

REQUIREMENTS FOR VARIANCE

1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST;

The 1999 New Hampshire Supreme Court case of Gray v. Seidel, 143 N.H. 327 (1999) clarified this standard to indicate that the ZBA must consider only whether the variance, if granted, will be contrary to the public interest. Prior to the Gray decision, the test was commonly thought to be whether the grant of a variance would benefit the public interest. Some confusion still remains among applicants, abutters and board members as to how this test must be applied; however, the correct question to ask and answer is that which is set forth in Gray v. Seidel. Among the resources which ZBA's may refer to in determining whether an application is or is not in the public interest are the Town's Master Plan and any purpose or preamble language in the ordinance.

2. SPECIAL CONDITIONS EXIST SUCH THAT LITERAL ENFORCEMENT OF THE ORDINANCE RESULTS IN UNNECESSARY HARDSHIP;

If "Use" Variance, hardship per Simplex Elements:

(a) 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;

(b) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on a property; and

(c) the variance would not injure the public or private rights of others.

If "Area" Variance, hardship per Boccia Elements:

(a) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and

(b) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance, which includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner

3. THE VARIANCE IS CONSISTENT WITH THE SPIRIT OF THE ORDINANCE;

This test in the variance criteria was addressed in Bacon v. Enfield, 151, N.H. 85 (2005) as well as several earlier cases, including Biggs v. Sandwich, 124 N.H. 421 (1984). The Biggs case instructs the ZBA to first examine the underlying rationale of the ordinance, and then examine how it reflects the desires of the town voters. This threshold examination, together with review of testimony and consideration of their own knowledge, experience and observations (see Durant v. Town of Dunbarton, 121 N.H. 352 (1981) will enable the ZBA to make a thorough and informed decision on this component of the variance criteria. The Bacon case provides a concrete example of how ZBA's should examine the purpose of any ordinance, but particularly ordinances that address shoreland or wetlands protection, and then see whether the granting of the variance complies with that purpose.

4. SUBSTANTIAL JUSTICE IS DONE;

No well developed body of case law exists to define the parameters of "substantial justice" which needs to be shown by an applicant. The authors concur with Peter J. Loughlin, Esq., author of Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 3d ed., who finds that the Office of State Planning Handbook provides one of the better explanations of the concept for both applicant and boards. The OSP handbook indicates as follows:

"It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. 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. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Id. at § 24.11.

and

5. NO DIMINUTION IN THE VALUE OF SURROUNDING PROPERTIES.

This variance criteria has not been the focus of any extensive Supreme Court analysis to date. That said, in considering whether an application will diminish surrounding property values, it is appropriate for ZBA's to 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 this criteria.