

LEGAL LUNCH AND LEARN WEBINAR SERIES

ZBA BASICS

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Duty to Assist

- Land Use Boards have an obligation under the New Hampshire Constitution to provide assistance to all citizens. *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- The subdivision/site plan process, or zoning relief process before the ZBA, is not a completely adversarial process.
- Land Use Boards have a duty to reasonably advise applicants and otherwise work with them as they attempt to negotiate the permit process.



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Alternate Participation

- “The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.”
RSA 676:1
- Alternates should be permitted to ask questions during public hearing
- Once the public hearing is closed and the application is returned to the board for a decision, the alternate’s participation should end.



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Public Hearing Rules

- Should be written as part of the board’s rules of procedure adopted under RSA 676:1
- Applicant presentation time limit?
- Abutter/easement holder/directly affected persons time limit is ok (5 minutes?)
- Testimony shall be germane to the plat/plan/application
- Permit rebuttal by applicant?



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Who Has the Right to be Heard By the ZBA - RSA 676:7?

- ✓ Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing.
- ✓ At the public hearing:
 - The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony
 - The board shall also hear from all nonabutters who can demonstrate that they are affected directly by the proposal under consideration.
 - The board may hear such other persons as it deems appropriate.
 - Any party may appear in person or by the party's agent or attorney



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What is the Role of the ZBA?

Safety valve

Quasi-Judicial

No enforcement authority

Obligation to assist public (reasonable)

Rules of procedure

No requirement for monthly meeting



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What is the ZBA's Jurisdiction?

- RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled, RSA 674:33, V
- RSA 236:115: Certificates of approval, junkyards
- Often serves as building code board of appeals



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What Decisions can be appealed to the ZBA?

- Appeals to the board of adjustment concerning any matter within the powers set forth in RSA 674:33 may be made “by any person aggrieved, or by any officer, department, board or bureau of the municipality affected by any decision of an administrative officer.”
- “Administrative officer” has been defined to mean any municipal official or board responsible for issuing permits or for enforcing the ordinance. It includes the building inspector, or other official or board with such responsibility.
- The term decision of the administrative officer includes any decision involving construction, interpretation, or application of the terms of the ordinance. It does not include discretionary decisions to enforce an ordinance but does include any construction or interpretation of the ordinance being enforced.15 *Land Use Planning and Zoning* § 21.10 (2021)



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“One Bite of the Apple” *Fisher v. Dover*

- ▶ Subsequent applications by unsuccessful petitioners are limited.
- ▶ Second application must be materially different in nature and degree from the original application. *Fisher v. Dover*, 120 N.H. 187 (1980)
- ▶ A change in applicable legal standards may be such a change. *Brandt v. Somersworth*, 162 N.H. 553 (2011)
- ▶ If the applicant has addressed/changed things that were reason for denial in original application—could be a material difference



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The Decision RSA 674:33 & 676:3

- 3 members must concur
- Must use one consistent voting method, RSA 674:33, I(c)
- Any change in the board's voting method shall not take effect until 60 days after adoption and shall apply only prospectively
- Decision must be in writing
 - (State reasons for approval/ disapproval)
- Conditions of approval?
- Issue decision w/in 5 business days



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ZBA Decisions

MEMBER	HARDSHIP 1 (A)	HARDSHIP 2 (B)	PUBLIC INTEREST	SPIRIT & SUB. JUSTICE	DIMINUTION OF VALUE
Don Burns	Met	Met	Met	Met	Met
Garth Orsmond	Met	Met	Met	Met	Met
June Branscom	Met	Met	Met	Met	Met
Michael O'Neil	Met	Met	Met	Met	Met
Harry Hadaway	Met	Met	Met	Met	Met

A motion was made by Mr. Orsmond and seconded by Ms. Branscom to grant the request for Case #101-23V: Bird's Landing, LLC (Charles Sargent, Applicant)- a variance from Zoning Ordinance Sections 6.02 and 6.07 to allow 147.92' of lot frontage where 200' is required for one of three 2+-acre lots proposed for the subdivision of an existing ~8.9-acre parcel. The vote carried with the unanimous vote of the Board.

A motion was made by Mr. O'Neil and seconded by Ms. Branscom to adopt the following Finding of Fact:

- 1. Special conditions of the property that distinguish it from other properties in the area are that it is an 8-acre lot with a proposed 3-lot subdivision with each lot over 2 acres which is consistent with the public purposes of the minimum lot frontage provision.*

The motion carried by unanimous vote of the Board.

New Law – Findings of Fact – RSA 676:3, I

- The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant.
- *The decision shall include specific written findings of fact that support the decision.*
- *Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal*, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.
- If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.



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New Law – Time for Decision – RSA 674:33, VIII

- The ZBA shall begin formal consideration and shall approve or disapprove applications within 90 days of the date of receipt
- The applicant may waive this requirement and consent to a mutually agreeable extension
- If the ZBA determines it lacks sufficient information to make a final decision on an application, and the applicant does not consent to an extension, the board may deny the application without prejudice
- If an application is denied without prejudice the applicant may submit a new application for the same or substantially similar request for relief



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ZBA Authority to Rule Zoning Relief is Unnecessary

- Contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance.
- That the mere filing of a variance application does not limit the ZBA's ability to determine whether the applicant's proposed use of property requires a variance in the first place.

