

applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment, (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property, and (3) the variance would not injure the public or private rights of others. *Hill v. Town of Chester* (2001) 146 N.H. 291, 771 A.2d 559. *Zoning And Planning* ⇨ 1480

That a circumstance is self-created is not dispositive in determining whether a variance is appropriate; rather, it is just one factor to consider. *Hill v. Town of Chester* (2001) 146 N.H. 291, 771 A.2d 559. *Zoning And Planning* ⇨ 1482

A person who purchases land with knowledge, actual or constructive, of the zoning restrictions which are in effect at the time of such purchase, is said to have created for himself whatever hardship such restrictions entail. *Hill v. Town of Chester* (2001) 146 N.H. 291, 771 A.2d 559. *Zoning And Planning* ⇨ 1482

Zoning board of adjustment (ZBA) may not grant a variance if it diminishes the value of surrounding properties. *Simplex Technologies, Inc. v. Town of Newington* (2001) 145 N.H. 727, 766 A.2d 713. *Zoning And Planning* ⇨ 1473

Applicants for a zoning variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment, (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property, and (3) the variance would not injure the public or private rights of others; abrogating *Governor's Island Club v. Gilford*, 124 N.H. 126, 467 A.2d 246, and *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 614 A.2d 1048. *Simplex Technologies, Inc. v. Town of Newington* (2001) 145 N.H. 727, 766 A.2d 713. *Zoning And Planning* ⇨ 1480

Remand was required, even though trial court properly applied settled law on appeal of denial of zoning variance by city board of zoning adjustment (ZBA), where Supreme Court departed from existing definition of required unnecessary hardship on appeal of trial court decision. *Simplex Technologies, Inc. v. Town of Newington* (2001) 145 N.H. 727, 766 A.2d 713. *Zoning And Planning* ⇨ 1759

To obtain variance to install dock, landowners were required to show that grant of variance would not be contrary to public interest, not that grant of variance would be of benefit to public interest. *Gray v. Seidel* (1999) 143 N.H. 327, 726 A.2d 1283. *Zoning And Planning* ⇨ 1532

Zoning board's decision requiring plaintiffs to show that granting variance "would be of benefit to the public interest" imposed a higher burden than

was required by statute, and was therefore an error of law. *Gray v. Seidel* (1999) 143 N.H. 327, 726 A.2d 1283.

Zoning board of adjustment has authority to attach reasonable conditions to variances from terms of zoning ordinance. *Healey v. Town of New Durham Zoning Bd. of Adjustment* (1995) 140 N.H. 232, 665 A.2d 360. *Zoning And Planning* ⇨ 1486

Property owners violated requirements of their variance by building two-car garage within setback after submitting plan to zoning board of adjustment showing plan to build one-car garage. *Healey v. Town of New Durham Zoning Bd. of Adjustment* (1995) 140 N.H. 232, 665 A.2d 360. *Zoning And Planning* ⇨ 1502

Although zoning board's failure to disclose specific findings concerning grant of variance is not error where no request for such findings is made, there must be sufficient evidence before board to support favorable finding on each of the statutory requirements for a special exception. *Grey Rocks Land Trust v. Town of Hebron* (1992) 136 N.H. 239, 614 A.2d 1048.

To support grant of variance it must be found that no diminution in value of surrounding properties would be suffered, that granting the permit would be of benefit to public interest, that denial of the permit would result in unnecessary hardship to owner seeking it, that granting the permit would do substantial justice, and that the use must not be contrary to spirit of ordinance. *Ouimette v. City of Somersworth* (1979) 119 N.H. 292, 402 A.2d 159. (Decided under prior law.) *Zoning And Planning* ⇨ 1473

Zoning board lacked authority to grant variance where only hardship alleged resulted from special needs of optionholder of property as opposed to special characteristics of the property. *Ouimette v. City of Somersworth* (1979) 119 N.H. 292, 402 A.2d 159. (Decided under prior law.) *Zoning And Planning* ⇨ 1478

For purposes of determining whether zoning variance should be granted, "hardship" results only if use of particular property is unduly restricted by zoning ordinance because of special conditions unique to that property which distinguish it from all others similarly restricted. *Ouimette v. City of Somersworth* (1979) 119 N.H. 292, 402 A.2d 159. (Decided under prior law.) *Zoning And Planning* ⇨ 1478

Statute authorizing zoning board of adjustment to grant variances does not distinguish between types of variances but instead requires showing of unnecessary hardship whenever owner of property requests variance. *Ouimette v. City of Somersworth* (1979) 119 N.H. 292, 402 A.2d 159. (Decided under prior law.) *Zoning And Planning* ⇨ 1478

