

The Presenter



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Spring 2022 Planning & Zoning Conference



ZBA Applications Part 1

Presented by:

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May 7, 2022

What is the Role of the ZBA?

Safety valve

Quasi-Judicial

No enforcement authority

Obligation to assist public
(reasonable)

Rules of procedure

No requirement for monthly meeting

What is the ZBA's Jurisdiction?



- RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled, RSA 674:33, V
- RSA 236:115: Certificates of approval, junkyards
- Often serves as building code board of appeals

Appeals to the ZBA RSA 676:5

- ▶ ZBA hears appeals, per RSA 674:33
- ▶ Heard within reasonable time, per ZBA rules
- ▶ ZBA may impose reasonable fees
- ▶ ZBA may require applicant to reimburse for third party review & consultation

What Decisions can be appealed to the ZBA?



- ▶ Appeals to the board of adjustment concerning any matter within the powers set forth in RSA 674:33 may be made “by any person aggrieved, or by any officer, department, board or bureau of the municipality affected by any decision of an administrative officer.”
- ▶ “Administrative officer” has been defined to mean any municipal official or board responsible for issuing permits or for enforcing the ordinance. It includes the building inspector, board of selectmen, or other official or board with such responsibility.
- ▶ The term decision of the administrative officer includes any decision involving construction, interpretation, or application of the terms of the ordinance. It does not include discretionary decisions to enforce an ordinance, but does include any construction or interpretation of the ordinance being enforced.¹⁵ *Land Use Planning and Zoning* § 21.10 (2021)

Effect of Appeal to ZBA



- ▶ An appeal of the issuance of any permit or certificate has the effect of suspending that permit or certificate and no construction, alteration or change of use which is contingent upon it shall be commenced.
- ▶ Likewise, an appeal of any order or other enforcement action stays 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 the facts stated in the certificate, a stay would, in the officer's opinion, cause eminent peril to life, health, safety, property or the environment. 15
Land Use Planning and Zoning § 21.12 (2021)

“One Bite of the Apple”

Fisher v. Dover



- ▶ Subsequent applications by unsuccessful petitioners are limited.
- ▶ Second application must be materially different in nature and degree from the original application. *Fisher v. Dover*, 120 N.H. 187 (1980)
- ▶ A change in applicable legal standards may be such a change. *Brandt v. Somersworth*, 162 N.H. 553 (2011)
- ▶ If the applicant has addressed/changed things that were reason for denial in original application—could be a material difference



Appeal to the board within a reasonable time (in your rules, RSA 676:5)



Hearing within 45 days



Notice to affected persons, RSA 676:7

Public Notice: 5 days

Individual Notice

Continuing the hearing



Opportunity to be heard, RSA 676:7

Certain individuals must be heard

Others may be heard



Decision based on facts and evidence, RSA 674:33, 91-A



Decision by impartial tribunal, RSA 673:14



Written decision with reasons, RSA 676:3

The Evidence



What does the board do during the hearing?

- Collect evidence and determine the facts
- Apply legal tests (e.g., the variance criteria)
- Develop a record for court review

Board has considerable discretion to choose between competing expert opinions:

- General studies and articles may not be enough to contradict specific expert opinion
- Board may question expert's qualifications, methodology, etc.
- Board may rely on personal knowledge of the area
- BUT uncontradicted expert testimony overcomes general member knowledge

All land use boards may hire consultants, RSA 673:16

ZBA may ask applicants to pay for special investigative studies

The Decision

RSA 674:33 & 676:3



- ▶ 3 members must concur
- ▶ Must use one consistent voting method, RSA 674:33, I(c)
- ▶ Decision must be in writing
 - ▶ (State reasons for approval/ disapproval)
- ▶ Conditions of approval?
- ▶ Issue decision w/in 5 business days

How to Make the Decision



- ▶ ZBA need not mindlessly accept the conclusions of experts with knowledge of the project.
 - ▶ ZBA entitled to question and reject the methodology or conclusions of the expert's studies of the proposed development.
- ▶ Although the ZBA may not disregard an expert opinion based upon vague and unsupported concerns of town residents, it may rely upon residents' statements of objective facts in its determination of how much weight to give an expert opinion.
- ▶ *Three Ponds Resort v. Town of Milton is illustrative*
 - ▶ Applicant commissioned a traffic study.
 - ▶ Traffic study concluded no additional impact.
 - ▶ ZBA considered Three Ponds' traffic study in detail and identified at least three significant concerns (all of which were supported by the record), before rejecting the expert's conclusions.



