

In the 2013 case of *Stephen Bartlett & a. v. City of Manchester*, 164 N.H. 634, the court held that the ZBA must always examine the nonconforming use issue first – even if the owner has ignored that and applied for a variance. That's because every variance implicitly raises the issue of what an owner can do without a variance – that issue being highly relevant to the question of whether “unnecessary hardship” exists. **Lesson:** A ZBA in every variance case must first check to see what the status is of any nonconforming uses. 2015 NHMA Law Lecture #1 - Grandfathering: The law of Non-Conforming Uses & Vested Rights by Bernie Waugh, Esq., and Adele Fulton, Esq.

A variance is valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a 6-month window within which the variance remains valid following the resolution of a planning application filed in reliance upon the variance.

In 2009, RSA 674:33 was amended to codify the five variance criteria, including diminution of property values and, more importantly, overrule the separate criteria for “area” variances established by the landmark decision in *Michael Boccia & a. v. City of Portsmouth & a.*, 151 N.H. 85, 104 [2004]. The legislature clarified its action by including a statement of intent in SB147 (Chaptered Law 307 of 2009) 307:5 Statement of Intent. “The intent of section 6 of this act is to eliminate the separate “unnecessary hardship” standard for “area” variances, as established by the New Hampshire Supreme Court in the case of *Boccia*, and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in *Simplex Technologies, Inc. v. Town of Newington & a.*, 145 N.H. 727 [2001], as those standards have been interpreted by subsequent decisions of the supreme court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the *Simplex* decision, as exemplified by cases such as *Governor's Island Club, Inc. v. Town of Gilford & a.*, 124 N.H. 126 [1983].”

The local ordinance cannot limit or increase the powers of the board to grant variances beyond statutory authority; this power must be exercised within specific bounds.

### The Five Variance Criteria

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

In the case of *Gray v. Seidel*, 143 N.H. 327 [February 8, 1999] the New Hampshire Supreme Court reaffirmed the variance standard in RSA 674:33, I(b) [1996], which states that the board has the power to “[a]uthorize... [a] variance from the terms of the zoning ordinance as will not be contrary to the public interest if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” [emphasis added] The court clarified that RSA 674:33, I(b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., “will not be contrary”) to the public interest if granted.

### COMMENT: Proving a Negative

"The applicant still has the burden of persuasion on all five variance criteria, but my advice to ZBA members is not to be procedural sticklers when it comes to the "public interest" criterion. If an applicant makes even a conclusory statement like: "As you can see, there's no adverse effect on the public interest," that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it. To put it another way, if the applicant satisfies the other four criteria, a denial based solely on the "public interest" criterion is, in my view, unlikely to be upheld in Court unless your decision identifies some specific way in which the proposed variance is contrary to that interest."

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

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public? See *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 (2005).

## 2. The spirit of the ordinance is observed.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, [RSA 674:16-20](#). In general, the provisions must promote the "health, safety, or general welfare of the community." They do this by lessening congestion in the streets; securing safety from fires, panic and other dangers; and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. This may include a review of the master plan upon which the ordinance was based.

For instance, a zoning ordinance might control building heights specifically to protect adjoining property from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent if the ordinance clearly states that this is the sole purpose for the building height limitation. On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property, the granting of the variance might be improper.

As another example, consider the question of frontage requirements. Most zoning ordinances specify a minimum frontage for building lots to prevent overcrowding of the land. If a lot had ample width at the building line but narrowed to below minimum requirements where it fronted the public street, a variance might be considered without violating the spirit and intent of the ordinance, because to do so would not result in overcrowding. There are many other variations of lot shapes and sizes that might qualify for a variance; the principles remain the same. The courts have emphasized in numerous decisions that the characteristics of the particular parcel of land determine whether or not a hardship exists.

However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. Again, the board cannot change the ordinance.

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

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

In *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 NH 102 (2007), the supreme court stated that “[t]he requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance. . . . [T]o be contrary to the public interest... the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality... Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.” (Internal citations and quotations omitted.)

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

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

### 3. Substantial justice is done.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by granting a variance that meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

Any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also,

the court will examine whether the proposed development is consistent with the area's present use. *Malachy Glen Associates v. Town of Chichester* 155 N.H. 102 (2007).<sup>2</sup>

#### **4. The values of surrounding properties are not diminished.**

Perhaps Attorney Timothy Bates says it best in an OEP training video, Zoning and the ZBA:

"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur."

"The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values."<sup>3</sup>

Also, in *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632 (1994), the court stated that the resolution of conflicts is a function of the zoning board of adjustment.

