



Zoning Board of Adjustment Special Meeting

Monday January 4, 2010, 7:00 p.m.
City Hall, Council Chambers, Claremont

Meeting Minutes Approved March 1, 2010

I. Roll Call

Present: Mike Hurd, Pierre Caouette, Carolyn Towle

Absent: Robert Woodman, Ed Friedman, Jim Hanson

City Staff: Mike McCrory; Interim City Planner, Jane Taylor, City Solicitor; Kelly LeBlanc, Administrative Assistant

Motion to: Accept Meeting Minutes from December 7, 2009

Made By: Carolyn Towle

Second: Pierre Caouette

Vote: Unanimous

Motion to: Accept Meeting Minutes from December 21, 2009

Made By: Pierre Caouette

Second: Carolyn Towle

Vote: Unanimous

II. New Business

- Work Session with regards to new or revised New Hampshire state statutes.
- New Variance Application – Effective January 1, 2010

Work Session: New or Revised New Hampshire Statutes

Jane Taylor, City Solicitor, delivered a presentation on Variances (RSA 674:33, I(b))

The Supreme Court revised standards pertaining to Unnecessary Hardship when granting a Variance. The new law eliminates the distinction between **Use** Variances and **Area** Variances.

A Variance essentially allows the applicant to legally violate the zoning ordinance.

The Standard prior to January 1, 2010 contains criteria which the ZBA currently utilizes; (1) Proposed variance will not diminish the value of surrounding property; (2) The variance will not be contrary to the interest of the general public; (3) If owing to special conditions literal enforcement of the ordinance would result in '*unnecessary hardship*'; (4) Spirit of the ordinance shall be observed; (5) Substantial justice done

The explanation of an '*Unnecessary Hardship*' is such that (1) a Zoning restriction would impact reasonable use of the property considering the unique setting, (2) there is no fair and substantial relationship existing between the general purpose of the zoning ordinance and the specific restriction on the property, (3) granting the variance would not pose a threat to the public or private rights of others.

2004 – Boccia case granted the difference between Use and Area Variances

January 1, 2010 – The difference between **Use** and **Area** Variances is eliminated

The New Variance standard took effect on January 1, 2010 – amendment of RSA 674:33, I(b)

- New Standard – Eliminates the distinction between **use** and **area** variances

The following three (3) criteria have been in use by the ZBA since the Simplex case in 2001 and have not changed:

- (1) Variance will not be contrary to public interest
- (2) Spirit of the ordinance is observed
- (3) Substantial justice is done

Two Additional criteria have been added:

- (4) The values of the surrounding properties would not be diminished by the Variance
- (5) Literal enforcement of the provisions of the ordinance would result in 'unnecessary hardship'
 - (A) Special Conditions are limited to the property itself, and *not* personal circumstances of the applicant. The individual plight of the applicant is irrelevant
 - (B) An unnecessary hardship is deemed to exist if special conditions distinguish the property from other properties in the area and the property cannot be reasonable used in strict conformance with the ordinance, making a variance necessary

Regarding Criteria 5-A

Pierre Caouette inquires if the 'individual plight' is valid under any circumstance pertaining to variances. Jane Taylor confirms that the plight of the applicant does not weigh on the application. Finances are not delineated as a hardship.

Special Conditions must be considered when contemplating the approval of a variance. If the Variance is for a problem that a majority of the people in the same area have then it is *not* a hardship. For example, if the majority of people in an area have too small of a lot for building a garage the zoning should be changed versus an application for variance.

A determination of *special conditions* distinguishes the property from other properties in the area. If *special conditions* are confirmed the question asked remains, 'Is the proposed use reasonable?'

There must be a burden on the applicant that is not mutually shared by the surrounding property owners.

Case law specifies that a determinations of 'reasonableness' shall be established through evidence. Formulating decisions via findings of fact support the determination.

****Minimum of 3 votes for all 5 criteria for application approval**

Findings of Fact are for each criteria but the official vote is the vote on the entirety of the application. There will be no vote after each findings of fact. However, answers in relation to the findings of fact must be validated with a reason.

