The ZBA in NH

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NH Zoning Board Powers – Overview

Pursuant to RSA 674:33, NH Zoning Boards have the power to:

1. Hear and decide appeals of administrative decisions (*See also* RSA 676:5)
2. Grant variances from the terms of the applicable zoning ordinance
3. Grant special exceptions (if provided for in applicable zoning ordinance)

Pursuant to RSA 674:33-a, NH Zoning Boards have the power to:

1. Grant Equitable Waivers of Dimensional Criteria

Appeals of Administrative Decisions

RSA 674:33, I(a)

- "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”

RSA 676:5

- Appeals “may be taken by the applicant, an abutter as defined by RSA 672:3, or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer.”

  (NO LONGER “any person aggrieved” effective September 2024.)

Appeals of Administrative Decisions

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. "Directly across the street or stream" shall be determined by lines drawn perpendicular from all pairs of corner boundaries along the street or stream of the applicant to pairs of projected points on any property boundary across the street or stream that intersect these perpendicular lines. Any property that lies along the street or stream between each pair of projected points, or is within 50 feet of any projected point shall be considered an abutter. 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.

Appeals of Administrative Decisions

RSA 676:5, II(a),

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.”

Appeals of Administrative Decisions

RSA 676:5, II(b)

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 it does include “any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.”

Sutton v. Town of Gilford, 160 N.H. 43 (2010) (challenges to building permit must first be made to ZBA).

New Hampshire Alpha of SAE Trust v. Town of Hanover
172N.H. 269 (2019)

(Second of two Dartmouth fraternity house cases)

(Case is *still going*)

- Review in zoning cases limited
- Factual findings deemed *prima facie* lawful and reasonable
- ZBA decision will only be set aside for errors of law or if the decision is unlawful or unreasonable
- Interpretation of an ordinance (or a statute) is *de novo*

New Hampshire Alpha of SAE Trust v. Town of Hanover
172N.H. 269 (2019)

We acknowledge that if formal recognition by the College were dispositive of the "in conjunction with" requirement, an unconstitutional delegation problem might well exist. *Cf. Fernald v. Bassett*, 107 N.H. 282, 284, 220 A.2d 739 (1966) (recognizing that a local zoning ordinance that conferred upon a private landowner the authority to grant a special exception to another landowner was an unauthorized delegation of authority). However, consistent with our longstanding practice, we will not construe a legislative enactment as unconstitutional when it is susceptible to a construction rendering it constitutional. *Duncan v. State*, 166 N.H. 630, 637, 102 A.3d 913 (2014).

New Hampshire Alpha of SAE Trust v. Town of Hanover
172N.H. 269 (2019)

- Remand to see if fraternity an "institution" in its own right *(current Superior Court decision = <u>not</u> an institution)*
- Lack of prior enforcement does not prohibit current enforcement
- ZBA free to accept or reject evidence and draw reasonable inferences from facts proved
- ZBA has "broad authority to grant a rehearing upon motion…"
- ZBA can reverse itself "if the interests of justice so require"
- ZBA member that requested Dartmouth be notified was not determined to be biased

Appeals of Administrative Decisions (Relative to Planning Board Decisions) (RSA 676:5, 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 . . . then such decision may be appealed to the board of adjustment under this section…"

- But not if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 that delegates administration to the planning board (appeals would be to the Superior Court, not ZBA)

- Planning Board decision regarding zoning ordinance provision is ripe for appeal to ZBA when such a decision is actually made. *See*, *Atwater v. Town of Plainfield*, 160 N.H. 503, 509 (2010) . Planning Board does not need not complete its consideration of the planning issues involved in a site plan review for a zoning issue to be ripe and appealable to the ZBA. *Id*. at 510. ("…it makes little sense to require that the planning board's approval of a site plan be final before a party can appeal to the ZBA on a zoning issue 'including something as fundamental as whether the proposed use is allowed by the zoning ordinance.'")

Appeals of Administrative Decisions (Relative to Planning Board Decisions) (RSA 676:5, III)

- But see, *Accurate Transportation, Inc. v. Town of Derry*, 168 N.H. 108 (2015)(mere vote to accept Site Plan as complete is not enough to trigger obligation to bring appeal to ZBA).