Board of zoning adjustment has authority to grant variance for permitted uses within district if it finds that no diminution in value of surrounding properties would be suffered, that granting permit would be of benefit to public interest, that denial of permit would result in unnecessary hardship to owner seeking it, that, by granting permit, substantial justice will be done and that use is not contrary to spirit of ordinance. *Alcorn v. Rochester Zoning Board of Adjustment* (1974) 114 N.H. 491, 322 A.2d 608. (Decided under prior law.) *Zoning And Planning* ⇨ 1469

Failure of zoning board of adjustment to disclose real basis of its decision denying request for variance prevented applicants from making requisite specification of ground on which they claimed the decision was illegal, unjust or unreasonable and thus denied them meaningful judicial review, requiring remand to board for clarification of grounds on which variance was denied so as to permit plaintiffs to file an appeal on merits if they deemed it necessary. *Alcorn v. Rochester Zoning Board of Adjustment* (1974) 114 N.H. 491, 322 A.2d 608. (Decided under prior law.) *Zoning And Planning* ⇨ 1724

Variances are provided for by zoning statutes so that litigation of constitutional questions may be avoided and speedy and adequate remedy afforded in cases where special conditions or exceptional environment may be thought to present such questions. *Bouley v. City of Nashua* (1964) 106 N.H. 79, 205 A.2d 38. (Decided under prior law.) *Zoning And Planning* ⇨ 1465

5. — Hardship, variances

Applicant failed to show that property was unique in its surroundings, and thus applicant did not prove unnecessary hardship and was not entitled to variance that would have allowed applicant to blend and store explosives in rural residential district, although property was large, difficult to develop because of topography, and ideally suited to applicant's needs for buffer zone as required by regulations of federal Bureau of Alcohol, Tobacco and Firearms (ATF); property's attributes did not distinguish site from any other rural land in area. *Garrison v. Town of Henniker* (2006) 154 N.H. 26, 907 A.2d 948. *Zoning And Planning* ⇨ 1496; *Zoning And Planning* ⇨ 1531

For purposes of showing that literal enforcement of zoning ordinance will result in unnecessary hardship, whether an area variance is required to avoid an undue financial burden on the landowner is determined by a showing of an adverse effect amounting to more than mere inconvenience. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1491

For purposes of showing that literal enforcement of zoning ordinance will result in unnecessary hardship, applicant seeking area variance is not required

to show that without the variance the land will be rendered valueless or incapable of producing a reasonable return. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1491

In making determination under *Boccia* unnecessary hardship test concerning whether there is no reasonable way for applicant to achieve what has been determined to be reasonable use without area variance, financial burden on landowner considering relative expense of available alternatives must be considered. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1491

Grant of zoning ordinance variance based on hardship was appropriate to allow single-family home to be built on lake lot where setbacks otherwise would have created building envelope that was oddly shaped and only 15 feet wide in some places. *Husnander v. Town of Barnstead* (1995) 139 N.H. 476, 660 A.2d 477. *Zoning And Planning* ⇨ 1492

Grant of zoning ordinance variance to build single-family home on lake lot was permissible despite alleged possibility of other permissible uses where other uses permitted by zoning ordinance, including tent for camping, agriculture, raising livestock, and roadside stand for selling vegetables, were not possible given lot's slope, abundance of ledge, and remote location. *Husnander v. Town of Barnstead* (1995) 139 N.H. 476, 660 A.2d 477. *Zoning And Planning* ⇨ 1495

Hardship warranting grant of zoning ordinance variance exists where deprivation resulting from application of ordinance is so great as to effectively prevent owner from making any reasonable use of land. *Husnander v. Town of Barnstead* (1995) 139 N.H. 476, 660 A.2d 477. *Zoning And Planning* ⇨ 1480

Zoning board of adjustment is authorized to issue variance from terms of zoning ordinance, provided that variance would not be contrary to public interest, if, owing to special conditions, literal enforcement of provisions of ordinance will result in unnecessary hardship and if variance does not result in diminution of surrounding property values. *Husnander v. Town of Barnstead* (1995) 139 N.H. 476, 660 A.2d 477. *Zoning And Planning* ⇨ 1474; *Zoning And Planning* ⇨ 1478

For hardship to exist for purposes of obtaining zoning variance, deprivation resulting from application of ordinance must be so great as to effectively prevent owner from making any reasonable use of land; furthermore, hardship must arise from some unique condition of parcel of land distinguishing it from others in area, as uniqueness of land, not plaintiff owner, determines whether hardship exists. *Grey Rocks Land Trust v. Town of Hebron* (1992) 136 N.H. 239, 614 A.2d 1048. *Zoning And Planning* ⇨ 1481