ZBA Authority to Rule Zoning Relief is Unnecessary

- ▶ Contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because the zoning board of adjustment (ZBA) will invariably consider this issue in deciding whether unnecessary hardship exists.
- ▶ 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, the Court concludes that the mere filing of a variance application does not limit the ZBA's ability to determine whether the applicant's proposed use of property requires a variance in the first place.

Bartlett v. City of Manchester, 164 N.H. 634, 635 (2013)

Special Exceptions

- Permission to do something zoning ordinance permits under specific circumstances
- Must be in zoning ordinance!

Variances

- Permission to do something not permitted by zoning ordinance
- Five criteria, RSA 674:33, I



Variance Criteria 1 & 2



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

Examine whether the variance would

- (a) alter the essential character of the locality or
- (b) threaten public health, safety or welfare.

2. The spirit of the ordinance is observed.

Examine the effect of the variance in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.

Variance Criteria 3



Substantial justice is done.

→ 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 the granting of a variance that meets the other qualifications. Courts will also look at whether proposed development is consistent with the area's present use.

Variance Criteria 4



The values of surrounding properties are not diminished.

In considering whether an application will diminish surrounding property values, consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. It is the board's job to weigh competing evidence.

Variance Criteria 5



Literal enforcement of the zoning ordinance would result in an *unnecessary hardship*.

1. “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 BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY;**
- (ii) THE PROPOSED USED IS A REASONABLE ONE.**

OR If #1 not satisfied:

2. 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.

Status of Variances



- ▶ A variance runs with the land and passes with the land to a subsequent purchaser.
- ▶ By definition, a variance is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner.
- ▶ Once granted, a variance can be enjoyed by both present and subsequent owners of the land. 15 *Land Use Planning and Zoning* § 24.05 (2021)

Special Exceptions



- ▶ The review standards for variances does not apply to special exceptions.
- ▶ In contrast to a variance, a special exception is a use permitted upon certain conditions as set forth in a town's zoning ordinance.
- ▶ If the conditions for granting a special exception are met, the zoning board must grant it, and by so doing, no exception to the application of the ordinance is truly made.
- ▶ A special exception is not the equivalent of a nonconforming use. Uses that are permitted as special exceptions are deemed to be permitted so long as they satisfy the special exception provisions in the ordinance.

Necessity for Special Exception Standards



- ▶ Where the legislative body creates uses that are permitted subject to a special exception under the terms of the ordinance, the adopted zoning regulation must spell out the standards under which the special exception can be granted.
- ▶ The special exception must be limited by standards sufficient to maintain the discretion of the board while providing the courts with a reasonable basis for judicial review of board decisions.
- ▶ The absence of such standards set forth in the ordinance, by which the board of adjustment can approve special exceptions, renders the grant of authority by the local legislative body void. 15 *Land Use Planning and Zoning* § 23.03 (2021)

Variances from the Terms of a Special Exception?



- ▶ When a ZBA is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth in the zoning ordinance.
- ▶ While a ZBA may grant a special exception, it cannot decide to waive any of the requirements for a special exception spelled out in the zoning ordinance.
- ▶ If a landowner cannot meet the conditions required for granting of a special exception, it may still be possible to obtain similar relief through the granting of a variance
- ▶ 15 *Land Use Planning and Zoning* § 23.02, § 23.06 (2021)

Status of Special Exception



- ▶ A special exception is not personal to the applicant, and it cannot be limited to the use only of the applicant.
- ▶ A special exception runs with the land and not a particular owner, hence a condition restricting the use to the particular owner would be inappropriate. 15 *Land Use Planning and Zoning* § 23.05 (2021)

Is Cumulative Impact a Permissible Consideration?



- ▶ Perreault v. Town of New Hampton, 171 N.H. 183 (2018).
- ▶ Applicant sought variance to construct a shed within the 20-foot side yard set back, that was denied by the ZBA.
- ▶ There was evidence of sixteen other properties, all located on the same road as the applicants' property, with storage buildings in locations that the applicants asserted were in violation of the setback requirements.
- ▶ According to the applicants, this evidence demonstrated that their proposed shed would not alter the essential character of the neighborhood or threaten the public health, safety, or welfare.
- ▶ The ZBA's denial was based upon the conclusion that allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.
- ▶ The Court assumed without deciding, that cumulative impact is a proper consideration in the variance context.

