. You should definitely ***not*** render advisory opinions to the administrative officer, since that would create a conflict of interest if the decision based on that advice were appealed.

Let's say Harvey Dogooder drops by the Zoning office one day and asks "You know that grandfathered house over on Oak Terrace — could somebody do that today under the Ordinance?" The Zoning Officer says no. This is ***not*** an appealable decision. Why? It's not a live controversy. Nobody is actually "aggrieved" (much less Harvey).

(g) ***When can an appeal be filed?*** The statute says "within a reasonable time, as provided by the rules of the board…" (RSA 676:5). ***Your rules should definitely cover this issue.*** However in *Tausanovich v. Town of Lyme*, 143 N.H. 144 (1998), the Court suggested that a "reasonable" time might well be held to begin running when the person appealing ***knew or ought to have known*** that an administrative decision had actually been made! Thus, if the administrative decision is made in a letter to a landowner, and an abutter

doesn't reasonably discover the decision until much later, there may still be room to argue that the abutter can appeal the issue. This area of law is not clear-cut. (But then what is?)

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

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

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

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

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

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

> **(1) The extent to which the proposed use reflects the nature and purpose of the prevailing nonconforming use. The proposal should be a "natural activity, closely related to the manner in which the piece of property [was] used" at the time the restriction was enacted; In other words, is it really the *same* use, simply "evolving" through new customs or technology?**
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> **(2) Whether the proposed use is merely a different manner of utilizing the same use or constitutes a use different in character, nature and kind;**
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> **(3) Whether the proposed change in use will have a substantially different effect on the neighborhood; and**

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

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

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

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

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

ZBA BASIC FUNCTION #3 – DECIDING SPECIAL EXCEPTIONS.

(a) ***Common citizen mistake*:** To assume that the Board can grant a special exception for almost anything. ***Wrong.*** A special exception can only be granted if a special exception is explicitly allowed for the requested use in that district under the ordinance.

(b) ***A special exception must be granted*** if the standards in the ordinance are found to be met. The board has no discretion ***unless the standards themselves allow discretion.***

(c) ***Difference between a special exception and a variance*:** A Special Exception is ***intended*** by the ordinance to be an allowed use (subject to ZBA supervision on whether the criteria are met). But a variance is ***intended to be prohibited,*** and can only be allowed if required ***on constitutional grounds*** due to unnecessary hardship.

> [***HINT***: This means a reason for denial, in order to be valid, must be a reason which does ***not*** apply ***everywhere*** in the zoning district!]

(d) ***Burden of Proof*** for a special exception is on the applicant to persuade the Board to make a positive finding of evidence that each special exception criterion is met. This does ***not*** mean the granting of permits hinges on the skill of the applicant. Board members are entitled to use their own knowledge. But the Board itself must have evidence on all criteria. You can't say "We can't think of a reason ***not*** to grant this."

- If you ***are*** relying on evidence you know about, but which didn't come up at the hearing, be sure and state the basis of your evidence in your written decision! Otherwise the court won't ***know*** you're basing your decision on that evidence.
- Notice the difference between a special exception and variance isn't truly the burden of proof, but rather should be your attitude. If you represent the public interest as embodied in the ordinance, then you should greet an SE with an open-minded welcome, but a variance with profound skepticism.

(e) ***"Volleyball" Issue:*** If an applicant needs another type of approval (e.g. site plan or subdivision) which board goes first? *Answer:* It doesn't matter; however the planning board cannot grant ***final*** approval unless project has complied with zoning. If the planning board requires alterations in a project, the person must come back to ZBA for altered approval, so that both boards have approved the same plan.