#### **5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

The term "hardship" has caused more problems for boards of adjustment than anything else connected with zoning, possibly because the term is so general and has so many applications outside of zoning law. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed.

The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a zoning board. Even in the same town, different results may be reached with just slightly different fact patterns. "This does not mean that either finding or decision is wrong *per se*, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme." *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632(1994). Moreover, evolution in the law on "hardship" creates further confusion on the issue.<sup>4</sup>

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<sup>2</sup> NHMA Law Lecture #1 - Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32.

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

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

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

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

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property (referred to by some as the relationship test)

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose? Once the purposes of the ordinance provision have been established, the property owner needs to establish that, because of the special conditions of the property, application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any "fair and substantial" way.<sup>5</sup>

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

And:

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

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

RSA 674:33 does not require an investigation of how severely the zoning restriction interferes with the owner's use of the land. It merely requires a determination that, owing to special conditions of the property, the proposed use is reasonable. This is necessarily a subjective judgment – as is almost everything having to do with variances – but presumably it includes an analysis of how the proposed use would affect neighboring properties and the municipality's zoning goals generally. It clearly includes "whether the landowner's proposed use would alter the essential character of the neighborhood." *John R. Harrington & a. v. Town of Warner*, 152 N.H. 74, 81 (2005); see also *Farrar v. City of Keene*, 158 N.H. 684 (2009).

The second of the two parts of the hardship criteria in RSA 674:33, I(b)(5)(A)(ii) – "The proposed use is a reasonable one" – cannot be considered in isolation and must be read in conjunction with the introductory language in subparagraph A – "... owing to special conditions of the property that distinguish it from other properties in the area . . ." - so that the criterion as a whole is "... owing to special conditions of the property . . . the proposed use is a reasonable one." In other words, the board needs to find that a use (or dimensional requirement) which otherwise must be considered unreasonable (because it violates the ordinance) is rendered reasonable by the special conditions of the property (or of its setting or environment, as *Simplex* says).

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

<sup>5</sup> This is comparable to the standard suggested in *St. Onge v. Concord*, 95 N.H. 306, 308 [1949]: "It may, therefore, be stated that 'unnecessary' as used in this connection, means 'not required to give full effect to [the] purpose of the ordinance'."

Board members should also be cognizant of the intent of Ch. Law 307 (2009) (the law that amended RSA 674:33) which was to eliminate the separate “use” and “area” variance standards of the *Boccia* decision and to deem that the unnecessary hardship standard is satisfied if the applicant meets the standards established in *Simplex* as those standards have been interpreted by subsequent decisions of the supreme court.

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

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

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

New Hampshire law has not distinguished between a “use” or “area” variance since RSA 674:33’s amendment in 2009. Since then, all variances require the existence of unnecessary hardship, whether it is for a use not allowed in a particular zone or a deviation from a dimensional requirement. If they have not already done so, municipalities should review their variance application forms and make necessary changes to reflect the elimination of the distinction between use and area variances. See the suggested form in Appendix C.

The granting of a variance should not be confused with “spot zoning,” defined by the New Hampshire Supreme Court as the singling out of a parcel of land by the legislative body through the zoning process for treatment unjustifiably differing from that of surrounding land, thereby creating an island having no relevant differences from its neighbors. *Bosse v. Portsmouth*, 107 N.H. 523(1967). Boards should not dismiss variance requests merely on the basis of a claim of improper spot zoning. On the contrary, although a variance which has been granted with no basis for treating the subject parcel in a manner different from surrounding property may create an effect similar to spot zoning, the grant of a variance is not spot zoning.

All requests for variances should be reviewed very carefully. Denial of a proper variance request may result in a taking or loss of legitimate property rights of a landowner while the granting of an improper variance may alter the character of a neighborhood, forever beginning a domino effect as adjacent, affected properties seek similar requests due to the now changed character of the area.

Spot zoning occurs when an area is unjustly singled out for treatment different from that of similar surrounding land. The mere fact that an area is small and is zoned at the request of a single owner does not make it spot zoning. Persons challenging a rezoning have the burden before the trial court to demonstrate that the change is unreasonable or unlawful. The zoning amendment, which merely extends a pre-existing agricultural land boundary and does not create a new incongruous district, is not spot zoning. The court also noted that the zoning amendment was supported by a majority of the public and would protect the health and welfare of area residents. See *Miller v. Town of Tilton*, 139 N.H. 429 (1995).

### Granting Variances for the Disabled

RSA 674:33 authorizes zoning boards of adjustment to grant variances to zoning ordinances for a person or persons having a recognized physical disability, which may be granted for as long as the particular person has a need to use the premises. RSA 674:33, V states: