



TOWN OF LONDONDERRY

ZONING BOARD OF ADJUSTMENT

268B Mammoth Road Londonderry, New Hampshire 03053 • Phone: 432-1100, ext.129

VARIANCE APPLICATION RULES AND GUIDELINES

PLEASE READ BEFORE FILLING OUT YOUR APPLICATION

- The **Applicant**, if different from the Owner, must sign the application on the last page.
- The applicant's **mailing address** should be listed underneath the applicant's name(s).
- **All owners must also sign** the application on the last page.
- **"Representative"** need only be filled out if someone else will be making the presentation for the applicant. This information must also be included on the last page of the application.
- Under **"Location of Property,"** you need to fill out the tax map, parcel & zone. This information can be obtained from the Town's website or the Planning & Economic Development Department.
- For **"Previous Zoning Board action on this property,"** see the Planning & Economic Development staff.
- If you are seeking a variance, **you are required to complete the five points of law on your application.** These points begin on page one of the Variance application under "Facts supporting this request," and continue on through the second page.
- You or your representative will also be required to **VERBALLY** present all five points of law when you make your presentation. **All five must be addressed to the satisfaction of the Board. *Failure to fill these out completely on the application and present them completely to the Board may result in a delay or a denial.***
- If you are seeking a **Special Exception to operate a Home Occupation**, please note that the State may have separate requirements for business licensing. Such requirements would be independent of this Special Exception and **it is the applicant's responsibility to ensure that any and all State requirements are fulfilled.**
- The Planning & Economic Development department can assist you in determining your abutters, but **YOU ARE RESPONSIBLE FOR OBTAINING AND VERIFYING THE CORRECT LIST OF ABUTTERS INCLUDING THE OWNERS' NAMES AND MAILING ADDRESSES FROM THE ASSESSOR'S OFFICE.**
- Decisions of the Zoning Board can be based only on the testimony presented at the public hearing. **It is the applicant's responsibility to provide the evidence in support of the criteria for the application.**



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- You are also encouraged to provide any additional information that will help explain your position (i.e. drawings, photographs, more detailed explanations or reasoning).
- **All relevant information, plans, drawings, etc., must be submitted with your application** so that they may be on file as public information. **Please make copies for yourself so that you will have the same information the Board has when you present to them.**
- If you bring additional materials to the meeting that were not submitted with your application, please make at least eight copies for Board members to follow along. *Remember, the more prepared you are, the less time you will need to spend before the Board.*
- The application fee is **\$60.00** and there is a **certified mailing charge** for (a) the owner, (b) applicant, (c) any representative, and (d) each abutter to cover the cost of certified mail. If an owner is repeated on your list with the exact same name and mailing address, they will only be counted once. Please provide three sets of 1" x 2 5/8" mailing labels for each abutter. If paying by check, you will only need to submit one check payable to the Town of Londonderry.
- Applications are due **BEFORE 5:00 PM** on the scheduled deadline date to be on the following month's agenda but you are strongly encouraged to apply earlier in case any additional issues need to be addressed. **Only one copy of your application and supporting documentation is required for submittal.**
- ***Applications will not be accepted after 00 on the deadline date. The Zoning Board will not accept late or incomplete applications.***
- Agendas for the public hearing with the Board of Adjustment will be posted in at least two public places. Legal notices will be sent via certified mail to the property owner(s), abutters and any other parties the Board may deem to have an interest (including any representative) at least five (5) days before the date of hearing and the legal notice is also printed in a local newspaper.
- Zoning Board meetings take place every third Wednesday of the month at Town Hall, 268B Mammoth Road in the Moose Hill Council Chambers.
- Meetings begin at 7:00 P.M. Your actual hearing time is dependent on the number of cases being heard that night and the other business of the Board.
- The Board reserves the right to continue cases to either the first Thursday or the third Wednesday of the following month should the meeting run to a late hour.



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- Meetings are recorded. Please approach the Board for your presentation and speak clearly into the microphone so that your case maybe recorded accurately.
- Please note that abutters have the right to attend the meeting to speak for or against your case, and ask questions. Abutters do not vote on your case. Only the Board may vote.
- Your case will be decided during deliberations, which typically occurs immediately following your presentation. You will receive notification of the Board's decision from the Planning & Economic Development department.
- Under Section 8.1.5.4 of the Londonderry Zoning Ordinance and New Hampshire Revised Statute Annotated 674:33, I-a (a) variances shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance; and IV (b) special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.

