

New Standard for Zoning Variances

The New Hampshire legislature recently amended the standards used to determine whether landowners are entitled to receive a variance from the terms of a zoning ordinance. See RSA 674:33, I. The new test requires a greater showing of hardship for certain applicants, and in some situations may increase the difficulty of obtaining a variance from a Zoning Board of Adjustment ("Zoning Board"). Variance applicants should be aware of this new standard, because once a Zoning Board makes an unfavorable determination on a variance application, the party seeking to set aside the Zoning Board's decision bears the burden of proof in a court of law to set aside the decision, and the Zoning Board's decision will be given a high degree of deference by New Hampshire courts. See Naser v. Town of Deering Zoning Bd. of Adjustment, 157 N.H. 322, 326-27 (2008).

New Hampshire Courts and Zoning Boards currently utilize a five-part test to determine whether or not an applicant will receive a variance. Under that test an applicant must demonstrate to a Zoning Board that he or she satisfies all of the following factors in order to obtain a variance:

(1) the variance will not be contrary to the public interest; (2) special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties.

Naser, 157 N.H. at 326.

Prior to the recent statutory amendment, when determining if the second part of the variance test had been met, Courts and Zoning Boards utilized two different and mutually exclusive tests depending upon whether an applicant sought a "use" variance or an "area" variance. If one sought a use variance, which was a variance related to a permitted use of the land, one had to show:

(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.

Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 731-732 (2001). If one sought an area variance, which was a variance made necessary by the physical characteristics of the lot, the Court would consider:

(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought

by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

Boccia v. City of Portsmouth, 151 N.H. 85, 92 (2004).

The new legislation however eliminates the separate test for "area" variances, and provides that all applications or appeals for variances filed after January 1, 2010 must be analyzed using a test that is essentially the same as that set forth in the Simplex case. See RSA 674:33, I(b)(5)(B).

Under the new statute, "unnecessary hardship" can be shown by establishing that, owing to special conditions of the property that distinguish it from other properties in the area either:

- (A) (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; or
- (B) 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.

RSA 674:33, I(b)(5)(A) and (B).

The elimination of two separate tests under which unnecessary hardship is determined will simplify the Zoning Board's analysis of whether an unnecessary hardship exists. However, under this new test some applicants seeking what used to be called an area variance in the future will be required to prove a greater showing of hardship. Taking this into consideration along with the Court's deferential standard in reviewing Zoning Board decisions, applicants should ensure that they have all the information necessary to prove they can obtain a variance well before filing their applications with the Zoning Board.

For additional information or questions regarding zoning variances, please contact [Peter F. Imse](#) or another member of Sulloway's [Real Estate, Development and Environmental](#) practice group.