In order for zoning board to have concluded that hardship exists for purposes of granting variance, it must find that literal enforcement of ordinance bars any reasonable use of land; thus, showing that landowner was making reasonable use of land at time of application for variance would preclude finding of hardship. *Grey Rocks Land Trust v. Town of Hebron* (1992) 136 N.H. 239, 614 A.2d 1048. Zoning And Planning ⇨ 1480

Marina failed to meet hardship requirement necessary to get zoning ordinance variance where marina was a viable nonconforming business; fact that marina was only one in town did not meet uniqueness requirement, and new building would have substantially impaired natural scenic, recreational and environmental values of surrounding property. *Grey Rocks Land Trust v. Town of Hebron* (1992) 136 N.H. 239, 614 A.2d 1048.

Landowners failed to establish unnecessary hardship sufficient to warrant zoning variance, though configuration of parcel, coupled with zoning setback requirements, prevented motel project from going forward, where only need for motel project was personal and financial plight of owners; alternative permitted uses for property existed, and nothing, aside from financial condition of owners, kept them from operating motel currently on sight as they had in the past. *Margate Motel, Inc. v. Town of Gilford* (1987) 130 N.H. 91, 534 A.2d 717. Zoning And Planning ⇨ 1512

Unnecessary hardship, warranting issuance of zoning variance, must arise from special condition of land which distinguishes it from other land in same area with respect to suitability for use to which it is zoned; size and dimensions of parcel do not create unnecessary hardship when land could still be used for purposes permitted by zoning ordinance. *Margate Motel, Inc. v. Town of Gilford* (1987) 130 N.H. 91, 534 A.2d 717. Zoning And Planning ⇨ 1480

Finding of unnecessary hardship does not necessarily require granting of variance; rather, zoning board is required to balance such hardship with considerations such as public interest. *Saturley v. Town of Hollis* (1987) 129 N.H. 757, 533 A.2d 29. Zoning And Planning ⇨ 1478

It is not uniqueness of plight of owner, but uniqueness of land causing plight that is criterion for unnecessary hardship warranting granting of variance. *Rowe v. Town of Salem* (1979) 119 N.H. 505, 403 A.2d 428. (Decided under prior law.) Zoning And Planning ⇨ 1481

"Special conditions" that would distinguish applicant's property, for which applicant sought variance to erect additional apartment building, from other property in area and warrant variance based upon "unnecessary hardship" did not exist and thus applicant, whose testimony indicated that income from existing apartments was sufficient to meet

expenses and that reason for requesting variance was to obtain greater return on his investment, was improperly granted variance by town board of adjustment. *Rowe v. Town of Salem* (1979) 119 N.H. 505, 403 A.2d 428. (Decided under prior law.) Zoning And Planning ⇨ 1495

To warrant granting of a variance based upon a finding of "unnecessary hardship" there must be something special about the applicant's property to distinguish it from other land in the same area with respect to its suitability for the use for which it is zoned. *Carbonneau v. Town of Exeter* (1979) 119 N.H. 259, 401 A.2d 675. (Decided under prior law.) Zoning And Planning ⇨ 1481

Mere fact that town selectmen did not except to portion of master's report stating that "the zoning board exceeded its rights in granting * * * a variance for * * * an apartment house," and did not appeal town board of adjustment's original order granting variance, did not require that town be estopped from seeking injunction to prevent use of buildings in question as apartments where such portion of master's report was taken out of context and was not part of findings, where landowner did not request finding that board had granted variance to construct apartments, and where variance actually granted was for "housekeeping units, motel"; because variance did not authorize construction of apartments, selectmen had no cause to appeal board's decision and their failure to appeal at such time did not bar their petition for injunction. *Town of Rye v. McMahan* (1977) 117 N.H. 857, 379 A.2d 807. (Decided under prior law.) Zoning And Planning ⇨ 1770

Owner had status of an applicant so as to permit Zoning Board to grant variance based on unnecessary hardship for use of her land, even though application had been signed only by a holder of option to purchase the property, where it clearly appeared that both option holder and owner were represented by attorney in applying for the variance. *Welch v. City of Nashua* (1967) 108 N.H. 92, 227 A.2d 600. (Decided under prior law.) Zoning And Planning ⇨ 1538

Unnecessary hardship must relate to owner and not to option holder in order to authorize a variance. *Welch v. City of Nashua* (1967) 108 N.H. 92, 227 A.2d 600. (Decided under prior law.) Zoning And Planning ⇨ 1478