Bartlett v. City of Manchester, 164 N.H. 634, 635 (2013)



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Variance – Origins & History:

- The current language of RSA 674:33, I (a) (2) comes, word for word, from the Standard State Zoning Enabling Act and has been part of New Hampshire law since 1925.
- It is probably safe to state that no single statutory provision has been the source of more litigation - between 1976 and 1989 there were approximately fifty cases decided by the New Hampshire Supreme Court that dealt with variances.

15 Land Use Planning and Zoning § 24.01 (2025)



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Purpose of Variance

- A variance is in the nature of a waiver of the strict letter of the zoning ordinance without sacrificing its spirit and purpose.
- A variance results in the establishment of a nonconforming use upon which the landowner has a right to rely.
- Variances are permitted by the terms of a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated.

15 Land Use Planning and Zoning § 24.02 (2025)



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Who May Apply for a Variance:

Some ordinances, and the rules of some boards, require the owner to sign the application. Therefore, where the property is under option and the real party in interest is the option holder, it makes a good deal of sense to avoid potential problems by having the application signed by the owner himself or by an attorney or agent authorized to sign for the owner, as well as by the option holder.

15 Land Use Planning and Zoning § 24.04 (2025)



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Placing Conditions on Variances

- RSA 674:33, II provides that the zoning board of adjustment shall have the power to “make such order or decision as ought to be made” in exercising its authority to grant variances.
- Conditions placed upon variances will generally be upheld unless they are beyond the authority of the board, outside the law, or plainly unreasonable.
- If conditions are imposed, they should be spelled out in detail in the board’s decision.

15 Land Use Planning and Zoning § 24.06 (2025)



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Variance Runs with the Land

- A variance runs with the land and passes with the land to a subsequent purchaser.
- By definition, a variance is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner.
- Once granted, a variance can be enjoyed by both present and subsequent owners of the land.

15 Land Use Planning and Zoning § 24.05 (2025)



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Conditions for Granting Variance:

- (A) The variance will not be contrary to the public interest;
- (B) The spirit of the ordinance is observed;
- (C) Substantial justice is done;
- (D) The values of surrounding properties are not diminished; and
- (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship

For purposes of this subparagraph (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; and

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) 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.



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Not Contrary to the Public Interest:

- *Gray v. Seidel and Town of Meredith*, 143 N.H. 327 (1999) the Court noted that the trial court and ZBA had committed an error of law in requiring the landowner to show that the granting of the variance would be a benefit to the public interest
- There are two methods for ascertaining whether granting a variance would violate an ordinance's basic zoning objectives: (1) examining whether granting the variance would alter the essential character of the neighborhood or, in the alternative; and (2) examining whether granting the variance would threaten the public health, safety, or welfare. *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508 (2011)

15 Land Use Planning and Zoning § 24.10 (2025)



Granting Permit will do Substantial Justice

- Examine whether any loss to an individual is not outweighed by a gain to the general public and thus constitutes an injustice, courts will look at whether the proposed development is consistent with the area's present use. *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508 (2011)
- For instance, where a proposed storage facility posed no further threat to wetlands, was appropriate for the area and did not harm abutters and, therefore, the public would realize no appreciable gain from denying a variance. *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102 (2007).

15 Land Use Planning and Zoning § 24.11 (2025)



The values of surrounding properties are not diminished

- Testimony as to the effect on value can be presented by the petitioner, abutters, appraisers, realtors, or other concerned parties.
- Board members are permitted to consider their own knowledge of conditions and circumstances resulting from their own familiarity with the area involved.
- Like any trier of fact, the board is entitled to decide how much, if any, weight to give testimony presented to it regarding value as well as on any other point. The board does not have to accept the conclusions of experts testifying before it.

15 Land Use Planning and Zoning § 24.09 (2025)



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Literal enforcement of the zoning ordinance would result in an unnecessary hardship.

1. "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - ✓ 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;
 - ✓ The proposed use is a reasonable one.

OR If #1 not satisfied:

2. 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.



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Suggestions on How to Determine Hardship:

- 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.
- The second of the two parts of the hardship criteria in RSA 674:33, I(b)(1)(B) – “The proposed use is a reasonable one” – cannot be considered in isolation and must be read in conjunction with the introductory language in subparagraph “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.



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Suggestions on How to Determine Hardship (cont.)

If paragraph #1 is not satisfied, the landowner must establish the standard in *Governor's Island Club v. Gifford*, 124 N.H. 126 (1983):

- ✓ For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land. If the land is reasonably suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met. *Governor's Island Club*, 124 N.H. at 130.
- ✓ The instances where relief would be available under this particular provision are believed to be relatively few.

