

**BOARD OF APPEALS
NEWTON, NEW HAMPSHIRE 03858**

APPLICATION FOR APPEAL

Date _____ Signature of Applicant _____
Phone _____ Mailing Address _____

Date _____ Signature of person filling out form _____
Phone _____ Mailing Address _____

Date _____ Attorney (if any) _____
Phone _____ Mailing Address _____

Date _____ Signature of Land Owner _____
Phone _____ Mailing Address (if other than applicant) _____

Location of Property (Map No.) _____

The following documents must accompany all applications for appeal:

1. Description of property, dimensions of frontage and distances to side and rear lot lines existing and proposed.
2. Description of variance request.
3. A certified plot plan drawn by a NH licensed/certified Surveyor or Civil Engineer (using a NH stamp only) to scale 1"=20' of area must be submitted with variance request. (A certified plot plan of 1"=50' allowable only with pre-approval of the Board.) *** Proposed structure, including foundation, roof overhang, and fascia, must also be shown on plot plan (drawn in by architect, not Applicant). All measurements will be in feet and inches. The variance dimension on the plan should reflect distance from property line to structure as described.
4. A copy of the State Waste Disposal Plan, if applicable.
5. Permit denial of the Building Inspector, Board of Health, appeal of the decision of the Planning Board, or other Town Official or Board, responsible of issuing permits.
6. List of five conditions in which you base your request. (attached)
7. Names and mailing address of all abutters of the property. This to include both sides, the rear, and across the street. (RSA 672:3)
8. Costs to be collected prior to the initiation of the appeals process. Check to be made out to the Newton Board of Appeals. (see next page for costs)

9. Any incomplete application &/or proper attached documents will result in postponing of the Hearing.

Administrative fee: \$100.00, and \$7.50 per abutter to cover notification via certified/return receipt mail and first class correspondence. Administrative cost of \$90.00 for the Legal notice as published by the Board in the Carriage Towne News prior to the Public Hearing.

LIST OF ABUTTERS

Name of Applicant _____ **Date of Application** _____

As per NH RSA 672:3 a list of abutters must be supplied with the Application for Appeal. List all abutters to the property on this form. If additional space is required, please photocopy and use this format.

- 1. Abutter's Name: TOWN OF NEWTON
Mailing/Street address: P.O. Box 378
Town, State, Zip: Newton, NH 03858

- 2. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 3. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 4. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 5. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 6. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 7. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 8. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

- 9. Abutters Name: _____
Mailing/Street address: _____
Town, State, Zip: _____

Certified by: _____ Date: _____

Board of Appeals Office

Attachment to Newton Application for Appeal

LIST OF FIVE CRITERIA

Name of Applicant _____ Date of Application _____

WHEN SUBMITTING AN APPLICATION FOR APPEAL, PLEASE HAVE THE FOLLOWING CRITERIA AVAILABLE AT THE TIME OF THE PUBLIC HEARING.

THE SUPREME COURT HAS DECLARED THAT EACH OF THE FOLLOWING CONDITIONS MUST BE FOUND IN ORDER FOR A VARIANCE TO BE LEGALLY GRANTED:

1. THE PROPOSED USE WOULD NOT DIMINISH SURROUNDING PROPERTY VALUES BECAUSE:

2. GRANTING THE VARIANCE WOULD BE OF BENEFIT TO THE PUBLIC INTEREST BECAUSE:

3. DENIAL OF THE VARIANCE WOULD RESULT IN UNNECESSARY HARDSHIP TO THE OWNER BECAUSE OF THE FOLLOWING SPECIAL CIRCUMSTANCES OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES SIMILARLY ZONED:

4. GRANTING THE VARIANCE COULD DO SUBSTANTIAL JUSTICE BECAUSE:

5. THE USE IS NOT CONTRARY TO THE SPIRIT OF THE ORDINANCE BECAUSE:

A variance is a relaxation or a waiver of the strict interpretation of any provision of the ordinance and may be granted by the board of adjustment on appeal. "Variances are included in a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." Sprague v. Acworth 120 NH 641, 1980.