(f) This raises the issue of ***what rights are granted by a special exception*****?**

- It ***does*** run with the land. For the Board to require it to expire upon transfer of ownership is a very strong hint that you're not considering the public interest and deciding the case in an objective way. The Court has said this is inappropriate. *Vlahos Realty v. Little Boar's Head Dist.***,** 101 N.H. 460 (1957).
- On the other hand, it is ***not*** the same as a rezoning (this is a common citizen mistake). A special exception is specific to what is granted. ***Be sure you make all details of the application a condition of the approval.*** Otherwise you end up like:
- *Geiss v. Bourassa*, 140 N.H. 629 (1996). Bourassa got a special exception to run a waste disposal business. The application was vague, saying only that the business "would be a continuance in nature to" a prior similar business. The permit itself was also vague, stating merely that the land could be used for an office, storage, and maintenance of the vehicles and equipment of Ken's Waste Disposal Business. The Court "disposed" of the case (ahem!) by holding that, although a ZBA does have the power to attach conditions, and even though the scope of this business had clearly mushroomed, there just was no clearly-identifiable condition, explicit or implicit, which the owner had violated. Alas, the terrible vagueness of both the application and of the ZBA's decision here is all too common in New Hampshire.

- ***Lessons:*** (i) Always require ***plans*** which are detailed enough so that future officials ***and future propery owners*** will know precisely the scope of what has been approved. (ii) Always state in your written decision the exact parameters and conditions of what is being permitted. (iii) Make sure that compliance with the plans as submitted is listed as an explicit condition of approval.

ZBA BASIC FUNCTION #4 – DECIDING EQUITABLE WAIVERS.

RSA 674:33-a instructs zoning boards of adjustment how to handle existing violations of ***dimensional*** requirements, where the violation occurred unknowingly, but is discovered later – for example by a bank doing a title search. Such violations can be "legalized" ***if*** the owner proves 4 elements (*see* statute for details).

(a) Equitable waivers can only be granted for ***dimensional*** violations (i.e. a physical layout or mathematical requirement such as frontage, setback, etc.) An illegal ***use*** cannot be legalized under this law.

(b) ***required procedures:*** The application procedures are the same as for variances or special exceptions. The local board may want to develop a separate application form entitled "Application For Equitable Waiver." Here are the 4 elements which must be proved - the burden of proof is on the landowner for all 4 elements:

(1) Innocent Mistake. The owner must show that the violation occurred by virtue of a good-faith error in calculation or measurement, on the part of either the owner, owner's agent, or a municipal official, or was due to a municipal official's mistake in construing the local ordinance. ***Ignorance of the law (or ordinance)*** does not count as a "mistake," nor does "failure to inquire, obfuscation, misrepresentation or bad faith."

(2) Not Discovered Until Too Late. The mistake must have been discovered ***only*** after a structure in violation was already substantially built, or a lot in violation had already been sold.

(3) No nuisance. The owner must also prove, to the board's satisfaction, that the violation doesn't constitute a "public or private nuisance, [or] diminish the value of other property, [or] adversely affect any present or permissible future uses of the property."

(4) High Correction Cost. Finally, the owner must prove that the cost of correction so far outweighs any public benefit, that it would be unfair to require the violation to be corrected.

As an alternative to (1) and (2) above, the owner can instead prove that the violation has existed for over 10 years without any attempt by the municipality to enforce it. Notice, however, that even with 10-year old violations, the owner must still prove the no-nuisance and high-correction-cost factors.

(c) ***Question*:** How can anybody prove a negative? That is, what does it take to prove ***lack*** of bad faith and ***lack*** of timely discovery? ***Answer:*** In most cases, the owner (or his/her agent) will simply say it was a good faith goof, and it will be up to the board to judge the person's credibility. You are not legally required to accept anybody's statement at face value merely because it stands uncontradicted. If you think it's the kind of mistake a competent engineer wouldn't make, inform the applicant you'd like to ask questions of the engineer or surveyor. Again, "obfuscation" and "failure to inquire" don't count. Thus, while a good faith mistake in measurement may qualify for a waiver, a sloppy or reckless failure to even ***try*** to make relevant measurements does ***not*** qualify. Granted, there's often a fine line between these two.

If the mistake is easily understandable, well fine. But if the board ends up thinking the mistake is one that somebody honestly trying to comply with the regulations just wouldn't have made, then the waiver should be denied on the grounds that the claim of good faith mistake is simply not credible. If lack of credibility is indeed a reason for denial, don't gloss over that factor in your written decision - a reviewing court will rarely second-guess you on issues of witness credibility.

