

# Basics for the ZBA in NH

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Christopher L. Boldt, Esq.  
Donahue, Tucker & Ciandella,  
PLLC

(603) 766-1686

[cboldt@dtclawyers.com](mailto:cboldt@dtclawyers.com)

## The Written Materials Cover:

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- What
- Where
- When &
- How
- +
- What Next

## Who

- Full Members
- Alternates
- Quorum

## What

- What:
  - Appeals of Administrative Decisions
  - Special Exceptions
  - Variances
  - Equitable Waivers of Dimensional Criteria

## Where

- Public vs. Non-Public
- Site Walk
  - By Board
  - Individual
  - 3<sup>rd</sup> Parties/Abutters

## When

- That night;
- Continued to date certain;
- Never?

## How

- Written
- Findings and Rulings
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## What Next

- Requests for Rehearing
- Appeals to Superior Court

# What

- What:
  - Appeals of Administrative Decisions
  - Special Exceptions
  - Variances
  - Equitable Waivers of Dimensional Criteria

# Separation

- Checks & Balances
- No Legislative Function
- Quasi-Judicial
- Takes a vote of 3 to decide
- Option to continue

## Appeals of Administrative Decisions

- RSA 674:33, I(a) and RSA 676:5
  - hear appeals “taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer”
  - concerning the Zoning Ordinance.

## Appeals of Administrative Decisions

- RSA 676:5, II(a),
  - “administrative officer” = “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” is further defined to include “any decision involving construction, interpretation or application of the terms of the [zoning] ordinance” but does not include “a discretionary decision to commence formal or informal enforcement proceedings”.
- Sutton v. Town of Gilford, \_\_\_ N.H. \_\_\_ (No. 2008-674; Issued March 30, 2010)(challenges to building permit must first be made to ZBA).

## Appeals of Administrative Decisions

### ■ RSA 676:5, III,

- includes reviewing Planning Board decisions or determinations
- which are based upon the construction, interpretation or application of the zoning ordinance,
- unless the ordinance provisions in question concern innovative land use controls adopted under RSA 674:21 and those provisions delegate their administration to the PI Bd.

## Appeals of Administrative Decisions

- definition of “a reasonable time” should be contained in the ZBA’s Rules of Procedure and should be referenced in any decision of an administrative officer to provide fair notice to the potential appellant.
- As short as 14 days. See, Daniel v. Town of Henniker Zoning Board of Adjustment, 134 N.H. 174 (1991); see also, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (ordinance definition of 15 days sufficient).
- In the absence of such definition, however, the Superior Court will determine whether the time taken by the appellant is reasonable.
  - Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998) (appeal brought within 55 days was held to be outside a reasonable time);
  - 47 Residents of Deering, NH v. Town of Deering et al., 151 N.H. 795 (2005)(provision of zoning ordinance authorized ZBA to waive deadline for administrative appeal);
  - Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006)(affirming dismissal of declaratory judgment action brought five months after planning board’s site plan determination); and
  - McNamara v. Hersh, 157 N.H. 72 (2008) (affirming dismissal of declaratory judgment action brought eight months after ZBA denial of neighbor’s appeal of administrative decision).

## Appeals of Administrative Decisions

- RSA 676:6, an appeal to ZBA stays the action being appealed,
  - unless, upon certification of the administrative officer, the action concerns “imminent peril to life, health, safety, property, or the environment”.



## Appeals of Administrative Decisions

- may include constitutional challenges against ZO provisions
  - See, Carlson's Chrysler v. City of Concord, 156 N.H. 938 (2007)(provisions of sign ordinance against auto dealer's moving, electronic sign found to be constitutional);
  - Community Resources for Justice, Inc. v. City of Manchester, 157 N.H. 152 (2008) (ban on private correctional facilities in all districts violated State constitutional rights to equal protection; intermediate scrutiny requires the government to prove that the challenged legislation be substantially related to an important governmental objective);
  - Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633 (2006)(overturning prior Metzger standard of review and redefining the "rational basis test" to require that the legislation be only rationally related to a legitimate governmental interest without inquiry into whether the legislation unduly restricts individual rights or into whether there is a lesser restrictive means to accomplish that interest.); and
  - 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
  - law in state of flux
  - Thomas v. Town of Hooksett, 153 N.H. 717 (2006)(finding of municipal estoppel reversed where reliance on prior statements of Code Enforcement Officer and Planning Board Chairman which 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 30 day nor could applicant's attorney reasonably rely that she had such authority);
  - Sutton v. Town of Gilford, \_\_\_ N.H. \_\_\_ (No. 2008-674; Issued March 30, 2010)(representation by Town Planning Director concerning "non-merged" status of lots could not be justifiably relied upon); .