Evidence of unnecessary hardship, that lot could be sold for filling station use for \$17,500 and that such use would not substantially injure adjoining properties or be contrary to public interest, whereas the lot was unsuitable for residential purposes, with value of not over \$3,000, was sufficient to warrant variance. *Bouley v. City of Nashua* (1964) 106 N.H. 79, 205 A.2d 38. (Decided under prior law.) Zoning And Planning ⇨ 1500

Holder of option on property was not one whom zoning variance hardship statute was designed to protect, and option holder could not claim that denial of variance would impose an unnecessary hardship. *Conery v. City of Nashua* (1960) 103 N.H. 16, 164 A.2d 247. (Decided under prior law.) Zoning And Planning ⇨ 1478

"Hardship" within statute authorizing hardship variances must be a hardship to one whom the statute was designed to protect. *Conery v. City of Nashua* (1960) 103 N.H. 16, 164 A.2d 247. (Decided under prior law.) Zoning And Planning ⇨ 1478

Financial hardship in and of itself does not warrant a variance in a zoning ordinance of a city. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1483

City's zoning ordinance, if interpreted, as limiting power of Board of Adjustment in granting variances, is in conflict with statute giving a Board of Adjustment power to authorize, on appeal in specific cases, such variance from terms of ordinance as will not be contrary to public interest where, owing to special conditions, a literal enforcement of ordinance will result in unnecessary hardship. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221h. (Decided under prior law.) Municipal Corporations ⇨ 592(1); Zoning And Planning ⇨ 1033

Where character of district had already changed to such a degree that proposed alteration of house to convert it from a four-apartment building into a six-apartment building, would be consistent with conditions already existing, and owner could not operate building profitably unless converted to a six-apartment building, "unnecessary hardship" existed so as to authorize variance. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1495

The word "unnecessary" as used in statute empowering a Board of Adjustment to authorize such variance from terms of ordinance as will not be contrary to public interest, where, owing to special conditions, a literal enforcement of ordinance will result in "unnecessary" hardship, means not required to give full effect to, purpose of ordinance. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1480

Any hardship suffered by a property owner as result of interference with owner's right to use property without commensurate public advantage, though no public or private rights are affected thereby, is an "unnecessary hardship" within meaning of statute empowering a Board of Adjustment to authorize variance from terms of ordinance. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63

A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1480

If a restriction on use, when applied to a particular property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions of the property distinguishing it from other properties similarly restricted, "hardship" results, authorizing variance in zoning ordinance. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1480

The public interest and spirit of zoning ordinance of city may be factors of controlling importance in determining whether a variance is warranted. *St. Onge v. City of Concord* (1948) 95 N.H. 306, 63 A.2d 221. (Decided under prior law.) Zoning And Planning ⇨ 1473; Zoning And Planning ⇨ 1474

Property may be deemed unique, for purposes of "unnecessary hardship" criterion of New Hampshire statute setting conditions for zoning board's grant of variance, if it is especially well suited to close significant gap in wireless communications coverage. *Industrial Tower and Wireless, LLC v. Town of East Kingston, NH*, 2009, 2009 WL 2704579, Unreported. Zoning And Planning ⇨ 1530

Town's zoning board's finding, in denying variance to permit wireless telecommunications provider to construct single tower in residential district, that provider had failed to show lack of feasible alternatives for closing coverage gap and in turn had failed to show unnecessary hardship warranting variance under New Hampshire law, was supported by substantial evidence, as required by Telecommunications Act; there was no evidence supporting provider's contention that multiple-tower approach would be cost-prohibitive, and provider's site search had focused on single-tower installations. *Industrial Tower and Wireless, LLC v. Town of East Kingston, NH*, 2009, 2009 WL 2704579, Unreported. Zoning And Planning ⇨ 1530

6. — Reasonable use, variances

For purposes of first factor of *Boccia* unnecessary hardship test, which focuses on whether area variance is needed to enable applicant's proposed use of property given special conditions of property, when area variance is sought, proposed project is presumed to be reasonable if it is permitted use under applicable zoning ordinance. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. Zoning And Planning ⇨ 1491

Under *Boccia* unnecessary hardship test concerning application for area variance, there must be no reasonable way for the applicant to achieve what has been determined to be a reasonable use without a variance. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. Zoning And Planning ⇨ 1491

7. — Evidence, variances

Property owner satisfied *Boccia* unnecessary hardship test and thus was entitled to area variance, which would allow owner to build multifamily dwelling within 50-foot setback from wetlands; multifamily dwellings were permitted use for property, and there would only be area of about 20 to 25 feet in width and less than 200 foot in length that could be developed without variance due to uniqueness of property and road and wetland setbacks. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1492