(d) ***Question:*** What's to prevent an owner from submitting sloppy plans, then blaming the violation on the building official's review of those plans? ***Answer:*** First of all, both planning board and zoning board of adjustment should state, very clearly in their regulations or by-laws, what types of plans are required (e.g. prepared by a licensed engineer, etc.) Secondly, this new law explicitly states that "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." Thus owners have no right to rely on a code official's review as a substitute for their own good faith attempt to make sure their plans comply.

Disclaimer recommended: Both for purposes of this law, and to avoid liability to landowners, code and planning departments should ***never*** make statements implying that any set of plans, or any as-built project, is in "full compliance" with all regulations! (Instead say something like "I did not discover any violations.") In fact, my recommendation is to develop a written statement, as part of the application form signed by the applicant, which says something like: ***"Neither the review of any plan by officials of the (Town), nor any subsequent inspection of the premises, should be relied upon as an assurance of conformity to legal requirements. The applicant shall remain fully responsible for complying with all applicable state or local laws, ordinances, regulations or conditions."***

ZBA BASIC FUNCTION #5 – DECIDING VARIANCE REQUESTS.

(a) Variances are ***supposed*** to be hard to get. The granting of a variance constitutes a ***violation*** of the ordinance, which is only allowed because it would be ***unconstitutional*** to apply the ordinance literally to the particular property.

(b) There are 5 well-established standards for a variance, but 99 percent of the cases hinge on the "unnecessary hardship" criterion. ***These 5 criteria are NOT of equal importance!*** You ***cannot*** do this "by the numbers." (each person voting on each of the 5 points, and taking a majority). The standards are:

1. Denial would result in unnecessary hardship.
2. No decrease in value of surrounding properties.
3. Not contrary to spirit and intent of ordinance.
4. Granting it would not be contrary to the public interest.
5. Granting it would do substantial justice.

(c) The last 4 criteria are really a checklist to keep you honest, and also ***for when you're not clear about "hardship" you can see if one of the other tests is clearly failed.*** But the overwhelmingly most important test is #1. The others are speculated on in the OSP Zoning Board of Adjustment Handbook.

For example, the "spirit and intent" criteria is a good one to use to make sure that you ***don't*** grant ***more*** than the ***minimal variance*** which will afford reasonable relief, yet still protect the interest which the regulation you're granting a variance from seeks to protect.

(d) Remember that ***none*** of these tests is air-tight. The case of *Nestor v. Town of Meredith ZBA*, 138 N.H. 632, said that even with a given set of facts, one board might reach a different result from another ***and both could be upheld!*** The standard of review puts the burden of proof on anybody seeking to set aside the board.

(e) Again, "evidence" can include the knowledge and beliefs of the board. So on the "no diminished value for surrounding property" criterion, even if the ***only testimony*** comes from a real estate broker who says yes or no, the board is ***not required*** to believe her.

SO JUST WHAT IS "UNNECESSARY HARDSHIP"?

The *Simplex Technologies v. Town of Newington* test for unnecessary hardship is as follows:

> **"Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others."**

The final meaning of the *Simplex* test will take more court decisions before settling into place. But, as one who wrote a brief in the case, here is my "take" on how a ZBA *should* read the decision for now – at least until the justices tell us otherwise.

1. QUESTION: Does the 3-part *Simplex* test replace the existing 5-part test for the granting of a variance?

> ***ANSWER: No!*** The 3-part *Simplex* test is only a test for ***unnecessary hardship***. Hardship is only ***one*** of the five tests which must be met in order for an applicant to qualify for a variance.

2. QUESTION: Does the applicant still have the burden of proof on all 5 of these criteria?

> ***ANSWER:*** Yes. *See Grey Rocks Land Trust v. Town of Hebron,* 136 N.H. 239 (1992). The *Simplex* decision did not change this principle. But some common sense must be used. If, for example, a Board were to deny a variance based ***solely*** on the fact that the applicant gave no testimony on the issue of whether "the variance will not be contrary to the public interest," a Court is unlikely to uphold that decision unless the Board's written decision suggests some specific manner in which the variance ***is*** contrary to the public interest (*Gray v. Seidel,* above).

