ZONING BOARD OF ADJUSTMENT

Decision On Variance (as of February 15, 2012)

A variance can be granted only if an applicant satisfies all five variance criteria.

1. **The variance is/is not contrary to the public interest.** A variance is contrary to the public interest if it violates "basic zoning objectives" by, for example, altering the character of the neighborhood or threatening public health, safety, or welfare.

The requirement that the variance not be contrary to the public interest is related to requirement # 3, below, that it be consistent with the spirit of the ordinance.

The first step in analyzing whether granting the variance is or is not contrary to the public interest and is consistent with the spirit of the ordinance is to examine the applicable ordinance. As the provisions of the ordinance represent a declaration of public interest, any variance is in some measure contrary to the ordinance. But mere conflict with the terms of the ordinance is insufficient. Rather, to determine whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, the board must look at whether granting the variance would unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, the result of granting the variance would be to violate the ordinance's basic zoning objectives.

The New Hampshire Supreme Court has recognized two methods for ascertaining whether granting a variance would violate an ordinance's basic zoning objectives: 1) examine whether granting the variance would alter the essential character of the neighborhood; and 2) examine whether granting the variance would threaten the public health, safety or welfare.

The applicant need not show that granting the variance would *serve* the public interest. In addition, it is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance without the need for the variance.

2. **Substantial justice is/is not done by granting the variance.** This requires a balancing test; a loss to the landowner that is not outweighed by a gain to the general public is an injustice. The Board should identify the loss the landowner would suffer if the variance is denied, and weigh it against the interests of the public.

In other words, any loss to the individual that is not outweighed by a gain to the general public is an injustice.

Examples of satisfaction of the "substantial justice" standard from New Hampshire Supreme Court decisions:

- A proposed storage facility project satisfied this standard because it posed no threat to wetlands, was appropriate for the area, and did not harm abutters; thus the general public would realize no appreciable gain from denying this variance.

- This standard was met for a proposal to expand a manufactured housing park, where it was shown that the variance sought would improve a dilapidated area of town and provide affordable housing in the area.

- This standard was met for a proposal to construct wireless communication towers where it was shown that the variance was the only reasonable way to remedy an existing gap in coverage.

A finding that the proposed variance would not diminish property values would also be evidence that this standard has been satisfied.

The analysis is not limited to looking at how the variance would benefit the public. The ZBA can also analyze whether the public would gain from a denial of the variance.

In addition, as noted for the other standards above, it is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance.

3. **The variance <u>is/is not</u> consistent with the spirit and intent of the Zoning Ordinance**. Typically, the intent of the Ordinance is to promote health, safety and welfare, and to preserve the values and character of the Town. Thus, consideration should be given as to whether the variance application is inconsistent with these goals. As noted above, this requirement is related to requirement #1, above, so reference is made to that discussion.

In addition, as noted for the other standards above, it is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance.

4. **Granting the variance <u>will/will not</u> diminish the value of surrounding properties**. Evidence from an appraiser or realtor would be relevant; statements of the applicant or the applicant's attorney can be considered, but need not be accepted. The Board can rely on its knowledge, experience, and observations.

5. **Special conditions do/do not exist on the property that distinguish it from other properties in the area, such that literal enforcement of the ordinance results in unnecessary hardship** (the unique features or special conditions should be identified):

Special conditions can relate to the existing property or the building(s) on the property, not just to the variance requested. The size of a building on a property is a relevant factor as a special condition. For example, a variance request for a large older home in a neighborhood of smaller homes could cite as a special condition the home's size.

Analyzing whether a property could still operate without the requested variance is not appropriate. Rather, the issue is whether the proposed variance is a reasonable use of the property, given its special conditions. Stated another way, the applicant does not have to demonstrate that its proposed use is "necessary" to the operation of its property.

a. **No fair and substantial relationship exists between the general purposes of Zoning Ordinance provisions and this restriction on the property because**: Consider the purpose of the zoning restriction and whether applying it to the specific property serves the purpose of the Zoning Ordinance.

b. **The proposed use is a reasonable one because**: Alternatively, if a variance does not meet this test, you may find unnecessary hardship if, and only if, owing to special conditions that distinguish the property from others in the area, "the property cannot reasonably be used in strict conformance with the ordinance," and a variance is necessary for its reasonable use. This is the old, pre-Simplex variance standard. Under it, a variance can be granted if the owner has no reasonable use of the property without a variance.