## Appeals of Administrative Decisions

### ■ De Novo Review

- Quellette v. Town of Kingston, 157 N.H. 604 (2008) (ZBA properly conducted *de novo* review under RSA 674:33 of Historic District Commission denial of certificate for supermarket).

## Special Exceptions

### ■ Different from Variances:

- Variance seeks permission to do something that is NOT allowed by ZO
- Spec. Exception seeks permission to do something that IS allowed by ZO if conditions met
- 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).
- Applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002).

## Special Exceptions

- Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Vol. 15 Land Use Planning and Zoning (3rd Ed., 2000), Section 23.02, p. 288.
- Finally, as with variances, special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958); see also, Loughlin, §23.05, p. 291;
  - but see, Garrison v. Town of Henniker, 154 N.H. 26 (2006) (Supreme Court noted without comment the restriction on the variance that it would terminate if the applicant discontinued the proposed use).

# Variations

## New Criteria

- Result of SB 147
- Purpose was to do away with the Boccia distinction between “use” and “area” variations for unnecessary hardship
- Effective for all “applications and appeals for variations” filed on or after January 1, 2010

## New 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

## New Criterion #5 A

- (5) 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.

## New 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.

## New Criteria

- Eliminates Boccia;
- “Returns” to Simplex;
- “Revives” Governor’s Island

# Variances

- Four key cases:
  - Simplex v. Town of Newington
  - Rancourt v. City of Manchester
  - Malachy Glen v. Town of Chichester
  - Farrar v. City of Keene

## Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001)

- Redevel. of Mfg. site into Shopping Center on line between Indust. & Comm. Districts
- ZBA denied variance; T. Ct. (J. Galway) affirmed
- “current restrictive approach” was “inconsistent with earlier articulations of unnecessary hardship”
- “inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate.”
- “constitutional rights of landowners” require that zoning ordinances “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.”
- tension between zoning ordinances and property rights

## Simplex Technologies

- prior req't for unnecessary hardship = no available use without a variance
- New Standard:
  - (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
- Rev & Remand to apply new standard

## Rancourt v. City of Manchester, 149 N.H. 51 (2003)

- 2 horses on 3 acre resid. lot; Dist. did not allow horses
- ZBA grants var.; T. Ct. aff'd; NHSC aff'd
- must show that the use is 'reasonable,' considering the property's unique setting in its environment
- unique, country setting; larger than surrounding lots; uniquely configured with more space at the rear; thick wooded buffer at paddock; proposed 1 ½ acres of stabling area was more than required to keep two animals in other zones



## Malachy Glen Associates, Inc. v. Town of Chichester,

155 N.H. 102 (2007)

- ZBA denied v's from buffer setbacks for previously approved storage units (but granted for driveway crossing); T.Ct. rev'd
- Remand when ZBA has not addressed factual issues; Render when "reasonable fact finder" could only reach one result
- Chester case - contrary to public interest is "related to" consistent with spirit of ord. & to be contrary ...v must unduly, and in marked degree conflict with zoning objectives
- uncontroverted evidence of surrounding uses & protections to wetlands
- reason for v request, cannot be used by ZBA to deny v
- Vigeant case - proposed project is presumed reasonable if it is a permitted use, that area v may not be denied because ZBA disagrees with proposed use, & whether property can be used differently from what proposed is not material
- Reducing the project by 50% would result in financial hardship and no reasonable trier of fact could have found otherwise
- Consideration of economic viability of scaled down version is not proper analysis under 'substantial justice' factor