3. QUESTION: Must an applicant still show special circumstances relating to the property itself?

> ***ANSWER:*** Yes. That is the very meaning of *Simplex* Test #1. Applicants must show that "a zoning restriction ***as applied to their property*** interferes with their reasonable use of the property, ***considering the unique setting of the property in its environment***." Thus the variance is still a remedy which hinges on the circumstances of the ***individual*** piece of property.
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> Furthermore, a variance still cannot rest on financial hardship alone, *Olszak v. Town of New Hampton*, 139 N.H. 723 (1995), nor alone on the personal circumstances of an owner, *Ryan v. Manchester*, 123 N.H. 170).

4. QUESTION: Does the word "unique" mean that the property must be utterly different from neighboring properties?

> ***ANSWER:*** No. The *Simplex* case in discussing the "hardship" requirement cited *Belanger v. City of Nashua,* 121 N.H. 389 (1981). In that case a variance for commercial use was upheld because the area's residential zoning restriction no longer reflected the actual character of the neighborhood. The Court emphasized that "zoning ordinances must be consistent with the character of the neighborhoods they regulate." It is clear that in a *Belanger*-type of situation, the "uniqueness" is the character of the entire neighborhood, not just the specific property. Thus "unique" should be thought of, not as absolutely unduplicated, but rather the ***particular*** setting of the property in its environment.

5. QUESTION: Does the *Simplex* test allow a Zoning Board of Adjustment to declare that a zoning regulation *per se* is unreasonable or unconstitutional?

> ***ANSWER: No!*** If all or most of the other properties in the zoning district are affected the same way by a restriction, the proper remedy is still an amendment to the zoning ordinance, ***not*** a variance. *Rowe v. Town of North Hampton*, 131 N.H. 424, 429 (1989).
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> The ZBA must assume that the regulation's ***general*** purpose is a valid one. Under *Simplex*, the "fair and substantial" test is applied to a comparison between the

regulation's general purpose, and the regulation ***as applied*** to the particular circumstances of this property in its environment. *Simplex* did not give Zoning Boards a green light to overturn the general purposes of a regulation.

6. QUESTION: What does *Simplex* Test #2 mean – the concept that "no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property"?

ANSWER: ***Both*** sides of the comparison must focus on the ***specific*** regulation or restriction ***from which the applicant is requesting a variance*** (for example a specific dimensional or use requirement).

Here are the questions the Board should ask, in order to apply the first two parts of the *Simplex* test:

(a) First what, in the abstract, are the ***general*** purposes of the regulation from which the person is seeking a variance? Why was that regulation written into the ordinance in the first place?

(b) Then secondly, are those general purposes fairly and substantially advanced when the restriction is viewed ***as applied*** to this specific property, considering that property's ***unique (or particular) setting and environment***? If so – if, that is, the restriction fairly and substantially advances the same purposes as applied to this particular property, as it does when considered in the abstract – then the property does ***not*** qualify for "unnecessary hardship" under the *Simplex* test.

> ***Example:*** Suppose a person applies to operate a business in a zoning district restricted to residential use. Suppose, also, that many business uses already exist in the neighborhood, due to "grandfathered" businesses, variances previously granted, etc. The Board would ask, first, (a) What is the ***general*** purpose of prohibiting businesses in a residential district? Answer: To preserve the residential character of a neighborhood, etc. (b) Is that purpose fairly and substantially served, ***as applied*** to this property, given its unique setting and environment? Answer: Perhaps not, if the neighborhood is no longer substantially residential in character. *Belanger v. Nashua*, 121 N.H. 389 (1981). As with most zoning issues, it's a judgment call for the Board.

7. QUESTION: But wait! What about the issue of the ordinance interfering with the property's "reasonable use"?

ANSWER: In my view the "reasonable use" question is ***part of*** the "fair and substantial purpose as applied" test, discussed above. Think of it as way of comparing alternatives. Let's say Use A is what the owner could do without the variance, Use B requires a variance of lesser degree (in the above example, a small-scale business), and Use C requires a variance of a much greater degree (a much larger scale business). The Board could very well look at the property's unique setting and environment, and decide that the general purpose of the restriction is ***not*** fairly and substantially advanced by prohibiting Use B, but ***is*** substantially advanced by prohibiting Use C. In other words, given that property's unique setting, Use B is no worse, in terms of the general purpose the restriction seeks to serve, than Use A, but Use C is much worse, in terms of that general purpose. ***If*** the Board reaches such a conclusion, then Use B is a "reasonable use" with which the

ordinance "interferes," but Use C is not. Use C would frustrate the regulation's purpose, but Use B would not.

