

Local Land Use Authority: A Primer of Relevant Laws for Those Appearing Before a Municipal Zoning Board of Adjustment

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What follows will provide an overview of local authorities and the process for siting commercial and/or residential developments in a typical municipality. This is not intended to be an exhaustive review but an introduction to those unfamiliar with the applicable law and procedure before local Zoning Boards of Adjustment.

Jurisdiction: What might bring a party before the Municipal Zoning Board?

Zoning Board of Adjustment: Jurisdiction and Procedures

The Zoning Board of Adjustment (ZBA) has the following powers under RSA 674:33, I(a):

1. Hear and decide administrative appeals (*see* RSA 676:5);
2. Grant Variances from the terms of the municipal Zoning Ordinance;
3. Grant Special Exceptions from the terms of the Zoning Ordinance; and
4. Grant Equitable Waivers from the Zoning Ordinance's dimensional requirements.

A person or party may find themselves before a municipal ZBA if the Zoning Ordinance requires the applicant to seek a Special Exception, if the proposal is not permitted so that a Variance from the restrictions of the Zoning Ordinance is required, or to appeal an administrative decision.

Special Exceptions

A Special Exception is use of land or buildings that is explicitly permitted by the Zoning Ordinance, but only upon satisfaction of specific conditions set forth in the Ordinance. Special Exceptions are useful in that they provide for types of land use which are necessary and desirable, but potentially incompatible with uses usually allowed in a particular district. In granting a Special Exception, the ZBA must ensure that the proposal is in "harmony with the general purpose and intent" of the Zoning Ordinance, as

well as satisfies the “general or specific rules contained in the Ordinance.” RSA 674:33, I(IV).

Variations

A Variance is a waiver, granted by the ZBA to the owner of the property in question, from the strict requirements of the Zoning Ordinance, without theoretically sacrificing the Ordinance’s spirit and purpose. A Variance is meant as a relief valve from the Ordinance, which, if strictly applied, would deny a property owner all beneficial use of his land and thus possibly amount to a regulatory taking or inverse condemnation. In order to grant a Variance, the ZBA must find that:

1. No diminution in the value of surrounding properties will result;
2. Granting the permit will not be contrary to the public interest;
3. Denial would result in unnecessary hardship to the property owner;
4. Substantial justice will be done by granting the permit; and
5. The proposed use is not contrary to the spirit of the ordinance. RSA 674:33, I(b); *see also Chester Rod and Gun Club v. Town of Chester*, 152 NH 577 (2005).

The most difficult of these 5 factors to satisfy is the finding of an “unnecessary hardship.” Further complicating this factor, the Supreme Court has recently distinguished between Use and Area Variations, and provided differing analyses depending on the nature of the Variance required. *See Simplex v. Town of Newington*, 145 NH 727 (2001), *Boccia v. City of Portsmouth*, 151 NH 85 (2004), and their respective progeny. In its simplest form, a Use Variance is appropriate when the Zoning Ordinance does not allow the proposed use of the property in its particular district, such as a commercial use in a residential district. An Area Variations is required when the proposed use is allowed, but the proposal cannot satisfy the dimensional requirements for a particular district, such as setbacks or frontage requirements. Recent proposed legislation, HB 446 (passed as a part of SB 147), effective January 1, 2010, would do away with this distinction between use vs. area variations, and seeks to codify the Court’s interpretation of the “unnecessary hardship” criteria. There is significant debate regarding the recently passed legislation, which is beyond the scope of this article.

Administrative Decisions

The ZBA also hears appeals from “decision[s] of the administrative officer” pursuant to RSA 676:5. These administrative decisions, defined to include those decisions that involve the “construction, interpretation or application” of the Ordinance, may include appealing the issuance or denial of a building permit, as well as a decision by the Planning Board regarding Site Plan or Subdivision Review. *See* RSA 676:5, III. Administrative decisions must be appealed within a “reasonable time”, and some ZBA’s specify the time period for such appeals. The Supreme Court has stated that the appeal from the Planning Board to the ZBA under RSA 676:5 is a **mandatory appeal**, and if not filed with the ZBA, the Superior Court has no jurisdiction to hear any subsequent appeal. *See Route 12 Books and Video v. Town of Troy*, 149 NH 569 (2003). The statute’s inclusion of Planning Board decisions based upon the Planning Board’s interpretation of the Ordinance can present a problem for those appearing before the Planning Board. Interested parties must determine if the Planning Board’s decision was based upon its interpretation of the Ordinance and then appeal accordingly. In practice, this can be a very difficult decision to make. Many parties file simultaneous appeals, one an appeal to the ZBA of any decision made by the Planning Board based upon the interpretation of the Ordinance, and the other appeal to Superior Court, via RSA 677:15,I, regarding decisions of the Planning Board under its powers of Site Plan or Subdivision Review.