If an individual votes negatively to one of the criteria, that board member *should not* vote positively in the final application vote. This process promotes consistency. As stated, all applications require three (3) positive votes for approval.

If the applicant can prove there is no other reasonable use for the land then subdivision B [Criteria 5-B] is utilized. The burden of proof is strictly on the applicant.

For example, if a house on a residential lot in a residential area of non conforming lot sizes burns down under the new standards, the ZBA would be hard-pressed to make a decision stating the applicant could not rebuild as this would present hardship on the applicant. The ZBA cannot claim the applicant is unable to rebuild in this circumstance or the neighborhood would have to rebuild to conform to lot size standards. Economic hardship cannot be considered for the rebuild.

The ZBA cannot prevent someone from a *reasonable* use. Changing the character of a lot is a valid concern. If there is a lot that has never had a house built on it but zoning is residential, 'grandfathering' does not apply. Grandfathering is limited to structures and does not apply to vacant lots.

What is reasonable is determined by the use of that parcel in the zone in which it exists.

Sub-section B is used *only* if the criteria in sub-section A cannot be achieved.

Creation of Record

The creation of a record is gaining importance with the new statute to assure cases do not elevate to the Supreme Court level.

A solid record is attained by asking a range of detailed questions, stating specific concerns, and an explanation of the answers to the findings of fact.

** The fact an application or request is not uniform with its surroundings is not a valid reason for the denial of an application. Questions such as ‘How,’ ‘Why’ and the significance of the difference which prompted the Variance application must be addressed.

Two (2) Additional Changes

1. Alternates – Chapter 114, House Bill 44, amends RSA 673:12 – Vacancy concern – Question: Can the chair appoint an alternate to fill the seat until city council/selectman fills the seat? State law allows the chair of the board to appoint an alternate until city council/selectman fills the seat on a permanent basis.

2. Notice of Decision (NOD) – Chapter 266, House Bill 189, amends RSA 676:3 – Now requires that whether you approve or disapprove application the decision must be available to the applicant. IF the application is *not* approved a detailed reason of the denial is required. If the application is approved with conditions the NOD must contain detailed conditions. When a plat is recorded the final decision, including conditions of approval, shall be included with or on the plat. In Sullivan County there are no longer marginal notations or writing in serial form for plans.

New Variance Application – 1.1.2010

Mike McCrory presents the changes in the new Variance application; effective 1/1/2010.

The procedure for filing petitions has incurred some semantic changes regarding who or what the applicant talks to. Comments were removed from page two concerning clarification of the Zoning ordinance omitting a sentence that directed the applicant to refer to the Zoning Officer to assist with clarifications. The concern with this statement is that it could potentially open the City to liability if the applicant is given a poor opinion, albeit one offered in good faith. The modified statement prompts the applicant to speak with an attorney; however there is some opportunity for the applicant to talk with staff.

Rules of Procedure remain unaltered

Submission for rehearing or appealing a decision and issuing a notice five (5) days after of a decision has been made

Application for a variance has been reduced to one application for all variances.

Application for a Variance: Additional information added about restrictions on the property (i.e. easements, covenants, etc)

The application follows the sequential format in accordance to how the law is written.

The Application for Variance contains two (2) sections: (1) Brief description of the project, (2) Conditions (1-5) and hardship clarification (Condition 5, subparagraph (A) and (B))
The language of the application is intended to be user friendly and comprehensible.

Revision Dates will be noted on the application itself to assure the most recent version is universally in use.

The introductory pages will accompany *all* Variance applications

III. Other

Mike Hurd inquires about giving more information to other boards. Zoning is concentrated on enforcement.

Discussion on methods to increase Board recruitment and membership. Advertisements will be issued in the *Valley News* and *Eagle Times* for available board seats and alternate board seats.

IV. Adjournment

Motion to: Adjourn

Made by: Pierre Caouette **Second:** Carolyn Towle

Vote: Unanimous

Meeting adjourned at 8:06 p.m.

**Respectfully Submitted,
Kelly LeBlanc
Administrative Assistant**