Appeals of Administrative Decisions

- *Batchelder v. Plymouth*, 160 N.H. 253 (2010)
  - Planning board approval of site plan included interpretation of ZO as allowing the removal of fill from an environmentally sensitive overlay zone as excavation "incidental to lawful construction."

- *Dartmouth Corporation of Alpha Delta v. Hanover*, 169 N.H. 743 (2017)
  - Zoning administrator's interpretation of ZO provision limiting student housing to "in conjunction with another institution" and meaning of "non-conforming use."

- *Working Stiff Partners, LLC v. Portsmouth*, 172 N.H. 611 (2019)
  - Interpretation of ZO definition of "dwelling unit" as excluding "transient occupancies that are similar in nature to hotels, motels, rooming houses, or boarding houses" to support prohibition of STR.

- *Town of Lincoln v. Chenard*, 174 N.H. 762 (2022)/*City of Laconia v. Kjellander*, 2023 N.H. LEXIS 139 (No.: 2022-0276)
  - In Lincoln: since junk yard was not defined in Town's ordinance, property owner was only determined to be maintaining a junkyard pursuant to state statute (RSA 236:114) but not in violation of Town ordinance, so ordered to abate nuisance but no attorney's fees. In Laconia: property met the City's definition of junk yard, so City entitled to attorney's fees.

Appeals of Administrative Decisions

Timeliness of appeal to Court/HAB

See RSA 677:15, I; RSA 677:15, I-a (a); *Krainewood Shores Ass'n v. Town of Moultonborough*, 174 N.H. 103 (2021); *PPI Enters., LLC v. Town of Windham* (Docket Nos. 2020-0249 & 2020-0250, Issued June 23, 2021, 2021 N.H. Lexis 109*); *Newfound Serenity, LLC v. Hebron*, 2024 N.H. 13 (2024).

- 30-day time period for appealing a planning board decision to the Superior Court under RSA 677:15, I commences the day after the date of the (final) decision.
- PB issues appealable to ZBA should come first. (RSA 677:15, I-a (a), RSA 676:5, III.)
- Appeal to HAB prior to opportunity for ZBA to rule on zoning questions is premature.

Appeals of Administrative Decisions

Timeliness of appeal to ZBA

- Effective September 13, 2025, RSA 676:5, I requires appeal to the ZBA to be taken within 30 days.
- No longer a “reasonable time” (i.e., no more 14- or 15-day appeal periods).
- Under RSA 676:5, III, the appeal period starts to run from conditional approval. *See Saunders v. Town of Kingston*, 160 N.H. 560 (2010).
- Appeal deadlines are jurisdictional, meaning cannot be waived.

Appeals of Administrative Decisions

- Exemption under RSA 674:39 (now 7 years instead of 4) does not apply to amendments to previously-approved site plans that substantially change the plan.

- In *Harborside v. City of Portsmouth*, 163 N.H. 439 (2012), Supreme Court affirmed Superior Court's decision to overturn ZBA decision that upheld Planning Board's approval to a site plan amendment.

  While a site plan for a hotel, restaurant, and retail space had previously been approved, the site plan did not include construction of a conference center.

  Because a conference center was determined to be "qualitatively different from retail space," the RSA 674:39 exemption did not apply, and parking requirements adopted after the original approval (that the amendment did not comply with) were deemed to apply.

Appeals of Administrative Decisions

- ZBA has authority to determine that an *un*appealed administrative official's decision that a variance is needed was error. This is because "contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance," and an applicant does not waive the claim that its proposed use is permitted under the accessory use doctrine simply by applying for a variance. *See Bartlett v. City of Manchester*, 164 N.H. 634 (2013)

Appeals of Administrative Decisions

- ZBA also can hear appeal of notice of violation if it involves an officer's interpretation of the underlying zoning ordinance.
  - *New Hampshire Alpha of SAE Trust v. Town of Hanover*, 174 N.H. 269 (2021) (affirming trial court's denial of petition for declaratory judgment that argued notice of violation was not appealable to ZBA, holding notice of violation may serve as basis for administrative appeal, but ZBA may not decide issues beyond contesting officer's construction, interpretation, or application of zoning ordinance).

