

But Which Do I Need? The Differences between a Special Exception and a Variance

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Now that Fall has arrived in earnest, many homeowners are rushing to complete those home improvement projects before the snow flies. But beware: you may not be able to place that new deck or patio exactly where you'd like it. Homeowners have a responsibility under NH law to comply with existing Zoning regulations in their Towns; and all but eleven or so municipalities in NH have Zoning Ordinances, which will govern such things as setbacks from front, side and rear property lines and wetlands for structures such as new homes, additions, decks, patios and even garden or wood sheds. The claim of "but I didn't know" seldom succeeds before a Zoning Board of Adjustment ("ZBA").

Those Zoning Ordinances, however, do usually contain provisions whereby certain uses are allowed by Special Exception subject to the review by the ZBA. In other instances, a homeowner will need to apply to the ZBA for a Variance. Here's the difference those two types of permits issued by the ZBA:

A special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances, e.g., a retail store over 5000 square feet is permitted in the zone so long as certain parking, drainage and design criteria are met. A variance seeks permission to do something that the ordinance does not permit, e.g., to locate the commercial business in an industrial zone (formerly termed a "use" variance), or to construct the new building partially within the side set-back line (formerly an "area" variance); and, as is set forth below in more detail, the standards for any variance without distinction are the subject of much judicial interpretation and flux.

A use permitted by special exception is also distinguishable from a non-conforming use. As described above, a special exception is a permitted use provided that the petitioner demonstrates to the ZBA compliance with the special exception requirements set forth in the ordinance. By contrast, a non-conforming use is a use existing on the land that was lawful when the ordinance prohibiting that use was adopted.

In the case of a request for special exception, the ZBA may not waive any of the requirements set forth in the ordinance; but the applicant may ask for a variance from one or more of the requirements. The applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement or condition stated in the Ordinance for the Special Exception. Additionally, if the conditions are met, the ZBA must grant the special exception. Note that effective September 22, 2013, the provisions of RSA 674:33, IV were amended to provide that Special Exceptions “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.” A similar provision was inserted concerning variances. See, RSA 674:33, I-a.

In order to receive a Variance, the homeowner must provide sufficient proof of each of the following five criteria: (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, where said term means that, owing to special conditions of the property that distinguish it from other properties in the area: 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 the proposed use is a reasonable one; or 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 each instance, the specific facts and applicable case law must be martialed into a coherent presentation to the ZBA. Additionally, in the event the ZBA denies an application, the Homeowner must present a clear and specific Request for Rehearing within 30 days of the ZBA’s vote; and any issues not contained in the Request cannot be later raised in a Complaint to the Superior Court. That Complaint must be filed with the Court within 30 days of the date the ZBA voted to deny the Request for Rehearing.