Town's zoning board's finding, in denying variance to permit wireless telecommunications provider to construct single tower in residential district, that tower would be contrary to spirit of governing ordinance, was supported by substantial evidence, as required by Telecommunications Act; ordinance sought to reduce negative aesthetic and environmental impacts, and board addressed specifics of provider's proposal by considering tower's height, location, type of installation, and visibility before concluding that it violated ordinance's spirit. *Industrial Tower and Wireless, LLC v. Town of East Kingston, NH*, 2009, 2009 WL 2704579, Unreported. *Zoning And Planning* ⇨ 1530

8. — Conditions, variances

Where owner of land on which a nonconforming commercial hotel was operating sought a variance to permit the construction of 280 condominium units mainly on land surrounding hotel and its facility which was zoned either as residential district permitting two-family residences or oceanside and beach district permitting only single-family dwellings on each acre of land, board was justified in granting variance insofar as it would permit the construction of a 104-unit condominium which would replace one wing of hotel but refusing any other variance. *Wentworth Hotel, Inc. v. Town of New Castle* (1972) 112 N.H. 21, 287 A.2d 615. (Decided under prior law.) *Zoning And Planning* ⇨ 1495

While statute has no express provision permitting conditions to be attached to variance board of adjustment has broad powers including the authority to attach reasonable conditions where necessary to observe spirit of ordinance, but the conditions must relate to the use of land and not to the person by whom use is to be exercised. *Wentworth Hotel, Inc. v. Town of New Castle* (1972) 112 N.H. 21, 287 A.2d 615. (Decided under prior law.) *Zoning And Planning* ⇨ 1486

9. — Denial of variance

If the proposed use is allowed, an area variance may not be denied by zoning board of adjustment (ZBA) on basis that ZBA disagrees with the proposed use of the property. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1491

Trial court would be justified in reversing zoning board's denial of request for variance only if it could find, by balance of probabilities, that board acted unlawfully or unreasonably in deciding if plaintiff failed to meet all requirements for variance. *Saturley v. Town of Hollis* (1987) 129 N.H. 757, 533 A.2d 29. *Zoning And Planning* ⇨ 1626

Zoning board acted reasonably and lawfully in denying landowner's request for variance in order to build septic tank on land classified as wetlands, even assuming board was unreasonable in not finding that landowner would suffer unnecessary hardship and that hardship was not self-imposed, given town's interest in keeping its public water supply area pollution free. *Saturley v. Town of Hollis* (1987) 129 N.H. 757, 533 A.2d 29. *Zoning And Planning* ⇨ 1532

Superior court applied appropriate standard, in considering whether plaintiff should be granted a variance to build a residence on his property located in a "wetland zone," and made a proper determination, based on the evidence before it, that denial of a variance by town board of adjustment was error as a matter of law. *Little v. Town of Rye* (1980) 120 N.H. 533, 419 A.2d 396. (Decided under prior law.) *Zoning And Planning* ⇨ 1704

Board which found requested use, the construction of condominiums, acceptable for only part of 50-acre tract on which a nonconforming commercial hotel was operated was not required to make specific findings to support the denial of variance as to remaining land. *Wentworth Hotel, Inc. v. Town of New Castle* (1972) 112 N.H. 21, 287 A.2d 615. (Decided under prior law.) *Zoning And Planning* ⇨ 1552

10. Nonconforming uses

"Use variance" allows the applicant to undertake a use that the zoning ordinance prohibits. *Vigeant v. Town of Hudson* (2005) 151 N.H. 747, 867 A.2d 459. *Zoning And Planning* ⇨ 1465

Town zoning board of adjustment, in deciding administrative appeal involving scope of a nonconforming use, could impose conditions on its continued enjoyment. *Peabody v. Town of Windham* (1997) 142 N.H. 488, 703 A.2d 886. *Zoning And Planning* ⇨ 1300

Zoning board, considering administrative appeal, may impose reasonable conditions to prevent improper expansions of nonconforming uses. *Peabody v. Town of Windham* (1997) 142 N.H. 488, 703 A.2d 886. *Zoning And Planning* ⇨ 1309

Town zoning board of adjustment's prohibition of paving materials, equipment, and vehicles on property previously used by well drilling business was reasonable restriction on nonconforming use; restriction was imposed, in part, to address environmental concerns associated with residual paving materials and groundwater after property's new owner sought to operate paving business on the

property, and was also intended to address health and welfare concerns and neighborhood impact generally. *Peabody v. Town of Windham* (1997) 142 N.H. 488, 703 A.2d 886. *Zoning And Planning* ⇨ 1307

