

Language counts when reviewing a special exception. In *Cornier v. Town of Danville ZB-1*, 142 N.H. 775 (1998), the ordinance allows excavations provided they are compatible with, and not injurious to, either natural features or historic landmarks or other historic structures. The board denied a special exception finding that the use would be detrimental to the historic and natural character of Tuckertown Road. The decision was appealed and upheld by the superior court. The supreme court reversed the ZBA, finding that there was nothing in the record to support the ZBA's conclusion that the proposal would have an adverse impact on the road. The court reminded the board that "the law demands that findings be more specific than a mere recitation of conclusions." Board members should be sure that factual conclusions like "adverse impact" are supported by factual findings contained in the record, whether from testimony, evidence, or board members' personal knowledge of the area. If you determine that there WILL be something (adverse impact, detrimental effect, etc.), you should next ask yourself, and make sure the record reflects, WHY you came to that conclusion, i.e., "We find that there will be an adverse impact because of x, y, z."

1998 Land Use Law Update, Timothy Bates, Esq., NH OSP Annual Planning and Zoning Conference, May 30, 1998.

A special exception is only valid if exercised within 2 years from being approved unless the local ordinance allows a greater time period or if such was included within the decision of the ZBA. Further, there is now a six-month window within which the special exception remains valid following the resolution of a planning application filed in reliance upon the special exception. See RSA 674:33, IV.

In 2018, the legislature amended RSA 674:33, I-a and RSA 674:33, IV to allow municipalities to amend their zoning ordinance to provide for the termination of unexercised variances and special exceptions that were granted before August 19, 2013.

The Planning Board must post a notice of termination in town hall for one year, stating that variances and special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice. Variances and special exceptions subject to these automatic termination provisions may still be extended by the ZBA for good cause.

Variations from the Terms of a Special Exception

The question sometimes arises as to whether an applicant for a particular land use can obtain a variance from one of the terms of a special exception in order to qualify for a special exception. Clearly, where a use is allowed by special exception provided certain criteria are met, the special exception could not be granted if any one of the criteria is not satisfied. Similarly, the board could not first grant a variance for the unsatisfied criteria, then turn around and grant the special exception even if all other criteria are met.

When a board is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth within the zoning ordinance. *Tidd v. Town of Alton*, 148 N.H. 424, 427 (2002) (Landowner not entitled to establish a campground by special exception since a requirement for the special exception was that there be no hazards created by automobile traffic and the evidence before the board was that there would be a hazard.) And while the board may grant a special exception, it cannot waive the requirement for a special exception. *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881, 886 (1991) (The abutter alleged that a special exception was needed before the particular land use

was permitted. Two of the Zoning Board of Adjustment members concluded that a special exception was needed. However, those members voted to waive the need for a special exception without addressing the need for or ability of a variance. The court ruled that the Zoning Board improperly “waived” the requirement for a special exception for the construction of 22 additional mobile home sites on a 42-acre tract of land.)

The fact that a landowner does not qualify for a special exception does not mean that approval could not be obtained to achieve the same goal. The landowner could apply for whatever variance relief was necessary to allow the use without applying for a special exception. In *New London Land Use Association v. New London Zoning Board of Adjustment et al.*, for example, the court noted as follows:

“Denial of Lakeside’s request for a special exception, because it did not conform to the density requirement of the zoning ordinance, does not restrict its vested right to continue its motel operation, nor does it require Lakeside to change, in any way, the manner in which the motel units are now situated upon the land. A special exception is a use permitted upon certain conditions as set forth in a town’s zoning ordinance. 3 Rathkopf, *Law of Zoning and Planning* § 41.02 (1987). It is generally recognized in this State that, in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements as set forth within the zoning ordinance. *Shell Oil Company v. Manchester*, 101 N.H. 76, 78, 133 A.2d 501, 502 (1957); *Stone v. Cray*, 89 N.H. 483, 487, 200 A.2d 517, 521 (1938). A zoning ordinance is not discriminatory because it permits the continuation of existing structures and conditions while prohibiting the creation of new structures or conditions of the same type. *Stone, supra* at 485, 200 A.2d at 520. If Lakeside seeks permission to act outside the ordinance, it may apply for a variance from the density requirements of the ordinance. *New London v. Leiskiewicz*, 110 N.H. [462], 466, 272 A.2d [856], 859 (1970).

New London Land Use Association v. New London Zoning Board of Adjustment et al., 130 N.H. 510, 517-18 (1988).

VARIANCES

RSA 674:33 Powers of Zoning Board of Adjustment

I(a) The zoning board of adjustment shall have the power to:

- (1)
- (2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
 - (A) The variance will not be contrary to the public interest;
 - (B) The spirit of the ordinance is observed;
 - (C) Substantial justice is done;
 - (D) The values of surrounding properties are not diminished; and
 - (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

I(b)(1) For purposes of subparagraph I(a)(2)(E), “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) 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
- (B) The proposed use is a reasonable one.