

Variations and Special Exceptions

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Variations

A variance is an authorization to a property owner to depart from literal requirements of zoning regulations in utilization of his property in cases in which strict enforcement of the zoning regulations would cause undue hardship. A variance stays with the property regardless of whether the property is sold. Variations are typically thought of as falling into two categories: use variations and area variations. A use variance is a variance permitting a use that is otherwise prohibited in a particular zoning district by the zoning ordinance. An area variance is a variance from restrictions which relate to the land itself, such as yard setbacks and height restrictions. Although the distinction between a use variance and an area variance was once important for purposes of establishing hardship, this is no longer the case.

Currently, in order for a Zoning Board of Adjustment to grant a variance, the applicant must prove that they meet all five parts of the test outlined in RSA 674:33. Accordingly, they must prove:

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

2. The spirit of the ordinance is observed;

The purpose of a variance is to allow for a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit or purpose. *Simplex Technologies, Inv. V. Town of Newington*, 145 N.H. 727, 729 (2001).

3. Substantial justice is done;

The guiding rule to determine substantial justice is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. *Farrar v. City of Keene*, 158 N.H. 684, 692 (2009).

4. The values of surrounding properties are not diminished; and

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

"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.

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 courts have determined that an applicant must show that the hardship is a result of specific conditions of the property and not the area in general. *Garrison v. Town of Henniker*, 154 N.H. 26, 32. In fact, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district, but instead, it must arise from the property and not from the individual plight of the landowner. *Id.* at 32-33. *See also Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102, (2007). Accordingly, satisfaction of the requirement that the circumstances which result in unnecessary hardship be peculiar to the applicant's property is most clearly established where the hardship relates to the physical characteristics of the land. *Id.* at 107-108.

It should be noted that the criteria used for determining "unnecessary hardship" set forth above applies 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. It is also important to remember that in order to obtain a variance, an applicant must establish that he meets all five criteria. If a Zoning Board determines that an applicant meets 4 out of the 5 criteria, the variance must be denied. Additionally, the Zoning Board of Adjustment has a right to attach reasonably related stipulations or conditions to a variance.

It is also significant to point out that it is well settled law in New Hampshire that once a Zoning Board of Adjustment denies a variance application, the Board may not review subsequent applications unless the

applicant can demonstrate that there is a material change of circumstances affecting the merits of the application. *Brandt Development Company of New Hampshire, LLC v. City of Somersworth*, 162 N.H. 553, 556 (2011). In New Hampshire, the applicant must show either (1) material changes in the proposed use of the land or (2) material changes in the circumstances affecting the merits of the application. *Id.* The *Brandt* case did, however, make it clear that the changes to the variance standard itself do constitute a material change in circumstances. For example, a variance application that was denied prior to the *Simplex* case may be heard once again by the Zoning Board under the current variance standards, even if it is for the same variance relief.

A Bit of History-Unnecessary Hardship

Prior to the case of *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001), meeting the unnecessary hardship standard was almost impossible for those seeking a variance. Before the *Simplex* decision, in order to establish unnecessary hardship, property owners had to demonstrate that the deprivation resulting from application of the ordinance was so great as to effectively prevent the owner from making any reasonable use of the land.

In *Simplex*, the court determined that the restrictive approach to determining hardship was inconsistent with its constitutional analysis concerning zoning laws. To safeguard the constitutional rights of landowners, we insist 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." *Simplex* at 731. In this balancing process, constitutional property rights must be respected and

protected from unreasonable zoning restrictions. As a result, the court determined that the definition of unnecessary hardship had become too restrictive. Therefore, in *Simplex*, the court departed from the restrictive approach that had previously defined unnecessary hardship and adopted an approach more considerate of the constitutional right to enjoy property. Under the criteria in *Simplex*, unnecessary hardship was established by demonstrating that: (1) 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; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

As briefly mentioned above, in 2004, the court made a distinction in the criteria for establishing unnecessary hardship between use variances and area variances in *Boccia v. City of Portsmouth*, 151 N.H. 85, 90 (2004). This however, is no longer the case in New Hampshire. Recent changes to the statute have removed the need to differentiate between use and area variances for purposes of establishing unnecessary hardship.

Special Exceptions

A special exception to a zoning ordinance refers to special uses which are permissive in a particular zone under the ordinance and are neither nonconforming uses nor akin to a variance. These uses are considered to be appropriate within the zoning district, but not at every location or without restrictions or conditions being imposed on the particular use. The main purpose of a special exception is to allow the Zoning Board of Adjustment the opportunity to review certain uses of property and their specific locations within a particular zone. Although

these uses are not expressly prohibited within the zoning district, they may not be appropriate in all locations. This process allows the Zoning Board of Adjustment to review the specific use on a case by case basis. Similar to a variance request, an applicant must satisfy certain criteria in order to obtain a Special Exception. RSA 674:33(IV) grants the Zoning Board of Adjustment the power to give special exceptions that are compatible with the general purpose and intent of the zoning ordinance and are in accordance with rules specified in the ordinance. Typical criteria to obtain a Special Exception include items such as:

- The requested use is specifically authorized in the ordinance.
- The requested use will not create undue traffic congestion or unduly impair pedestrian safety.
- The requested use will not overload any public or private water, drainage, or sewer system or any other municipal system, nor will there be any significant increase in storm water runoff onto adjacent property or streets.
- The requested use will not create excessive demand for municipal police, fire protection, schools or solid waste disposal services.
- The requested use will not create hazards to the health, safety or general welfare of the public, nor be detrimental to the use of or out of character with the adjacent neighborhood.

- The proposed location is appropriate for the requested use.

- The requested use is consistent with the spirit and intent of the ordinance and Master Plan.

It should be noted that these are just some of the general requirements that may be included in a zoning ordinance for granting a special exception. It is not uncommon that a city or town will have specific provisions in addition to these that pertain specifically to the needs and features of their municipality.