Appeals of Administrative Decisions

- Pursuant to RSA 676:6, an appeal to the ZBA has the effect of maintaining the status quo and suspending any appealed permit or certificate, meaning no construction, alteration, or change of use. An appeal of any order or other enforcement action shall stay all enforcement "unless the officer from whom the appeal is taken certifies to the board of adjustment . . . 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."

- Pursuant to RSA 677:9, the filing on an appeal with the Court "shall **not** stay any enforcement proceedings . . . and shall **not** have the effect of suspending the decision of the zoning board of adjustment or local legislative body." (Emphasis added.)

Appeals of Administrative Decisions

- May include constitutional challenges against ZO provisions:
  - *Carlson's Chrysler v. City of Concord*, 156 N.H. 399 (2007) (provisions of sign ordinance disallowing electronic changeable copy sign found to be constitutional.)
  - *Community Resources for Justice, Inc. v. City of Manchester*, 157 N.H. 152 (2008) (Complete ban on federal halfway houses violated builder's equal protection rights guaranteed by the State Constitution. City did not meet its burden to prove that the ban was substantially related to an furthering an important governmental interest.) **Court also granted a builder's remedy**
  - *Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633 (2006) (Overturned prior *Metzger* standard and held that the rational basis test requires that the legislation be only rationally related to a legitimate governmental interest without inquiry into whether the legislation unduly restricts individual rights or whether there is a lesser restrictive means to accomplish that interest.) **Aesthetic basis for zoning provisions can suffice**
  - *Taylor v. Town of Plaistow*, 152 N.H. 142 (2005) (Ordinance provision requiring 1000 feet between vehicular dealerships upheld.)

Appeals of Administrative Decisions

- May involve claims of municipal estoppel:

Elements are: (1) representation or concealment of material facts was made by municipality with knowledge of those facts; (2) other party is unaware of the truth of the matter; (3) representation made with the intention of inducing other party to rely upon it; and (4) other party reasonably relied upon the representation to detriment.

- *Thomas v. Town of Hooksett*, 153 N.H. 717 (2006)(finding of municipal estoppel reversed because reliance on prior statements of Code Enforcement Officer and Planning Board Chairman that were contrary to express statutory terms was not reasonable);
- *Cardinal Development Corporation v. Town of Winchester ZBA*, 157 N.H. 710 (2008)(ZBA not estopped to deny motion for rehearing as untimely filed where ZBA Clerk did not have authority to accept after hours fax on 30th day nor could applicant's attorney reasonably rely that she had such authority);
- *Sutton v. Town of Gilford*, 160 N.H. 43 (2010)(representation by Town Planning Director concerning "non-merged" status of lots could not be justifiably relied upon).

Appeals of Administrative Decisions

- *Dembiec v. Town of Holderness*, 167 N.H. 130 (2014)
  - Assertion of a municipal estoppel claim for the first time in the trial court is not barred by the exhaustion of administrative remedies doctrine.
  - The applicable statutes do not confer jurisdiction upon ZBA to grant relief under the equitable doctrine of municipal estoppel.

(Also noted that although prior cases including *Thomas v. Town of Hooksett* involved municipal estoppel claims that were initially asserted at the ZBA, the Court did not address whether the ZBA had jurisdiction to decide those claims.)

Appeals of Administrative Decisions

- *Forster v. Town of Henniker*, 167 N.H. 745 (2015)
  - Weddings are not a valid “accessory use” under statutory definitions of agriculture or agritourism.
  - “Accessory use” is “occasioned by” and “subordinate to” principal use.
  - Must be “associated with a frequency that is substantial enough to rise above rarity
  - Petitioner failed to prove proposed uses have “commonly, habitually and by long practice been established as reasonably associated with the primary use in the local area.”

Appeals of Administrative Decisions

- De Novo Review
  - *Ouellette v. Town of Kingston*, 157 N.H. 604 (2008) (ZBA allowed to conduct *de novo* review under RSA 674:33 of Historic District Commission ("HDC") denial of certificate for supermarket).

  - Not required to give deference to findings and rulings of HDC

Special Exceptions

Meaningfully different from variances:

- A variance application seeks relief in the form of permission to do something that is **not** allowed by ZO.
- An application for a special exception seeks permission to do something that **is** allowed by ZO (*if* all conditions are met). (If all conditions are met, then ZBA must grant it.)
- ZO should provide checklist of conditions.

Special Exceptions

- 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).