MEETING PROCEDURES

1. The Clerk reads the case into the record.
2. The applicant makes his/her presentation.
3. The Board addresses the applicant with questions and/or comments.
4. Those in favor of the request are asked to speak at the microphone.
5. Those opposed or having questions regarding the request are asked to speak at the microphone.
6. The applicant may rebut any comments or questions.
7. The opposition may then also rebut.
8. The Board addresses the applicant with any additional comments or questions.
9. The case is taken under advisement immediately and voted on unless the Board chooses to do so at a later time.



ZONING BOARD OF ADJUSTMENT - VARIANCE

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Prior to completing this application, you will need to obtain and provide as part of your application a completed ZONING BOARD OF ADJUSTMENT REASON FOR APPEAL form. This form requires a determination from the Zoning Administrator.

PLEASE READ GENERAL GUIDELINES BEFORE COMPLETING APPLICATION

LOCATION OF PROPERTY: Street address _____
Tax map _____ Parcel _____ Zone _____

Owner's name (s) _____ Tel. No. _____

Owner's address _____

Owner's Email address _____

Applicant's name(s) _____ Tel. No. _____

Applicant's address _____

Applicant's Email address _____

Representative's name _____ Tel. No. _____

Representative's address _____

Representative's Email address _____

NOTE: THIS APPLICATION IS NOT ACCEPTABLE UNLESS ALL THE FOLLOWING REQUIRED STATEMENTS HAVE BEEN MADE. Additional information may be supplied on a separate sheet if the space provided is inadequate.

A variance is requested from Section _____ of the zoning ordinance for the following reason(s):

Previous Zoning Board action on this property: _____

Facts supporting this request:

1. The variance will not be contrary to the public interest:

2. The spirit of the ordinance is observed:

3. Substantial justice is done:

4. The values of surrounding properties are not diminished:

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship:

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

(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.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, 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.

I understand that I must appear in person at the public hearing scheduled by the Zoning Board of Adjustment. If I cannot appear in person, I will designate a representative or agent in writing below to act on my behalf.

I hereby designate _____
_____.

By signing below, I hereby confirm that all information contained in this application is truthful and accurate to the best of my knowledge and belief. I also certify that I am the lawful owner of the subject property and have verified the attached list of abutters with the Assessing Department.

Owner's Signature

Owner's Signature

Applicant's Signature

Applicant's Signature

Dated

Total fee due (to be calculated by the Planning Department): \$ _____

LIST OF ABUTTERS

The following is a list of all abutting property owners concerned in this appeal. The Planning Department can assist you in determining your abutters, but **YOU ARE RESPONSIBLE FOR OBTAINING THE CORRECT LIST OF ABUTTERS. YOU ARE ALSO RESPONSIBLE FOR VERIFYING THE OWNERS' NAMES AND MAILING ADDRESSES FOR THIS LIST WITH THE ASSESSOR'S OFFICE.** This information is necessary to properly notify all interested parties with certified notices. Failure to provide complete and accurate information on abutters will result in the application being returned and may delay the scheduling of your hearing or result in a rehearing.

[illegible]

PREPARING YOUR ABUTTER'S LIST



1. Go to: <https://londonderrynh.mapgeo.io/datasets/properties?abuttersDistance=300> and click the "Search" box. Enter the property address in the address box and press enter. The parcel information should then appear as results. Click on the parcel information. Once the parcel is highlighted, click on the abutter box on the top right of the screen. A distance box containing the number 300 will appear and right below that box is a blue "Find" box. Click on the blue "Find" box.
2. A white box will appear asking "Clear search results?" Click on the "No" box.
3. A new screen will appear with the subject property outlined in blue and all other properties within 300 feet in red.
4. At this point, you will make the determination of who are the abutters.
5. Per NHRSA **672:3 Abutter**. – "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board.

** If an abutting property is under a condominium or other collective form of ownership, the term abutter ***means the officers of the collective or association***, as defined in RSA 356-B:3, XXIII.

** If an abutting property is under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes ***the manufactured housing park owner i.e. mobile home park and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the subject parcel.***

6. By clicking on the subject property, you are able to zoom in to assist in determining the abutter list. If there are properties outlined in red that do not meet the statutory definition of an abutter, you should click on the parcel and that parcel will then be removed from the list. Once you are satisfied with the list, click downloaded results. A white "Download Abutters" box will appear. Click on the "Abutters Report" box for the creation of the report. This report is your abutter's list.