15 Land Use Planning and Zoning § 24.19 (2025)



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Special Conditions - Self Created Hardship

- Special conditions can be determined based upon the proposed use itself having “special conditions.” Is the subject property itself unique in its environment? *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508, 518 (2011).
- Self-created hardship should be only one factor to be considered when assessing hardship. It should not in and of itself justify denial of a variance. A denial based exclusively on self-created hardship, without more, is not conclusive on the issue of undue hardship. *Kvader v. Town of Chesterfield*, No. 2010-0151, 2011 N.H. LEXIS 45, at *9 (Mar. 21, 2011)



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Cumulative Impact *Perreault v. New Hampton*.

- *Perreault v. Town of New Hampton*, 171 N.H. 183 (2018).
- Applicant sought variance to construct a shed within the 20-foot side yard set back, that was denied by the ZBA.
- There was evidence of sixteen other properties, all located on the same road as the applicants' property, with storage buildings in locations that the applicants asserted were in violation of the setback requirements.
- According to the applicants, this evidence demonstrated that their proposed shed would not alter the essential character of the neighborhood or threaten the public health, safety, or welfare.
- The ZBA's denial was based upon the conclusion that allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.
- The Court assumed without deciding, that cumulative impact is a proper consideration in the variance context.



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Status of Variances

- A variance runs with the land and passes with the land to a subsequent purchaser.
- By definition, a variance is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner.
- Once granted, a variance can be enjoyed by both present and subsequent owners of the land. 15 *Land Use Planning and Zoning* § 24.05 (2021)



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Special Exceptions

- The review standards for variances does not apply to special exceptions.
- A special exception is a use permitted upon certain conditions as set forth in a town's zoning ordinance.
- If the conditions for granting a special exception are met, the zoning board must grant it, and by so doing, no exception to the application of the ordinance is truly made.
- A special exception is not the equivalent of a nonconforming use. Uses that are permitted as special exceptions are deemed to be permitted so long as they satisfy the special exception provisions in the ordinance.



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Variances from the Terms of a Special Exception?

- When a ZBA is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth in the zoning ordinance.
- While a ZBA may grant a special exception, it cannot decide to waive any of the requirements for a special exception spelled out in the zoning ordinance.
- If a landowner cannot meet the conditions required for granting of a special exception, it may still be possible to obtain similar relief through the granting of a variance
- 15 *Land Use Planning and Zoning* § 23.02, § 23.06 (2021)



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Status of Special Exception

- A special exception is not personal to the applicant, and it cannot be limited to the use only of the applicant.
- A special exception runs with the land and not a particular owner, hence a condition restricting the use to the particular owner would be inappropriate. 15 *Land Use Planning and Zoning* § 23.05 (2021)



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Administrative Appeals

- The board rules on whether the building inspector/code enforcement officer correctly applied regulations when denying a permit
- When interpreting the ordinance in an administrative appeal, the board must confine its review to the language of the ordinance when that language is plain and unambiguous
- The ZBA can substitute its judgment for that of the administrative official and is not required to give deference to the rulings of the administrative official.
- The ZBA's jurisdiction is appellate not original – meaning the board cannot render an advisory opinion on the meaning of the zoning ordinance in the absence of an appeal by an aggrieved property owner.



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Time for Exercising Variances and Special Exceptions



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,...



2018 amendment allows for termination of variances granted prior to 8/19/13 by zoning amendment



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Rehearings, RSA 677:2

- Motion must be filed within 30 days
- ZBA may even reconsider its own decision within that time period
- Hold meeting to determine whether to grant rehearing
- Grant rehearing when board committed technical error or there is new evidence that was not available at the time of the first hearing
- If rehearing is granted, may consider certain issue(s) or rehear entire case



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Action on Motion for Rehearing

- The N.H. Supreme Court has made it clear that in furtherance of the finality of decisions by zoning boards, rehearings should not be lightly granted.
- Rehearings should only be granted if the petitioner can demonstrate that the board committed technical error or that there is new evidence that was not available at the time of the first hearing.
- Such new evidence should reflect a change in conditions which occurred subsequent to the original hearing or which was unavailable at the time of the original hearing. 15 *Land Use Planning and Zoning* § 21.18 (2021)



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Beyond the Rehearing

- ▶ Affected party with standing may appeal to Superior Court within 30 days, RSA 677:4, or, if the application involves housing and housing development, to the Housing Appeals Board.
- ▶ Be sure to compile and preserve “the record” as completely as possible.
- ▶ If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.

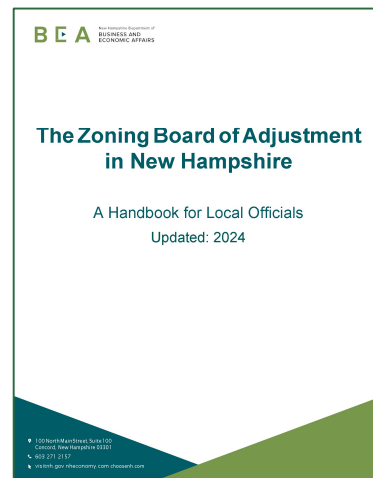


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Good Resource: ZBA Handbook

- ▶ Downloadable
- ▶ Free digitally
- ▶ Searchable
- ▶ Linked TOC



<https://www.nheconomy.com/office-of-planning-and-development/resources/zoning-board-handbook>



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