- But applicant may seek a variance for the project as a whole *See 1808 Corporation v. Town of New Ipswich*, 161 N.H. 772 (2011).

- Applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. *See McKibbin v. City of Lebanon*, 149 N.H. 59 (2002).

Special Exceptions

As with variances, special exceptions are not personal but run with the land. *See Vlahos Realty Co., Inc. v. Little Boar's Head District*, 101 N.H. 460 (1958); *see also*, Loughlin, §23.05, p. 369.

But a use allowed by special exception might be able to be lost by abandonment (if the ZO indicates as such). *See* Loughlin, §23.06, p. 370.

Special Exceptions

- RSA 674:33, IV (b)

  Special exceptions “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…”

- RSA 674:33, IV (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.”

Variances

Relief from the literal enforcement of the provisions of a zoning ordinance.

Applicants have to satisfy all criteria.

Variance Criteria 1 - 4

(1) The variance will not be contrary to the public interest;

(2) The spirit of the ordinance is observed;

(3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and…

Variance Criterion 5(A)

Literal enforcement of the provisions of the ordinance would result in an 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.

Variance Criterion 5(B)

(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 definition of “unnecessary hardship” set forth in subparagraph (5) 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.

Variance Criteria

Recall that, consistent with *Bartlett v. City of Manchester*, 164 N.H.634 (2013), the question to be answered may be whether a variance is even needed.

Variances

- Some notable cases:
  - *Perreault v. Town of New Hampton*
  - *Harborside v. Parade*
  - *Malachy Glen v. Town of Chichester*
  - *Farrar v. City of Keene*

Perreault v. Town of New Hampton, 171 N.H. 183 (2018)

- ZBA (after 4 public hearings and 2 site visits) denied abutter-supported and fire chief okayed request for variance to place permanent shed within side setback.
- Upheld by Superior Court and Supreme Court.
- Criteria 1 (not be contrary to the public interest) and 2 (consistent with the spirit of the ordinance) basically the same.
- Mere conflict with terms of ordinance insufficient. Variance "must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." (Some things the Court looks to are whether variance would (i) alter essential character of the locality or (ii) threaten public health, safety, or welfare.)
- Supreme Court assumed without deciding that cumulative impact is a proper consideration in variance context.

Perreault v. Town of New Hampton, 171 N.H. 183 (2018)

- Supreme Court found no error of law with Superior Court's conclusion that municipality may "validly exercise zoning power solely to advance aesthetic values…"

- Applicant argued other properties in neighborhood had outbuildings within the setbacks.
  - ZBA found others outbuildings:
    - Located based on variances obtained when different criteria applied
    - Predated setback
    - Not actually within setback
    - Not known to Town prior and being investigated

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- ZBA granted variances to allow two not-permitted parapet sings and two marquee signs in excess of the maximum sign area.
- ZBA made several specific findings in support of its decision.
- Superior Court affirmed the marquee sign decision but overturned the parapet sign decision.
- Supreme Court upheld ZBA's decision on both parapet signs and marquee signs using the then new statutory criteria that the Court deemed to be "similar, but not identical, to" the tests in *Simplex Technologies v. Town of Newington* and *Governor's Island Club v. Town of Gilford*.

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- As to Criteria 1 (not be contrary to the public interest) and 2 (consistent with the spirit of the ordinance), Supreme Court (i) determined that Superior Court "appears to have examined whether allowing the signs would *serve* the public interest," and (ii) ruled that this was a legal error.

- Supreme Court went further to consider the record and found that it supported the ZBA's factual findings.

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- As to substantial justice criterion, Supreme Court cited to three prior cases, including *Malachy Glen Assocs. v. Town of Chichester*, and reiterated that "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."

- Superior Court erred by focusing on the benefit to the public by *granting* the variance. ZBA correctly focused on whether public would benefit from *denying* the variance.

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- As to question of unnecessary hardship related to marquee signs, Supreme Court held that "[s]ince the variance at issue is to install a sign on a building . . . ZBA and trial court did not err by focusing upon the building's size to determine whether the property has "special conditions."

- Property owner did not have to demonstrate that the proposed signs were "necessary" to its operation, only that they were "reasonable."