Considerations When Appealing an Adverse Decision

Record Before the Board and Subsequently the Court

It is imperative that while appearing before the Zoning Board, the parties do an adequate job of creating the “record.” The Record is important because if any party appeals an adverse decision to Superior Court, the subsequent hearing before the Court will be limited to the record compiled by the Board from the proceedings below. The Record is the compilation of all written materials submitted to the Board by any party before it, and also includes the Board’s own materials such as meeting minutes, notices, and agendas. Each party bears the responsibility for ensuring that any materials, legal

issues, or items that are relevant to the matter before the Board, or to that party's position, must be generated, filed and affirmatively made a part of the Record.

Appeal of Adverse Decisions to Superior Court

For zoning related decisions or orders, the appealing party must first request the ZBA to rehear, or reconsider, the decision or order within 30 days. RSA 677:2. Note that RSA 677:2 even allows the Board of Selectmen of a municipality to appeal the decision of its Zoning Board. Appeals must be made to Superior Court within 30 days of the ZBA's adverse decision on rehearing. RSA 677:4. In the Request for Rehearing filed with the ZBA, the appealing party **must** "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 677:3. Any argument made to the Superior Court **must** first have been raised in a Request for Rehearing to the ZBA, otherwise the Superior Court will refuse to hear it as it does not have jurisdiction to do so. *See Shaw v. City of Manchester*, 118 NH 158 (1978). This procedure ensures that the ZBA will have an opportunity to correct any action illegally taken or any illegal interpretation or application of the Ordinance, if correction is necessary, before an appeal to Superior Court is filed. *See Bourassa v. Keene*, 108 NH 261 (1967) (decided under prior law). The ZBA is not required to grant rehearing, so it is not uncommon for the ZBA to deny the request for rehearing; and the appealing party may then file in Superior Court for relief, setting forth any claim already pled within the just-denied Request for Rehearing.

Standing to Appeal

"Person[s] aggrieved" by a decision of the Zoning Board may file a subsequent appeal to Superior Court. *See* 677:4. RSA 677:4 defines a "person aggrieved" as any person entitled to request rehearing from the ZBA pursuant to RSA 677:2. The Supreme Court has interpreted the requisite standing the same in either case, stating that standing does not apply to all persons in a community who feel injured or affected, but that the person appealing must have a direct, definite interest in the outcome. *See e.g. Goldstein v. Town of Bedford*, 154 NH 393 (2006). In a string of cases, the Supreme Court has identified several factors to determine whether a party has this threshold inquiry to bring

the appeal: the proximity to the proposed site; the type of the outcome proposed; the immediacy of injury to the appellant; and the prior participation in the administrative hearings below. See *Thomas v. Town of Hooksett*, 153 NH 717 (2006); *Nautilus v. Town of Exeter*, 139 NH 450 (1995); and *Weeks Restaurant Corp. v. Dover*, 119 NH 541 (1979). Abutting landowners to a proposed development site almost surely have the requisite standing to request rehearing and/or appeal an adverse decision to Superior Court. The above factors and analysis are generally utilized more frequently when a non-abutter, such as a near neighbor, wishes to request rehearing or appeal.

Burden of Proof

Once before the Superior Court, the burden of proof for the Petitioner, the party bringing the appeal, for both Planning and Zoning Board appeals is essentially the same. *Bayson Properties v. City of Lebanon*, 150 NH 167 (2003). The burden is on the appealing party to prove that the decision appealed from was unlawful or unreasonable. The decision of the Board cannot be set aside or vacated unless there is an error of law, or the Court finds that based upon the balance of the probabilities from the evidence before it, the decision was unreasonable. RSA 677:6; see also *Rancourt v. City of Manchester*, 149 NH 51 (2003). Although all factual findings of the Board are presumed to be lawful and reasonable and accorded deference by the Court, the Superior Court is not bound by the Board's conclusions of law and may review any question of law without deference to the Board's determination below. *Sundberg v. Greenville ZBA*, 144 NH 341 (1999). In addition, the Court may not sit as a "super land use board" and cannot substitute its own factual determinations for those of the Board. *Lone Pine Hunters' Club v. Town of Hollis*, 149 NH 668 (2003).

If you wish to appear before a local municipal board or would like to appeal a Board's decision, but are not sure of your rights and how best to proceed, please feel free to contact the experienced attorneys at Baldwin & Callen, PLLC, for a free 30 minute consultation regarding your concerns. Located at 3 Maple Street near downtown Concord, via phone at (603) 225-2585, or on the web at www.nhlandlaw.com.