** Please note the additional notification requirements, if an abutting parcel is under a condominium or other collective form of ownership or a manufactured housing park form of ownership.

7. You will need to have the accuracy of the owners' names and addresses verified by the Assessing Department. You can either print out the list and bring it in to the Assessing Department or e-mail the list to Adumont@londonderrynh.org.
8. Please attach the updated and verified list to your application or transfer the information to the "List of Abutters" page in the application.
9. If you have any questions about creating the list, please see the Planning Department. If you have any questions about verifying the owners' names and addresses, please see the Assessing Department.



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THE FIVE VARIANCE CRITERIA

*The following are excerpts from "The Board of Adjustment in New Hampshire: A Handbook for Local Officials" provided by the State of New Hampshire Office of Energy and Planning. While the information here is intended to assist the layperson in presenting the information required under State law to obtain a variance from the Town's zoning ordinance, **it is still ultimately the applicant's responsibility to address the five variance criteria to the satisfaction of the Zoning Board of Adjustment** during their presentation.*

VARIANCES- A DEFINITION

A variance is a relaxation or a waiver of any provision of the ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate 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 N.H. 641, (1980). The local ordinance cannot limit or increase the powers of the board to grant variances beyond statutory authority, this power must be exercised within specific bounds.

[RSA 674:33 Powers of Zoning Board of Adjustment:](#) **(effective January 1, 2010)**

I (b) The zoning board of adjustment shall have the power to authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
 - (A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - (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.
 - (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, 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.

(The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance).

THE FIVE VARIANCE CRITERIA

1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

In the case of Gray v. Seidel 143 N.H. 327 (February 8, 1999) the NH Supreme Court reaffirmed the variance standard in RSA 674:33, I(b) (1996), which states that the board has the power to A[a]uthorize . . . [a] variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

The court clarified that RSA 674:33, I(b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., "will not be contrary") to the public interest if granted.

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public? (see Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005) on page 99.)

. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restricts can be made to those listed in the state enabling legislation, RSA 674:16-20. In general, the provisions must promote the “*healthy, 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 [applicant] must determine the legal purpose the ordinance serves and the reason it was enacted. **"This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based."**

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.

In Malachy Glen Associates, Inc. v. Town of Chichester (March 20, 2007), the supreme court stated that *"The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance."*

[T]o be contrary to the public interest . . . the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. . . . Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare."

. SUBSTANTIAL JUSTICE IS DONE.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. **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 granting a variance it meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

Perhaps Attorney Tim Bates says it best in the OEP training video, Zoning and the ZBA: *"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur. The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in*

mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values."

. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

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 so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed. The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a zoning board. Even in the same town, different results may be reached with just slightly different fact patterns. *"This does not mean that either finding or decision is wrong per se, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme."* Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548, (1994)

A For purposes of this subparagraph, unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area

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.

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

Once the purposes of the ordinance provision have been established, the property owner needs to establish that, because of the special conditions of the property, application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any "fair and substantial" way. This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

and ii The proposed use is a reasonable one.

The applicant must establish that, because of the special conditions of the property, the proposed use is reasonable. [H]ardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'

This is necessarily a subjective judgment - as is almost everything having to do with variances - but presumably it includes an analysis of how the proposed use would affect neighboring properties and the municipality's zoning goals generally. It clearly includes "whether the landowner's proposed use would alter the essential character of the neighborhood."

B If the criteria in subparagraph A are not established an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it from other properties in the area 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.

In the event the applicant is unable to satisfy the Simplex standard as codified in paragraph (5)(A), he or she may still establish unnecessary hardship under the standard in paragraph (5)(B).

This provision states that unnecessary hardship is established “if, owing to special conditions of the property that distinguish it from other properties in the area, 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.”

Under this standard, it is not enough to show that the proposed use is reasonable; the applicant must establish that there is no other reasonable use of the property that would comply with the zoning ordinance. Even though the restriction significantly limits the value of the property, the standard is not met if the property can be put to any reasonable use. If the owner is currently making a reasonable use of the property, that fact is “conclusive evidence that a hardship does not exist.” Further, the owner still must show that the subject property is unique, so that the zoning restriction imposes more of a burden on it than on other properties in the area.

[The five paragraphs above are from *The Five Variance Criteria in the 21st Century*, NH LGC Law Lecture #2, Fall 2009]