To put it another way, in my view "reasonable" means reasonable ***in terms of*** the general abstract purposes and goals of the regulation from which the variance is being sought. (The recent case of *Rancourt v. City of Manchester* (January 2003) doesn't emphasize this point very well, because of the fact that in that case the plaintiff did not challenge the "fair and substantial" element, and the Court didn't discuss it.)

8. QUESTION: What is the meaning of *Simplex* Test #3 – that the variance "would not injure the public or private rights of others"?

ANSWER: Attorney Peter Loughlin calls this the "no harm, no foul" portion of the test. In general, if the proposal satisfies the other two parts of the test, then "unnecessary hardship" exists, unless the Board is able to identify some specific harm which the proposal will cause to the public or to some individual, ***and*** the harm interferes with a "right" as opposed to, say, a mere expectation (and there's clearly room for debate over where that line gets drawn).

Think of this new test as a bit similar to the existing "no-decrease-in-surrounding-property-values" test, except that it encompasses injuries to ***all*** types of rights, not just property rights. There is clearly some overlap between the "hardship" test under *Simplex* and the other four variance criteria.

9. QUESTION: Can the Board of Adjustment still grant a variance if an applicant meets the ***old*** hardship test?

ANSWER: In my opinion, yes! This is another vital point for officials to grasp. Most commentary I have seen assumes that this new *Simplex* test for "hardship" ***replaces*** the older test. But that's not what the Court said, and in my view there are now ***two alternative*** tests for "unnecessary hardship."

Under the older test of "unnecessary hardship" an applicant had to show that "the deprivation resulting from the application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land." *Governor's Island Club v. Gilford*, 124 N.H. 126 (1983). In my opinion there will still be some cases where an owner qualifies under this old test, even though he or she does ***not*** qualify under the new test!

Why? Because under *Simplex* Test #2 an owner must show that there is a disconnect – "no fair and substantial relationship" – between the ***general*** purpose of the restriction, and the restriction ***as applied*** to the specific property. In my view there will still be cases where there is ***no*** such disconnect – where the ordinance restriction ***does*** serve an overwhelmingly important public purpose as applied to the particular property – but where nevertheless, due to the uniqueness of that property, the restriction leaves the owner without ***any*** reasonable use under the older "hardship" test.

This makes sense. After all, a variance is supposed to serve as a "constitutional safety valve." These two hardship tests can be thought of as providing "safety" against two ***different*** types of constitutional property rights infringements: The older "no reasonable use" test is the mirror image of an

unconstitutional "taking," under which the owner must show that the property's value has been "substantially destroyed." *Buskey v. Town of Hanover*, 133 N.H. 318, 323 (1990). On the other hand the newer *Simplex* test protects against "substantive due process" violations, *Asselin v. Town of Conway*, 137 N.H. 368 (1993); *Caspersen v. Town of Lyme*, 139 N.H. 637 (1995) – except that the court in *Simplex* has ratcheted up the level of scrutiny the Court will use, from a simple "rational basis" test to a "fair and substantial relationship" test.

OTHER CONSIDERATIONS:

(a) Notice that the "unique physical circumstances" need not be located on the lot itself! An example would be where the uses in the surrounding neighborhood had so changed that existing zoning didn't reflect reality.

(b) The circumstances creating the "hardship" must be something ***other than*** the precise thing being regulated by the provision you're seeking a variance from . (In the *Rowe v. North Hampton* case, the restriction said at least half the minimum lot size had to be non-wetland in order to build. The owner said uniqueness was fact that lot was mostly wetland. ***Wrong!***

(c) A variance, like a special exception, runs with the land. ***Don't rely on the applicant's reputation.*** When you're writing down your decision and conditions, ***assume every property will be sold to a scofflaw!***

(d) The Ordinance should specify an "abandonment" period within which variance must become "vested" or lost – so that owners can't get a variance and "keep it in the bank" for years at a time.

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