THE FIVE VARIANCE CRITERIA

1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

In the case of Gray v. Seidel, 143 N.H. 327 (February 8, 1999) the NH Supreme Court reaffirmed the variance standard in RSA 674:33, I(b) (1996), which states that the board has the power to "[a]uthorize… [a] variance from the terms of the zoning ordinance as will not be contrary to the public interest if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." (emphasis added) The Court clarified that RSA 674:33, I (b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., "will not be contrary") to the public interest if granted.

COMMENT: Proving a Negative

"The applicant still has the burden of persuasion on all five variance criteria, but my advice to ZBA members is not to be procedural sticklers when it comes to the "public interest" criterion. If an applicant makes even a conclusory statement like: "As you can see, there's no adverse effect on the public interest,' that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it.

To put it another way, if the applicant satisfies the other four criteria, a denial based solely on the "public interest" criterion is, in my view, unlikely to be upheld in Court unless your decision identifies some specific way in which the proposed variance is contrary to that interest."[2]

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public? (See Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005) on page D-25.)

2. ***THE SPIRIT OF THE ORDINANCE IS OBSERVED.***

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, RSA 674:16-20. In general, the provisions must promote the *"health, safety, or general welfare of the community."* They do this by lessening congestion in the streets, securing safety from fires, panic and other dangers, and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. "This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based." [3]

For instance, a zoning ordinance might control building heights specifically to protect adjoining property from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent, if the ordinance clearly states that this is the sole purpose for the building height limitation. On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property, the granting of the variance might be improper.

As another example, consider the question of frontage requirements. Most zoning ordinances specify a minimum frontage for building lots to prevent overcrowding of the land. If a lot had ample width at the building line but narrowed to below minimum requirements where it fronted the public street, a variance might be considered without violating the spirit and intent of the ordinance, because to do so would not result in overcrowding. There are many other variations of lot shapes and sizes that might qualify for a variance; the principles remain the same. The Courts have emphasized in numerous decisions that the characteristics of the particular parcel of land determine whether or not a hardship exists.

However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. **The board cannot change the ordinance.**

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[2] *1999 Municipal Law Update: The Courts*, H. Bernard Waugh, Jr., Esq., Chief Legal Counsel, NHMA, October 1999.

[3] *Zoning and the ZBA*, OSP video script (Timothy Bates, Esq.), pg. 4.

In Maureen Bacon v. Town of Enfield, No. 2002-591, (N.H. Jan. 20, 2004), the ZBA denied a variance for a small propane boiler shed attached to the outside of a lakefront house because (1) it did not satisfy the Simplex "hardship" standard; (2) it would violate the spirit of the ordinance; and (3) it would not be in the public interest. The Supreme Court noted that there were three grounds for the Superior Court's decision, and explained, "In order to affirm the trial court's decision, we need only find that the Court did not err in its review concerning at least one of these factors."

Focusing on the "spirit of the ordinance" factor, the Court concluded, "While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and over development could be inconsistent with the spirit of the ordinance."

In Malachy Glen Associates, Inc. v. Town of Chichester, (March 20, 2007), the Supreme Court stated that *"The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance." Chester, 152 N.H. at 580.*

[T]o be contrary to the public interest...the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality...

Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare."

3. SUBSTANTIAL JUSTICE IS DONE.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by granting a variance that meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

Perhaps Attorney Timothy Bates says it best in the OEP training video, Zoning and the ZBA: *"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a*

finding as to whether a decrease in property value will occur. The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values." [4]

Also, in Nestor v. Town of Meredith ZBA, 138 N.H. 632, (1994), the Court stated that the resolution of conflicts is a function of the zoning board of adjustment.

5. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

The term "hardship" has caused more problems for boards of adjustment than anything else connected with zoning, possibly because the term is so general and has so many applications outside of zoning law. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed. The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a zoning board. Even in the same town, different results may be reached with just slightly different fact patterns. *"This does not mean that either finding or decision is wrong per se, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme."* Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548, (1994)

On January 29, 2001, the NH Supreme Court issued an opinion in Simplex Technologies, Inc. v. Town of Newington, which dramatically changed the standard for granting zoning variances. The Court refined the long-held standard for unnecessary hardship and established three conditions that must be used by boards of adjustment when determining if a hardship exists. (See Appendix F for background information about this significant court decision.)

On May 25, 2004, the NH Supreme Court issued an opinion in Michael Boccia & a. v. City of Portsmouth & a, which further refined variance law to distinguish between use and area (dimensional) variances. In Boccia, the Court concluded that it must distinguish between *use* variances and *dimensional* variances, observing that the hardship criteria of Simplex could only logically be applied to uses of land.

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[4] *Zoning and the ZBA*, OSP video script (Timothy Bates, Esq.), pg. 3.