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- Supreme Court rejected the argument that the public interest, spirit of the ordinance, and substantial justice criteria were not met the same results could have been achieved by installing smaller, conforming marquee signs because the argument was based on "defunct unnecessary hardship test for obtaining an area variance"

- In other words, applicants no longer have to prove that the benefit they seek can*not* be achieved by reasonably feasible means other than an area variance.

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- ZBA resolves conflicts in evidence and assess credibility of offers of proof.
- ZBA can rely on its own knowledge, experience, and observations.
- ZBA does not need to accept conclusions of experts.

Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007)

- ZBA denied variance from wetlands buffer setbacks for previously approved storage units. Superior Court and Supreme Court overturned ZBA decision.

- The reason for a variance request cannot be used by ZBA to deny the variance.

"[O]ne of the members of the ZBA voiced a concern . . . 'We have had troubles with wetlands that feed Marsh Pond and the overflowing of the pond. If there is a large area that is paved it will diminish the absorption of rainwater.' However, no discussion resulted from this comment, there was no evidence before the ZBA to support it, and, most tellingly, this was not listed in the ZBA's "Statement of Reasons" for finding that the plaintiff had failed to satisfy the public interest and spirit of the ordinance requirements…"

- Citing to *Vigeant v. Town of Hudson*, (i) a proposed project is presumed reasonable if it is a permitted use under ZO, and (ii) if the use is allowed, an area variance can't be denied simply because ZBA disagrees with that use (in other words, whether property could be used differently from proposed use is not material).

- If ZBA has not addressed a factual issue, trial court ordinarily must remand, but remand is unnecessary when "record reveals that a reasonable fact finder necessarily would have reached a certain conclusion."

Physical Disability Variances (RSA 674:33, V)

"…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."

(Emphasis added.)

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

- ZBA shall grant an equitable waiver “[w]hen 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…”

- Property owner has the burden of proof (4 criteria)

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

ZBA can grant waiver “if and only if the board makes all of the following findings:”

(a) Violation was not noticed or discovered by owner, former owner, owner's agent or representative, or municipal official, until after a substantial completion of a structure in violation, or after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

(b) 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;

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

(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

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

(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.

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

Equitable Waivers of Dimensional Requirements (RSA 674:33-a)

Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions (*see Schroeder v. Windham*, 158 N.H. 187 (2008)).

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.

Equitable Waivers of Dimensional Requirements

- *RDM Trust v. Town of Milford*, ___ N.H. ___ (Docket No. 2015-0495; Issued March 31, 2016) 2016 N.H. Lexis 105*
  - Grant of equitable waiver overturned where the setback violation was not caused by the owner's error in measurement but rather on a conscious decision to build a deck on an existing non-conforming (i.e., within the setback) home.

- *Lane v. City of Dover*, ___ N.H. ___ (Docket No. 2023-0629; Issued April 4, 2025)
  - In upholding ZBA's grant of equitable waiver, Supreme Court rejected neighbor's proffered definition of substantial completion ("ready to be used for its intended purpose") in favor of a common dictionary-based definition ("having largely, but not all, necessary components").

Equitable Waivers of Dimensional Requirements
Dietz v. Town of Tuftonboro, 171 N.H. 614 (2019)

- ZBA granted 2 equitable waivers, one for 1999 addition within lake setback and one for 2008 addition.
- CEO had granted building permit for 1999 addition.
- ZBA had granted variance for 2008 addition.
- A 2014 survey showed more of the additions were located within setback than had been thought.
- Abutter complained and wanted all removed.
- Superior Court and Supreme Court affirmed both equitable waivers.

Equitable Waivers of Dimensional Requirements
Dietz v. Town of Tuftonboro, 171 N.H. 614 (2019)

- Written findings of each element are not required by RSA 673:33-a. (Might changes to RSA 676:3 impact this?)
- RSA 673:33-a, I(d) is to be interpreted broad enough to apply to situations where applicant knew the facts but, nonetheless, relied on a misinterpretation of an ordinance by a municipal official (in other word, the applicant was "ignoran[t] of the facts *constituting the violation*.")
- Burden is on the Applicant to show all elements; but once ZBA grants, the burden shifts to the Appealing Party to show error of law or unreasonable.

