

Tips for Evaluating Five Variance Criteria

The Variance Will Not be Contrary to the Public Interest

- Does request unduly violate the basic objectives of the zoning ordinance?
- Does it alter the essential character of the neighborhood?
- Does granting the variance threaten the public health, safety or welfare? For example, analyze whether the variance would:
 - Lessen or increase traffic;
 - Provide for adequate light and air;
 - Overcrowd or overdevelop area;
 - Alter aesthetics of neighborhood, change natural environment or impact wetlands.¹

The Spirit of the Ordinance is Observed

- Does request violate the explicit or implicit purpose of the ordinance?
 - Look at specific ordinance regulation for purpose. Is regulation to protect light/air quality, overcrowding, or traffic, etc.?
- Would the variance injure the public or private rights of others?

¹ The Salem Zoning Ordinance refers to RSA 674:17, which explicitly notes considering:

- Zoning ordinances shall be designed:
 - (a) To lessen congestion in the streets;
 - (b) To secure safety from fires, panic and other dangers;
 - (c) To promote health and the general welfare;
 - (d) To provide adequate light and air;
 - (e) To prevent the overcrowding of land;
 - (f) To avoid undue concentration of population;
 - (g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;
 - (h) To assure proper use of natural resources and other public requirements;
 - (i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings; and
 - (j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.
- II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

Substantial Justice is Done

- Does the request cause harm to the general public that outweighs the benefit to the property owner?
- Would the variance have a significant adverse impact on an individual neighbor?
- Weigh the benefit of the variance to the applicant against any harm to the general public and harm to other individuals
- Is the request consistent with the surrounding area?

The Values of Surrounding Properties Will Not be Diminished

- Burden is on applicant to convince ZBA that project will not decrease values;
- Members may use own knowledge of area and rely on non-expert evidence;
- Members can weigh dueling experts to assess credibility; and
- Members cannot ignore expert testimony if it is not contradicted and there is no basis for questioning its credibility.

Literal Enforcement of the Provisions of the Ordinance Would Result in an Unnecessary Hardship Use (A) or (B)

(A) Owing to the 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 and the specific application of that provision to the property; and
- (ii) The proposed use is a reasonable one

If the criteria in subparagraph (A) are NOT established, an unnecessary hardship will be deemed to exist, if and only if:

(B) Owing to the special conditions, set forth above, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it

- Applicant first has to establish that there are special conditions of the property that distinguish it from other properties in the area. Without special conditions, the application fails.
 - What is unique about this property? Look directly at the lot and determine if things such as shape, size, location, etc. distinguish this property from others in the area.
- It is not enough to demonstrate that the property would be difficult to use for other purposes or that it is uniquely suited for the proposed use. Even if those facts are present, applicant still must demonstrate that the property is different, in a meaningful way, from other properties in the area.
- Applicant must establish that, because of special conditions of the property, requiring compliance with ordinance would not advance the purposes of the ordinance in any fair and substantial way.
 - Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

- Applicant must establish that, because of special conditions of the property, the proposed use is reasonable. Does the zoning restriction as applied interfere with the landowner's reasonable use of the property?
- Consider how the proposal would affect neighboring properties and the Town's zoning goals. Would the request alter the essential character of the neighborhood?
- If the applicant is unable to establish hardship under A, would the lack of a variance effectively prevent the applicant from making any reasonable use of the land? The applicant must establish that there is no other reasonable use of the property that would comply with the zoning ordinance. Even if the restriction significantly limits the value of the property, the standard is not met if the property can be put to any reasonable use. Also, the applicant must show that the property is unique, so that the zoning restriction imposes more of a burden on it than other properties in the area.