Town zoning board of adjustment did not exceed its jurisdiction when it limited size of vehicles authorized to use access road to property previously used by well drilling business as condition of nonconforming use by owner that sought to use property for construction business; vehicle restriction was intended to maintain scope of nonconforming use by limiting size of vehicles allowed to enter and leave the property. *Peabody v. Town of Windham* (1997) 142 N.H. 488, 703 A.2d 886. *Zoning And Planning* ⇨ 1311

11. Reasonable procedures

Pursuant to town's power to pass zoning regulations and to establish board of adjustment for the purpose of granting variances and exceptions from terms of zoning ordinance, town could prescribe reasonable procedures for board to follow in order to carry out such purpose; requirement that board record its findings or reasons for granting or refusing to grant variance could therefore be imposed by municipal ordinance. *Lavallee v. Britt* (1978) 118 N.H. 131, 383 A.2d 709. (Decided under prior law.) *Zoning And Planning* ⇨ 1535; *Zoning And Planning* ⇨ 1552

Statutory grant to town of the power to enact zoning regulations and to establish board of adjustment for purpose of making special exceptions and variances from terms of zoning ordinances necessarily confers the further power to prescribe reasonable procedures necessary to effectuate the purpose for which the power is given. *Lavallee v. Britt* (1978) 118 N.H. 131, 383 A.2d 709. (Decided under prior law.) *Zoning And Planning* ⇨ 1006

12. Exceptions

Denial of special exception by town's zoning board of adjustment was unreasonable; applicant sought special exception to build gravel road, located in wetlands conservation district, over owner's land, applicant presented evidence from two scientific experts, and lay opinions of certain board members, based upon general information not specifically addressed to subject site, were insufficient to counter uncontroverted expert opinions presented by applicant. *Continental Paving, Inc. v. Town of Litchfield* (2009) 158 N.H. 570, 969 A.2d 467. *Zoning And Planning* ⇨ 1532

Although zoning board of adjustment has authority to grant special exception for issuance of building permit, it cannot waive requirement that one be obtained. *Mudge v. Precinct of Haverhill Corner* (1991) 133 N.H. 881, 587 A.2d 603. *Zoning And Planning* ⇨ 1465

Town ordinance regulating removal of dirt, permitting five exceptions: agricultural activities, ceme-

tery operations, landscaping, building construction, and construction of private roads or parking spaces, did not create true exceptions to general prohibition of ordinance, and thus did not conflict with statute vesting authority to grant special exceptions in board of adjustment. *Town of Goffstown v. Thibeault* (1987) 129 N.H. 454, 529 A.2d 930. *Zoning And Planning* ⇨ 1033

Request for attorneys fees for prevailing party, under statute permitting award for frivolous or bad-faith appeals, does not apply to interlocutory transfer without ruling, and attorneys fees may only be awarded by the superior court. *Town of Goffstown v. Thibeault* (1987) 129 N.H. 454, 529 A.2d 930. *Costs* ⇨ 260(4)

Under zoning ordinance prohibiting dance halls and amusement centers, but evidencing purpose to permit restricted uses for "gas sales, boat liveries and grocery facilities" where "approved" by several bodies specified, since ordinance contemplated that uses in question "may" be made upon conditions prescribed therein, and without regard to "unnecessary hardship", it was evident that the establishment of a "special exception" was intended rather than a "variance" requiring showing of "special conditions" resulting in "unnecessary hardship". *Fernald v. Bassett* (1966) 107 N.H. 282, 220 A.2d 739. (Decided under prior law.) *Zoning And Planning* ⇨ 1466

The statute defining powers of board of adjustment with respect to zoning distinguishes between "exceptions," constituting relief from operation of zoning ordinance which board may decide only when established by vote, and "variances," which may be authorized on appeal from orders of an administrative official. *Stone v. Cray* (1938) 89 N.H. 483, 200 A. 517. (Decided under prior law.) *Zoning And Planning* ⇨ 1466

Under statutes governing authority of local board of adjustment to make special exceptions from zoning ordinance, only the ordinance may declare such exceptions, and board may decide application of exceptions in particular cases but may not decide conditions under which exception will be granted. *Stone v. Cray* (1938) 89 N.H. 483, 200 A. 517. (Decided under prior law.) *Zoning And Planning* ⇨ 1471

13. Advisory opinions

While zoning board of adjustment is authorized on appeal to make such order or decision as ought to be made, its duty does not extend to the rendition of an advisory opinion, and its duty was satisfied by its finding that requested use was not an accessory use to residence within meaning of ordinance. *Perron v. City of Concord* (1959) 102 N.H. 32, 150 A.2d 403. (Decided under prior law.) *Zoning And Planning* ⇨ 1340(3)

