

# VARIANCE DELIBERATION FORM

## ZONING BOARD OF ADJUSTMENT

This form is used by the Zoning Board of Adjustment as a guideline in reviewing applications for variance.

In a groundbreaking case in 1952, *Gelinas V. Portsmouth*, The New Hampshire Supreme Court said that the ZBA must find an applicant meets five specific conditions in order to grant a variance. These conditions have been clarified in subsequent court decisions.

Conditions 1, 2, 4, and 5 apply to all variances. Condition 3 is applied differently for use variances and area variances.

A use variance allows a use of the property that zoning ordinance does not ordinarily allow.

An area variance allows a permissible use

1. On an area of the lot that the zoning ordinance usually protects, or
2. Bigger than the zoning ordinance usually allows.

**Case Under Consideration:** \_\_\_\_\_

**Nature of Request:**

Condition 1: Granting the variance will not lead to any decrease in value of surrounding properties.

The court has said that blocking a view of the water, blocking a view of the sunset, and blocking sunshine would decrease property values. It has said that a use consistent with abutting uses does not decrease property values.

*Staff Comments:*

Condition 2: Granting the variance would not be contrary to the public interest

The court has ruled such things as increasing traffic congestions, decreasing traffic safety, decreasing the tax base, creating the potential for sewage/septic overloading, and increasing the risk of damage to water quality may be contrary to the public interest.

*Staff Comments:*

Condition 3. Denying the variance will create an unnecessary hardship for the applicant. The Court has been clear that hardships created by the action of the property owner do not count.

In 2001, in *Simplex v. Town of Newington*, the Court said there are three tests as to what creates an unnecessary hardship:

1. The zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment

The courts apply this test differently for a use variance and an area variance.

- a. Use Variance

In 2003, in *Rancourt v City of Manchester*, the court said that the unique conditions of the lot made the proposed use reasonable. Rancourt had bought a 3 acre lot at a time that livestock was allowed. After they bought, the ordinance was changed to prohibit livestock. Rancourt argued that their lot was uniquely large, it was in a country setting, and there was a wooded buffer around the area where they wanted to keep a horse. The court agreed that these unique conditions made a use variance reasonable.

*Staff Comments:*

- b. Area Variance

In 2004, in *Boccia v City of Portsmouth*, the court set the standard for hardship regarding an area variance. If the only reasonably feasible way to accomplish an allowable use is by way of an area variance then it should be granted. It added that an alternative to an area variance that would create "undue financial burden" is not reasonably feasible.

In 2005, in *Vigeant v. Town of Hudson*, the Court further clarified that the ZBA may not inject preferences about the type of use into an area variance. If the use is allowable, only the area tests can be applied.

*Staff Comments:*

2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

*Staff Comments:*

3. The variance would not injure the public or private rights of others

*Staff Comments:*

Condition 4: By granting the variance substantial justice would be done

This condition becomes important if other conditions do not provide a clear answer. It encourages the ZBA to step back and take a broad look at balance of public vs. private interest. It allows the Board to consider if a variant use would have less impact than a permitted use, or if it is similar to adjoining uses.

*Staff Comments:*

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

The court has said a project that creates congestion beyond that envisioned in the zoning ordinance, or one that threaten wetlands protected by a wetlands ordinance are examples of being contrary to the spirit. In 2004, in Bacon v. Town of Enfield, they added that the ZBA could consider the cumulative impact of a particular variance if it was granted to everyone in a similar situation, not just the impact of the applicant alone.

*Staff Comments:*