## Farrar v. City of Keene,

158 N.H. 684 (2009)

- ZBA granted use & area v's for mixed use of historic 7K sq.ft. home in district that allows res. & office uses but silent on mix
- T. Ct. found no conflict w/ chair, aff'd area but rev'd use v based on lack of evid of 2<sup>nd</sup> & 3<sup>rd</sup> prongs of Simplex hardship
- Harrington v. Warner, above, for "non-dispositive factors": interference with reasonable use, hardship caused by unique setting of property, and whether essential character of neighborhood would be altered
- Size of lot, size of house, allowed uses, adjacent historic homes now offices with higher traffic volume
- ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, zoning restriction still interferes with [applicant]'s reasonable use of property as his residence
- 3<sup>rd</sup> prong – that v would not injure public/private rights - is coextensive with 1<sup>st</sup> & 3<sup>rd</sup> criteria for use v – namely that v not contrary to public interest and v is consistent with spirit of ord.
- Substantial justice = "any loss to the individual that is not outweighed by a gain to the general public is an injustice."

## Variances

- Appendix A as Hand-out on New Criteria

## Disability Variances

- RSA 674:33, V authorizes variances without a finding of unnecessary hardship “when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises”.
  - Requires that the v. “shall be in harmony with the general purpose and intent” of the ordinance. RSA 674:33, V(a).
  - ZBA is allowed to include a finding that the v. shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

## Equitable Waivers of Dimensional Requirements

- RSA 674:33-a, ZBA can grant equitable waivers from
- physical layout, mathematical or dimensional requirements imposed by ZO
  - but not use restrictions – see, Schroeder v. Windham, 158 N.H. 187 (2008)

## Equitable Waivers of Dimensional Requirements

- Owner has burden of proof on four (4) criteria:
  - that the violation was not noticed or discovered by any owner, agent or municipal representative, until after the violating structure had been substantially complete, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. RSA 674:33-a, 1(a);
  - that the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith on the part of the owner or its agents, but was instead caused by either a good faith error in measurement or calculation made by the owner or its agent, or by an error of ordinance interpretation or applicability by a municipal official in the process of issuing a permit over which he has authority. RSA 674:33-a, 1(b);

## Equitable Waivers of Dimensional Requirements

- that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and
- that due to the degree of construction or investment made in ignorance of the violation, the cost of correction so far outweighs any public benefit to be gained such that it would be inequitable to require a correction. RSA 674:33-a, I(d).

## Equitable Waivers of Dimensional Requirements

- If the violation has existed for more than 10 years and that no enforcement action, including written notice of violation, has commenced during such time by the municipality or any person directly affected, then Owner can gain a waiver even without satisfying the first and second criteria. RSA 674:33-a, II.

## Equitable Waivers of Dimensional Requirements

- Property shall not be deemed a “non-conforming use” once the waiver is granted
- Waiver shall not exempt future use, construction, reconstruction, or additions from full compliance with the ordinance. RSA 674:33-a, IV.
- Does not to alter the principle of an owner’s constructive knowledge of all applicable requirements, nor does it impose any duty on municipal officials to guarantee the correctness of plans reviewed or property inspected by them.  
Id.

Where

## Public v. Non-Public

- ZBA must hold the public hearing within 30 days of receipt of notice to appeal. RSA 676:7, II.
  - Applicant is not entitled to the relief sought merely because this time requirement is not met by the board. Barry v. Amherst, 121 N.H. 335 (1981)(finding that the legislature did not provide that such failure would constitute approval).

## Public v. Non-Public

- RSA 91-A applies to ZBA as “public body”
- Minutes must be available for inspection within 5 business days
- Ability to go into “non-public” extremely limited under 91-A:3
  - To discuss pending litigation
  - NOT to discuss a pending application
- If necessary, have “non-meeting” with Atty
- No discussions by email

## Site Walks

- Schedule during Public Meeting
- Post Notice
- Public allowed to come if a quorum of the Board is present
- Can take one individually
- Limit discussions – otherwise notes must be kept and minutes generated

## When

- That night
  - If possible but not necessary
  - Comport with Due Process
  - Avoid 91-A issues
    - Drafts circulated to a quorum are not protected
- If continued, set to date certain in public meeting

