BEA New Hampshire Department of BUSINESS AND ECONOMIC AFFAIRS

The Zoning Board of Adjustment in New Hampshire

A Handbook for Local Officials

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from the special exception requirement that the building's foundation not exceed 1,500 square feet).

The Zoning Board of Adjustment in New Hampshire, NH OSI Spring Planning & Zoning Conference, April 2018; presented by Christopher L. Boldt, Esq., Donahue, Tucker, & Ciandella, PLLC.

The practical application of a special exception may be illustrated by a hypothetical case of a rural town that has no industrial zone but wants to allow industries to locate in a particular district under certain circumstances. One condition, which must be stated in the ordinance, might be that the proposed industry would not create a hazardous traffic condition. Whether or not the traffic conditions generated by a particular industry would be hazardous would depend on the type of operation proposed; the road in question; the set-back of buildings on nearby lots; the location of intersections, school crossings, parks and homes; and off-street parking provisions.

It would not be possible to set uniform requirements in the ordinance, such as the number of persons who may be employed, that would prevent traffic hazards in all cases and yet not be needlessly restrictive in a specific case. By referring the matter to the board of adjustment, it is possible to consider each case on its own merits and still remain within the intent and purpose of the ordinance. "There must... be sufficient evidence before the board to support a favorable finding on each of the statutory requirements for a special exception." *Barrington East Cluster Unit I Owner's Association v. Barrington*, 121 N.H. 627 [1981].

Special exceptions are sometimes used to control the location of specific commercial or industrial uses such as public utilities, gas stations and parking lots, which may appropriately be located in residential districts. Schools, hospitals, nursing homes, and other establishments with similar location problems often require approval as special exceptions subject to conditions spelled out in the zoning ordinance.

The granting of a special exception does not alter the zoning ordinance, but applies only to the particular project under consideration. An application for an additional similar use on the same parcel would have to be considered separately by the board and approved or denied based on the application and the conditions required.

The board of adjustment cannot legally approve a special exception for a prohibited use if the ordinance does not identify that use. Also, the board cannot legally approve a special exception if the stipulated conditions do not exist or cannot be met. On the other hand, if the special exception is listed in the ordinance and the conditions are met, the board cannot legally refuse to grant the special exception even though it may feel that the standards are not adequate to protect the neighborhood.

Three questions must be answered to decide whether or not a special exception can be legally granted:

1. Is the use one that is ordinarily prohibited in the district?
2. Is the use specifically allowed as a special exception under the terms of the ordinance?
3. Are the conditions specified in the ordinance for granting the exception met in the particular case?

"If the conditions for a special exception are not met, the board cannot allow it; however, if the conditions are met, the board must grant the special exception." *Shell Oil v. Manchester*, 101 N.H. 76 (1957).

In *Sklar Realty Inc. v. Merrimack and Agway, Inc.*, 125 N.H. 321 (1984), the supreme court added a new dimension to the validity of a special exception in certain circumstances. If conditions imposed by a

Exhibit

RSA 500-A:12 Examination

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

4. FINDINGS OF FACTS

RSA 676:3, I Written Findings of Fact

I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulations and checklist requirements for the findings of fact portion of the approval. Findings of fact should not replace conditions of approval. For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board. The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact.

At the conclusion of public testimony but before the public hearing is closed, the board should begin to deliberate, in public, and in a manner such that all discussions can be heard by the public on the essential facts that the testimony has established. This practice is helpful should the board have any additional questions for the applicant or if they need clarification about any evidence or testimony presented while establishing the facts of the case. An example of fact finding would be if a variance has been requested and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood. The board should vote to find, as a fact, that values either will or will not be diminished and why (because of increased density, noise, congestion, traffic, or what have you). The court has strongly recommended, and has required in many instances, that specific findings be stated.

In the case of *Alcorn v. Rochester*, 114 N.H. 491 (1974), the supreme court remanded a decision of the