The local ordinance cannot limit or increase the powers of the board to grant variances under this authority, but this power must be exercised within bounds. In several decisions, from 1952 to the present, the Supreme Court has declared that each of the following conditions must be found in order for a variance to be legally granted:

"(1) no diminution in value of surrounding properties would be suffered;

(2) Granting the permit would be of benefit to the public interest;

(3) Denial of the permit would result in unnecessary hardship to the owner seeking it;

(4) By granting the permit, substantial justice would be done: and

(5) The use must not be contrary to the spirit of the ordinance."

Gelinas v. Portsmouth 97 NH 248, 1952

Terms such as spirit, hardship, and injustice are abstract and cannot be measured as specific quantities. Each case must be considered separately and the decision based on the judgment of the members of the board. Court decisions through the years, however, have shaped the meanings of these terms as they apply to zoning law. The discussion that follows represents a consensus of opinions on the terms. Although every jurisdiction might not agree with them completely; in general, a board of adjustment can consider them acceptable guidelines.

1. No diminution in value of surrounding properties would be suffered. This particular point needs only a brief mention, although the board member will find that, in practice, much of the testimony will bear on this question. The public hearing provides an opportunity for abutters to state how the proposed variance would affect their property. The board should weigh the opinions of abutters along with its own understanding of the situation. The final decision must be based on the factual evidence presented, even though granting the variance might have some adverse effect on property values in the immediate area.

2. Granting the permit would be of benefit to the public interest. As an extension of the first condition, the board must decide that granting the requested variance will provide a benefit to the general public. This was set forth in the Supreme Court decision, U-Haul Co. v Concord, 122 NH 910, 1982. The company requested a variance to construct an apartment for a resident manager in a commercial zone. The Court agreed that this would

be in the public interest "...because the presence of a manager on the premises could serve to reduce vandalism and theft."

3. Denial of the permit would result in unnecessary hardship to the owner seeking it. 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 imposed is shared equally by all property owners, no grounds for a variance exist. Only when there is some characteristic of the particular land in question that makes it different from the others can hardship be claimed.

Until June 30, 1975, several definitions of hardship were used by New Hampshire courts. On that date, in Hanson v. Manning 115 NH 366, the New Hampshire Supreme Court set the standard for unnecessary hardship. The Court said that a variance may be granted only when, among other things, there are "special conditions" about the property which distinguish it from other property in the area. The decision read, in part, "There is no evidence that there is anything about the defendant's land to distinguish it from other land in the same area with respect to its suitability for the use for which it is zoned."

The Court further clarified the standard in 1983: "The concept of unnecessary hardship...is a narrow one. A hardship exists when an ordinance unduly restricts the use to which land may be put. 'The hardship must arise from a special condition of the land which distinguishes it from other land in the same area with respect to (its) suitability for the use for which it is zoned.' (emphasis added) It is not enough that the application of the ordinance may cause the landowner to suffer some financial loss.

"For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land. If the land is reasonable suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met." Governor's Island Club, Inc. v. Town of Gilford 124 NH 126, 1983 (citations omitted)

"The hardship must relate to special character of the land rather than the personal circumstances of the landowner." Assoc. Home Utilities Inc. v. Bedford 120 NH 812, 1980.

The board of adjustment is not in a position to alleviate suffering or difficulties by granting special privileges any more than a court can give a person the right to embezzle because it is otherwise difficult for him to earn a living.

- Peculiar characteristics means a condition of the land such as shape, size, topography, sub-surface conditions, or an obstruction which prevents the owner from complying with the zoning ordinance. This condition must be unique to the land in question and not shared by other parcels of land in the district. If it is a prevailing

condition, one owner cannot claim that the law discriminates against him. Under these circumstances, relief might come through a change of the ordinance itself and would require action by the local legislative body.

Two recent decisions illustrate interpretations of the hardship criteria by the New Hampshire Supreme Court.