## When

### ■ Never?

- NO, must make a decision
- charged with the duty to be of assistance to its applicants and citizens as they attempt to maneuver the “bureaucratic maze” of regulations, ordinances and hearings, while not expressly advising them. See, Carbonneau v. Rye, 120 N.H. 96 (1980); and City of Dover v. Kimball, 136 N.H. 441 (1992); compare with, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (no constitutional duty to take initiative to educate abutters about project and permit/appeal process).
- Mandamus

## How

### ■ RSA 676:3, ZBA must issue

- final written decision which either approves or disapproves an application;
- if denied, the board “shall provide the applicant with written reasons for the disapproval.” RSA 676:3, I
- per 2009 amendments, written decision of approval must include “a detailed description of all conditions necessary to obtain a final approval”; and when a plat is to be recorded that “the final written decision, including all conditions of approval, shall be recorded with or on the plat.” See, Laws of 2009, Chap. 307 (SB 189).



## How

- Thomas v. Town of Hooksett, 153 N.H. 717 (2006),
  - NHSC vacated T Ct's rev's of ZBA's grant of v. & rem'd
  - T Ct's rev's based in part on no finding by ZBA as to why departure from ZO justified.
  - Applicant had addressed 5 elements for use v. in application and ZBA "briefly discussed the variance and ruled unanimously in favor of granting it."
  - "ZBA's decision to grant v. amounted to implicit finding by the board that the Simplex factors were met." Id., at 724, *citing*, Pappas v. City of Manchester Zoning Board, 117 N.H. 622, 625 (1977).
  - "Although disclosure of specific findings of fact by board of adjustment may often facilitate judicial review, absence of findings, at least where there is no request therefore, is not in and of itself error. Id., *again citing*, Pappas."

## How

- RSA 674:33, II, ZBA is entitled to attach conditions to its grant of relief and any failure to comply with the same may constitute a violation. Healey v. New Durham, 140 N.H. 232 (1995).
- If conditions are imposed, clarity and specificity are required for both performance and enforcement purposes. Geiss v. Bourassa, 140 N.H. 629 (1996). See also, 2009 amendments to RSA 676:3 via SB 189.
- Garrison v. Henniker, 154 N.H. 26 (2006)

## What Next

## Requests for Rehearing

- Jurisdictional pre-requisite for further appeal
  - Kalil v. Town of Dummer, \_\_\_ N.H. \_\_\_ (Nos. 2009-17 & 2009-18; Issued February 11, 2010)(appeal brought in guise of inverse condemnation claim six months after ZBA's denial of variance application was barred);
  - Cardinal Development Corporation v. Winchester ZBA, 157 N.H. 710 (2008) (rq/reh faxed to ZBA office after close of business on Monday following 30th day not timely filed where ZBA did not have procedural rule allowing faxed or after-hours filings);
  - McNamara v. Hersh, 157 N.H. 72 (2008)(rejecting attempt to couch late filed appeal of administrative decision as a declaratory judgment action);
  - Mountain Valley Mall Assoc. v. Conway, 144 N.H. 642 (2000) (appeal correctly dismissed where plaintiff failed to file rq/reh on special exception);
  - but see, Colla v. Town of Hanover, 153 N.H. 206 (2006)(rev'g disml of Superior Ct appeal where rq/reh listing such grounds as "decision is unreasonable", "decision denies const. rights to equal protection and due process", "decision is contrary to Boccia", and "decision is contrary to ZO" deemed sufficient).

## Requests for Rehearing

- RSA 677:2,
  - a motion or request of rehearing must be filed with ZBA within 30 days after any order or decision
  - 30 day period is now calculated in calendar days “beginning with the date following the date upon which the board voted to approve or disapprove the application.”
  - No more “30 means 29” trap

## Requests for Rehearing

- Once rq/reh filed, ZBA is obligated to either grant or deny rq (or suspend order or decision complained of pending further consideration) w/in 30 days.
- The purpose is to afford ZBA opportunity to correct its own mistakes; and a board is entitled to reconsider its prior ruling and upon reconsideration make the same decision for the same or different reasons. See, Fisher v. Town of Boscawen, 121 N.H. 438 (1981)(decided under former statute).