14. Delegation of authority

So far as zoning ordinance purported to confer upon lake improvement association and selectmen of town the authority and duty to decide whether an exception should be permitted, it constituted an unauthorized delegation of authority. *Fernald v. Bassett* (1966) 107 N.H. 282, 220 A.2d 739. (Decided under prior law.) *Zoning And Planning* ⇨ 1056

While the statute authorized enactment of ordinance permitting board of adjustment to "hear and decide special" exceptions to zoning ordinance, delegation of such authority to board by ordinance was defective, in that it failed to establish standards by which board should be governed in determining whether such an exception should be made. *Fernald v. Bassett* (1966) 107 N.H. 282, 220 A.2d 739. (Decided under prior law.) *Zoning And Planning* ⇨ 1057

14.5. Exhaustion of administrative remedies

Adjoining landowner's failure to exhaust administrative remedies regarding town's issuance of amended building permit to property owner barred adjoining landowner's claim that sought permanent injunctive relief prohibiting construction and development of property owner's lot; adjoining landowner did not appeal issuance of permit to town's zoning board of adjustment (ZBA). *Sutton v. Town of Gilford* (2010) 160 N.H. 43, 992 A.2d 709. *Zoning and Planning* ⇨ 1571

Adjoining landowner's failure to appeal to town's zoning board of adjustment (ZBA) town's issuance of amended building permit to property owner did not bar, on basis of failure to exhaust administrative remedies, adjoining landowner's request to Superior Court for declaratory judgment stating that property owner owned single, merged lot, not two lots; Superior Court action began three months before property owner obtained amended permit, and amended permit was predicated on property owner's assertion that she was entitled to rebuild her guest house whether she owned one lot or two lots. *Sutton v. Town of Gilford* (2010) 160 N.H. 43, 992 A.2d 709. *Declaratory Judgment* ⇨ 44

Question raised in homeowners' declaratory judgment petition, which was whether building permit issued to abutting landowners' predecessors in interest violated town ordinance that allowed building on only ten percent of the land, was not a question that was peculiarly suited to judicial treatment or resolution, and thus, homeowners were not excused from exhausting their administrative remedies. *McNamara v. Hersh* (2008) 157 N.H. 72, 945 A.2d 18. *Declaratory Judgment* ⇨ 44

The legislature enacted a scheme that ordinarily requires exhaustion of administrative remedies when challenging decisions regarding building permits in order to give the local zoning board the first opportunity to pass upon any alleged errors in its

decisions, so that the court may have the benefit of the board's judgment in hearing the appeal. *McNamara v. Hersh* (2008) 157 N.H. 72, 945 A.2d 18. *Zoning And Planning* ⇨ 1571

15. Jurisdiction

Jurisdiction of a zoning board of adjustment relates to granting of special exceptions and variances, and zoning board had no jurisdiction to review order of board of selectmen that landowner cease operating campground by specified date and advising him that any operation of the campground after that date would be deemed a violation of town's zoning ordinance. *Town of Derry v. Simonsen* (1977) 117 N.H. 1010, 380 A.2d 1101. (Decided under prior law.) *Zoning And Planning* ⇨ 1469; *Zoning And Planning* ⇨ 1556

Under statutory scheme for zoning, an application for a variance must be first directed to zoning board of adjustment, and superior court has only jurisdiction to hear appeals from decisions of the board. *Town of Derry v. Simonsen* (1977) 117 N.H. 1010, 380 A.2d 1101. (Decided under prior law.) *Zoning And Planning* ⇨ 1469; *Zoning And Planning* ⇨ 1579

15.5. Presumptions

Town residents who appealed decision of zoning board of adjustment (ZBA) that reversed denial by historic district commission of application to construct supermarket in historic district failed to overcome presumption of prima facie lawfulness and reasonableness with respect to ZBA's finding that the store was principally designed to serve shoppers from town; while residents disputed the accuracy of sales estimate upon which ZBA partly relied in making that finding, they did not dispute other factors on which ZBA relied, i.e., the smaller size of that store as compared to other supermarkets and the absence of a supermarket in the town. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 84

Town residents who appealed decision of zoning board of adjustment (ZBA) that reversed denial by historic district commission of application to construct supermarket in historic district failed to overcome presumption that ZBA's finding that traffic would not negatively impact the district was prima facie lawful and reasonable, where residents did not dispute evidence to which ZBA pointed in support of that finding. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 84