Variance granted Labrecque v. Salem, 128 NH 455, 1986, involved two contiguous substandard lots at the edge of a residential district, with abutting residences on one side and a commercial zone on the other. The dwelling on one lot was destroyed by fire and not rebuilt within the required one year. The other dwelling was unoccupied for more than a year and the owner was notified that it no longer conformed to zoning requirements.

A variance was granted to allow commercial use of the combined lots because the land was not suitable for residential septic disposal even if the lots were combined. Denial of the abutter's appeal of the variance at the superior court level was affirmed by the Supreme Court, which stated: "The land thus was not suitable for the permitted use, and the board's finding of hardship was justified."

Variance denied Margate Motel v. Gilford, 130 NH 91, 1987, was an appeal from a variance granted, after a rehearing, by the Gilford Board of Adjustment. The Bluebird Motel applied for a variance from the setback requirements of the zoning ordinance to allow construction of a 2-story motel to replace individual cabins that had lost money over the past few years. The owners felt that the units no longer met acceptable standards for tourist accommodations in the area. An abutter, the Margate Motel, appealed the board's decision claiming that the only basis for requesting the variance was the financial condition of the owners.

The variance was upheld by superior court, but reversed on appeal to the Supreme Court. In addressing the issue of uniqueness of the land as a basis for hardship, the Court noted that the parcel may not be suited for construction of a motel that would meet current industry standards, but concluded that the situation did not support a finding of unnecessary hardship: "On the contrary, alternative permitted uses for this property abound... the Gilford Zoning Ordinance enumerates some twenty-five permitted uses for the property that the defendants have not shown are precluded by the uniqueness of the land."

4. By granting the variance substantial justice would be done. It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. 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 the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

5. The use must not be contrary to the spirit of the ordinance. 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 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.

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.

Unnecessary hardship cannot be based on the fact that a variance will allow the landowner to make a greater profit with his land; or that the granting of the variance will be a convenience to the landowner; or that the abutters have no objections; or that the use of the land by the landowner, after granting the variance, will bring more taxes to the community. “It is irrelevant that the land cannot be used for a particular purpose.” Moore v. Rochester 121 NH 100, 1981.

The court also noted in Quimette v. Somersworth 119 NH 292, 1979, that the actual owner of the land, not an option holder, is the one for whom the hardship must be determined.

In order for unnecessary hardship to be found, special conditions of the property must exist that make it unique from all property around it. When this occurs, strict application of the zoning ordinance to that parcel would be unfair. Generally, variances will be properly granted in situations where:

- (a) The shape or topography of the land distinguishes it from surrounding properties, or
- (b) Special conditions exist and the property is unique because of changing circumstances. To illustrate this, consider a situation where, because of nonconforming uses or a zoning change, a parcel remains residential when all of the surrounding property has been converted to business use and the neighborhood has taken on a commercial character.

The following definition and discussion of the term “hardship” is offered because of the many problems caused by the use of this one word. Hardship can be defined as a needless or unnecessary restriction of a person’s right to enjoy the lawful use of his property because peculiar characteristics of the land make it impossible to comply with the exact terms of the zoning ordinance. In this definition:

- Needless or unnecessary restriction, means that nothing would be gained by enforcing the exact terms of the ordinance and the situation can be remedied by granting a lawful variance.

“When the restriction, as applied to a particular piece of land, is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his property is great, the exercise of the police power becomes arbitrary and unreasonable and this court will afford relief under the constitution of this state.”

Metzger v. Town of Brentwood 117 NH 497, 1977.

- Lawful use of property, means the use as permitted under the zoning ordinance. The basic idea of a variance is to allow a person the same rights and privileges of land ownership as his neighbors – not to grant him special privileges that are denied to his neighbors.
- Caused by inability to comply with the exact terms of the zoning ordinance, means, in this context, that the hardship is caused by the application of the zoning ordinance and without the ordinance the difficulty would not exist. In other words, the land itself must have some value whether or not the ordinance is applied. A man who owns a bottomless swamp has troubles, but they are not caused by the zoning ordinance. A variance cannot be granted to relieve hardship caused by flood, fire, earthquake or any other act of God or man unrelated to the land.