Cumulative Impact - *Foley v. Enfield*



- ▶ The applicant sought to construct two-story house and an attached, two-car garage within the 30-foot setback from Rollins Point Road, eight to ten feet from his lot line. He argued that the ZBA erred in finding that the variance would violate the spirit of the ordinance by promoting overcrowding of the land.
- ▶ The ZBA chair noted that while the plaintiff's proposed construction of a larger house on his property may not have a "great effect" on Rollins Point, the cumulative effect of granting similar variance requests in the future could be "large and irreversible."
- ▶ During deliberations, the majority of the ZBA observed that the plaintiff's proposed construction "would crowd the land of Rollins Point and might encourage further such crowding and thereby would degrade the natural environment of the point."
- ▶ Court concluded that, in evaluating the plaintiff's variance request, the ZBA acted properly in considering the cumulative impact of granting similar variances in the future on Rollins Point. See *id.*

Time for Exercising Variances and Special Exceptions



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,...



RSA 674:33, I-a



2018 amendment allows for termination of variances granted prior to 8/19/13 by zoning amendment

Rehearings, RSA 677:2

- Motion must be filed within 30 days
- ZBA may even consider its own decision within time period
- Hold meeting to determine whether to grant rehearing
- Grant rehearing when board committed technical error or there is new evidence that was not available at the time of the first hearing
- If rehearing is granted, may consider certain issue(s) or rehear entire case

Action on Motion for Rehearing



- ▶ The N.H. Supreme Court has made it clear that in furtherance of the finality of decisions by zoning boards, rehearings should not be lightly granted.
- ▶ As a general rule, rehearings should be granted only if the petitioner can demonstrate that the board committed technical error or that there is new evidence that was not available at the time of the first hearing. Such new evidence should reflect a change in conditions which occurred subsequent to the original hearing or which was unavailable at the time of the original hearing. 15 *Land Use Planning and Zoning* § 21.18 (2021)

Beyond the Rehearing



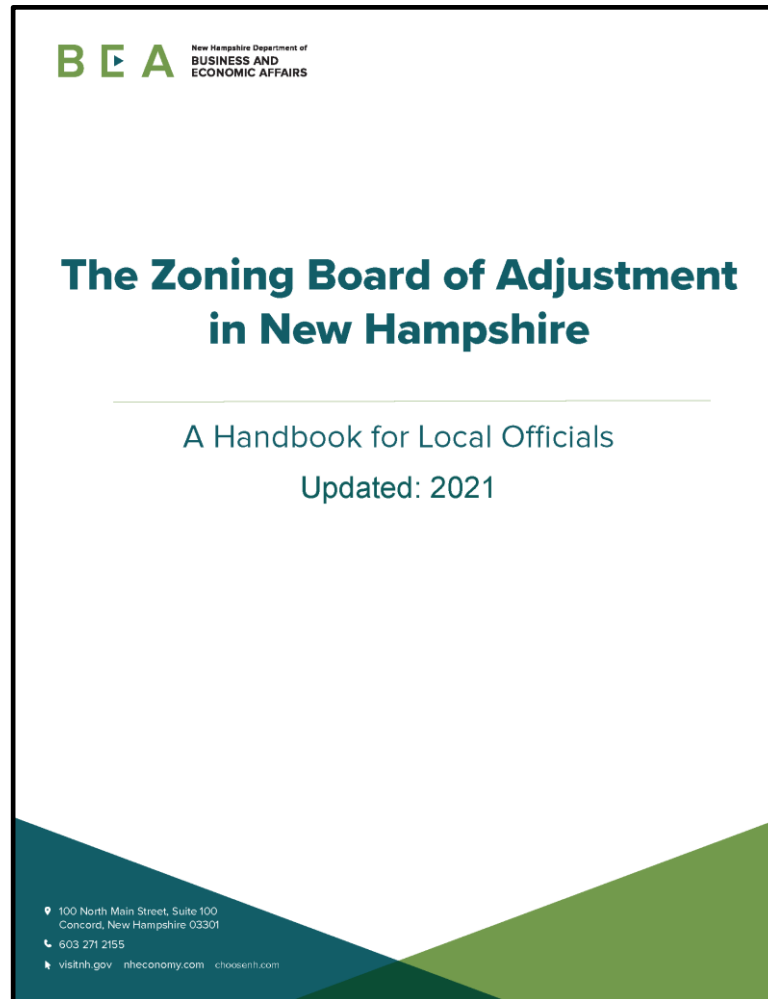
- ▶ Affected party with standing may appeal to Superior Court within 30 days, RSA 677:4, or, if the application involves housing and housing development, to the Housing Appeals Board.
- ▶ Be sure to compile and preserve “the record” as completely as possible.
- ▶ If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.



Best Resource: ZBA Handbook



- ▶ Downloadable
- ▶ Free digitally
- ▶ Searchable
- ▶ Linked TOC



<https://www.nh.gov/osi/planning/resources/documents/zoning-board-handbook.pdf>

Thank you!

- All Conference Session slides and recordings will be available next week

Feedback Encouraged!

- Please fill our survey that can be found at link below

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