16. Admissibility of evidence

In proceeding to review decision of board of adjustment granting variation for construction of gasoline filling station in area zoned as general residential district, court properly admitted testimony of members of adjustment board which court deemed material and of assistance in reaching deci-

sion, since great liberality in admission of evidence is policy of Legislature in such cases. *Gelinas v. City of Portsmouth* (1952) 97 N.H. 248, 85 A.2d 896. (Decided under prior law.) *Automobiles* ⇨ 395; *Zoning And Planning* ⇨ 1657

16.5. Findings

Whether or not the zoning board of adjustment (ZBA) misunderstood the findings of historic district commission (HDC) with respect to the impact on traffic that construction of a supermarket would have on the character of historic district was irrelevant on judicial review of ZBA's decision reversing HDC's denial of application to construct supermarket in historic district, as ZBA was entitled to conduct de novo hearing on application and was not bound by HDC's findings. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 96

Whether there was evidence to support requirements under applicable regulations for construction of a supermarket in a historic district involved findings of fact made by the zoning board of adjustment (ZBA), which trial court was required to deem prima facie lawful and reasonable on appeal from ZBA's decision reversing the denial by historic district commission of application to construct supermarket. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 680

Finding of zoning board of adjustment, in reversing decision by historic district commission that denied application to construct supermarket in town's historic district, that proposed supermarket would be consistent with other uses in the district was not unreasonable; while predominant use in district was residential, there were several large nonresidential uses in the area including two schools, the village market, and a restaurant, and even though village plan of development placed commercial uses in center of village, town's master plan encouraged commercial development along route where supermarket was to be located. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 84

17. Sufficiency of evidence

Evidence supported trial court's determination that order of town zoning board, denying request for special exception and requiring removal of portion of parking lot that encroached upon conservation zone, was unreasonable; trial court took view of site and found that due to dense growth of trees, view between river and parking lot was obstructed, making board's decision based on esthetics unreasonable. *Korpi v. Town of Peterborough* (1991) 135 N.H. 37, 599 A.2d 130. *Zoning And Planning* ⇨ 1661

18. Review

Challenges to decisions regarding building permits ordinarily must first be made to the zoning board of adjustment, not to the Superior Court. *Sutton v. Town of Gilford* (2010) 160 N.H. 43, 992 A.2d 709. *Zoning and Planning* ⇨ 1571

Should a party be dissatisfied with the decision of a zoning board of adjustment regarding its review of a decision regarding a building permit, the party may appeal to the Superior Court. *Sutton v. Town of Gilford* (2010) 160 N.H. 43, 992 A.2d 709. *Zoning and Planning* ⇨ 1581

Interpretation of regulations under which zoning board of adjustment reversed decision of historic district commission that denied application for construction of supermarket in historic district was question of law that would be reviewed de novo by Supreme Court. *Ouellette v. Town of Kingston* (2008) 157 N.H. 604, 956 A.2d 286. *Environmental Law* ⇨ 680

In reviewing decision of zoning board of adjustment denying application for variance, appropriate standard is not whether as a matter of law evidence compelled contrary finding but whether order or decision was unjust or unreasonable. *Barry v. Town of Amherst*, 121 N.H. 335, 430 A.2d 132 (1981). (Decided under prior law.) *Zoning And Planning* ⇨ 1633

Master, in evaluating action of zoning board of adjustment and in arriving at his conclusions, could consider, in addition to transcript of evidence produced before board of adjustment, testimony of clerk of board of adjustment, a selectman who had testified at hearing before board, occupant of house owned by abutter to north of premises owned by parties desiring variance, and traffic engineer. *Vannah v. Bedford* (1971) 111 N.H. 105, 276 A.2d 253. (Decided under prior law.) *Zoning And Planning* ⇨ 1657

On appeal from denial by board of adjustment of requested variance for purpose of building gasoline service station on property zoned residential and agricultural, nothing in record warranted master's conclusion that board misconceived its authority to grant variance requested if statutory requirements were met. *Vannah v. Bedford* (1971) 111 N.H. 105, 276 A.2d 253. (Decided under prior law.) *Zoning And Planning* ⇨ 1661

Fact that the master sitting as a board of adjustment would arrive at a result different from that reached by zoning board of adjustment is not sufficient to set aside decision of board; only if decision of board could not be reached, either in whole or in part, by reasonable men is it subject to modification or vacation by trial court. *Vannah v. Bedford* (1971) 111 N.H. 105, 276 A.2d 253. (Decided under prior law.) *Zoning And Planning* ⇨ 1631

In proceeding in relation to application for variance for construction of gasoline filling station in