Three recent NH Supreme Court Cases

- *Lane v. City of Dover*, 2025 N.H. LEXIS 82 (already discussed)

- *My Way Realty, LLC v. City of Manchester*, 2025 N.H. LEXIS 124
  - ZBA may not simply ignore uncontradicted expert testimony. May rely in part upon their own judgment, experience, and personal knowledge, so long as decision is "based on more than the mere personal opinion of its members."
  - ZBA's refusal to allow applicant to present additional information after entering into deliberations was not unreasonable and was upheld.

- *McGowan v. Town of Hampton*, 2026 N.H. LEXIS 75
  - Use of a loft space was not an ADU because the space did not have a cooking stove or kitchen sink
  - As such, prior use of loft as STR did not violate the zoning ordinance.
  - Consequently, STR use of loft was a lawful preexisting nonconforming use (so they did not need a special exception)

RSA 91-A

- Applies to ZBA
  - Avoid Email?
  - RSA 91-A:3(II)(l) allows Non-Public Session to consider legal advice
    - (“Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.”)
  - RSA 91-A:2, II-b requires approved mins & notices of meetings to be posted on website or listed where they may be found
    - (“If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.”)

Recent Legislation

HB 577

Effective July 1, 2025

Changes to RSA 674:71

I. Accessory dwelling unit" means a residential living unit that is [~~within or attached to~~] ***located on a lot containing*** a single-family dwelling[~~, and~~] that provides independent living facilities for one or more persons, including provisions for sleeping, eating, cooking, and sanitation**,** on the same parcel of land as the principal dwelling unit it accompanies. ***Accessory dwelling units may be constructed at the same time as the principal dwelling unit*.**

II. "Attached unit" means a unit that is within or physically connected to the principal dwelling unit, or completely contained within a preexisting detached structure.

III. "Detached unit" means a unit that is neither within nor physically connected to the principal dwelling unit, nor completely contained within a preexisting detached structure.

HB 577

Effective July 1, 2025

RSA 674:72 repealed and reenacted.

Changes to RSA 674:73

Detached Accessory Dwelling Units. A municipality [~~is not required to but may~~] ***shall*** permit ***one*** detached accessory dwelling [~~units~~] ***unit.*** Detached accessory dwelling units shall comply with the requirements of, and any municipal ordinances or regulations adopted pursuant to, RSA 674:72, IV through IX. [~~If a municipality allows detached accessory dwelling units, it may require an increased lot size.~~]

HB 413

Effective July 1, 2025

Amends several statutes (RSA 674:39; RSA 674:34, I; RSA 155-A:11-b, I; RSA 478:1-a; RSA 679:5, IV; and RSA 673:3, IV)

The bill:

- Applies to any planning board approval granted on or after July 1, 2023.
- Extends the vested/exemption period for approved subdivisions and site plans from 5 to 7 years.
- Increases the work commencement period from 2 years to 3 years.
- Limits the jurisdiction of the local building code board of appeals to hearing decisions made under local amendments to state building fire code (all others heard by state building code review board (“BCRB”).
- Provides that decisions of the state fire marshal and final decisions of a local building code board of appeals must firs be appeals to the BCRB; and the BCRB’s decision may then be appealed to either the superior court or the housing appeals board.

SB 282

Effective July 15, 2025

This bill allows residential buildings between 6 and 4 floors above grade to have only one stairway under certain conditions.

HB 92 (Ya can’t vote twice)

Effective August 22, 2025

Amend RSA 673:3 by inserting after paragraph IV the following new paragraph:

V. When a member also serves on a planning board, the individual shall recuse herself or himself from voting on matters previously decided by or pending before the planning board in a quasi-judicial capacity in which the member participated as a voting member.

SB 284 (one parking space per residential unit)

Effective September 13, 2025

Amend RSA 674:16, VII to read as follows:

VII. In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate accessory parking for vehicles[~~, but shall not require more than 1.5 residential parking spaces per unit for studio and one bedroom units under 1000 square feet that meet the requirements for workforce housing under RSA 674:58, IV, and shall not require more than 1.5 residential parking spaces per unit for multi-family developments of 10 units or more~~]. ***However, it shall not set the maximum residential parking spaces per unit to more than one parking space per residential unit, except that studio and one-bedroom units under 1,000 square feet that meet the requirements for workforce housing under RSA 674:58, IV, and multi-family developments of 10 units or more may require up to 1.5 parking spaces per unit.***