## Requests for Rehearing

- MacDonald v. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171 (2005)
  - Whether 2<sup>nd</sup> rq/reh required when ZBA ruled on a new issue in its denial of rq.
  - Statutory scheme does not anticipate ZBA rendering new findings or rulings in denial
  - Held that when ZBA denies rq/reh, the aggrieved party need not file 2<sup>nd</sup> rq.
  - “A better practice for ZBA to take when it identifies new grounds for its initial decision and intends to make new findings and rulings ... would be to grant reh without adding new grounds.” Id., at 176.
  - After reh and new order citing new grounds for denial, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon
  - Superior Ct may consider an issue not first set forth in rq/reh under “good cause” exception in RSA 677:3, I. Id.

## Requests for Rehearing

- ZBA’s decision must be entered upon records and communicated to applicant in writing
  - not required to state reasons or to hold public hearing (although the decision must be made at a public meeting). See, Loughlin, §21.16, page 268.
  - Cf., DHB v. Town of Pembroke, 152 N.H. 314 (2005)(diff. betw. public hearing and public meeting).
- If no action within the 30 day period and applicant does not request extension of time, it may be assumed that the motion has been denied and that applicant should proceed to Superior Court. Id., citing, Lawlor v. Salem, 116 N.H. 61 (1976)(ordinance provided that if rq/reh not acted upon within 10 days it was automatically considered denied).

## Requests for Rehearing

- 74 Cox Street, LLC v. City of Nashua, 156 N.H. 228 (2007)
  - Recognizing right of ZBA to reconsider decision to deny a rehearing within the thirty-day limit.
    - Ct's language refers to "municipal boards" and "prior to final decision"
    - Interests of justice

## Appeals to Superior Court

- RSA 677:4, "any person aggrieved by any order or decision" of ZBA may file petition w/ Superior Ct within 30 days of date of vote to deny rq/reh.
- "Person aggrieved" includes any party entitled to rq/reh under RSA 677:2
  - use of "includes" implies list is not exhaustive, NHSC has determined does not include all possible municipal boards. Hooksett Conservation Comm'n v. Hooksett ZBA, 149 N.H. 63 (2003)

## Appeals to Superior Court

- Petition must specify the grounds upon which ZBA's decision or order is claimed to be unlawful or unreasonable
- RSA 677:6, BOP upon the party seeking to set aside the ZBA's order or decision

## Appeals to Superior Court

- Standard for Review
  - factual findings of the ZBA are deemed *prima facie* lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is persuaded, based upon a balance of probabilities, on the evidence before it, that the ZBA's decision is unreasonable
- “In close cases, where some evidence in the record supports ZBA's decision, Superior Ct. must afford deference to the ZBA.” Farrar v. Keene, 158 N.H. 684 (2009)

## Appeals to Superior Court

- Orders of Notice
  - (a) date for Appearance;
  - (b) date for Answer and Certified Record must be filed; and
  - (c) date for hearing on the merits. See, RSA 677:8 and RSA 677:12.
- The Answer is a more detailed document wherein each paragraph of the petition is either admitted, denied, or further explained in some way.
  - Prepared by muni's atty with active help of ZBA Chair & Secretary
- Certified Record must contain full and complete copy of the ZBA's file on the matter
  - not only underlying application and any documents received into evidence by the ZBA, but also all notices, minutes of meetings, decisions and rq/reh

## Appeals to Superior Court

- Unlike effect of filing original appeal to ZBA, no automatic stay of any enforcement proceeding via the filing of petition with Superior Ct. RSA 677:9.
- Court, “on application and notice, for good cause shown” grant restraining order against such enforcement pending outcome of case.
  - If such relief is requested, the Orders of Notice will also include a date for preliminary hearing on whether restraining order is warranted
    - usually include requirement of showing of irreparable harm

## Appeals to Superior Court

- Hearing on Merits
  - Offers of Proof
  - Certified Record
  - Seldom live testimony

Questions





■ Good Luck!