HB 457 (at least two occupants per bedroom)

Effective September 13, 2025

Amends RSA 674:16 by inserting after paragraph VII the following new paragraph VIII:

In its exercise of the powers granted under this subdivision, the legislative body of a city, town, village district, or county in which there are located unincorporated towns or unorganized places **shall not** adopt any ordinance that **restricts the number of occupants of any dwelling unit to less than 2 occupants per bedroom**, and the governing body thereof shall not enforce any such ordinance. Such legislative body **shall not** adopt any zoning ordinance within a municipality that **discriminates based on the familial or non-familial relationships or marital status among the occupants of the dwelling unit, including but not limited to college students**, and the governing body thereof shall not enforce any such ordinance. Nothing in this section shall prohibit the enforcement of the state building code or state fire code.

HB 296

Effective September 13, 2025

- Amends RSA 674:41, I(d)(1) to read as follows:

(1) The local governing body, after review and comment by the planning board ***or after establishing that the private road identifies and complies with policy adopted by the governing body of the municipality***, has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof

- Amends RSA 676:5, I to read as follows:

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 the applicant, an abutter as defined by RSA 672:3, 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,~~] ***30 days*** 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.

SB 283

Effective September 30, 2025

Adds RSA 674:77 and 674:78

Requires municipalities to exclude below-grade areas from floor-area-ratio (FAR) calculations and review and adjust height limitations as needed to maximize capacity and height potential for new construction.

SB 281

Effective July 1, 2026

Amends RSA 674:41, I (c) to read as follows:

(c) Is a class VI highway, provided that[~~:~~

- ~~(1) The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class VI highway or a portion thereof; and~~
- ~~(2) The municipality neither assumes responsibility for maintenance of said class VI highway nor liability for any damages resulting from the use thereof; and~~
- ~~(3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds~~] ***the landowner signs a liability waiver acknowledging that the municipality shall not maintain the highway nor provide any services to any lot accessible by the highway. The waiver shall state that the municipality shall not accept any responsibility for losses or damages caused by a lack of services, and that the responsibility for such services falls solely on the landowner. Prior to the issuance of a building permit, the applicant shall produce evidence that this waiver has been recorded in the county register of deeds***; or

HB 631
(may be repealed this session by HB 1010)

Effective July 1, 2026

Establishes new statute, RSA 675:59-a.

- Will require in municipalities “any part of which is designated as urban area by the United States Census Bureau…” to allow multifamily or mixed-used developments on parcels/lots that are “currently serviced by both a municipal water system and a municipal sewer system” and “located on a parcel zoned for commercial, office, retail, or parking uses.”

HB 631 (cont.)

- Prohibits municipalities from imposing certain regulations on permitted multifamily or mixed-use developments: (1) minimum or maximum residential density; (2) certain limits on building height; (3) certain mandatory setbacks; (4) restrictions on lot size or coverage; (5) “Mandatory walls, fences, or screening, or use of impervious pavement outdoors other than if necessary for disability accommodation, or public health and safety based on the preponderance of evidence.”; (6) mandatory non-public open space or common areas.

HB 631 (cont.)

- Municipality may require up to 20 percent of available ground floor space be dedicated to retail uses.

- Municipality may require the development include on-site vehicle parking, but “[t]he property owner shall have full authority to determine the location and size of the parking lot provided for residents, except as necessary to comply with federal law.”

- “A municipality . . . may regulate the siting and design of a residential or mixed-use development that is required to be permitted under this section provided that the regulations do not individually or cumulatively discourage the development through unreasonable costs or delay.”

Pending Legislation

- HB 1681: “AN ACT relative to the definition, inspection, and local approval of tiny houses and yurts as innovative housing structures.”
- HB 1079: Makes changes to ADU statutes.
- HB 1540: Adds some ability to regulate ADUs in the protected shoreland district.
- SB 508: Adds the following language to ZBA appeal statute (RSA 676:5, I) — “All grounds for appeal must be stated in the initial notice.”
- SB 439: Would provide for zoning authority to allow data centers in zoning districts designated for commercial or industrial use.
- SB 435: Would change the 5th variance criteria from “unnecessary hardship” to “an unreasonable restriction on the use of the property.”

Questions?

Thank you!

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