

1 ZONING BOARD OF ADJUSTMENT  
2 268B MAMMOTH ROAD  
3 LONDONDERRY, NH 03053

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5 MEETING MINUTES

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7 DATE: JANUARY 20, 2010

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9 BOARD MEMBERS PRESENT: VICKI KEENAN, CHAIR  
10 MATTHEW NEUMAN, VICE CHAIR  
11 JIM SMITH, VOTING MEMBER  
12 MICHAEL GALLAGHER, VOTING ALTERNATE  
13 JOE GREEN, VOTING ALTERNATE

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15 ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/  
16 ZONING OFFICER

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18 Chair Vicki Keenan opened the meeting at 7:00 PM. She appointed alternate Michael Gallagher  
19 to vote for absent member Larry O'Sullivan and alternate Joe Green to vote for absent member  
20 Neil Dunn.

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22 Approval of December 16, 2009 minutes- Chair Keenan entertained a motion to approve the  
23 minutes of the December 16, 2009 meeting. J. Smith so moved. M. Neuman seconded. The  
24 motion was approved, 5-0-0.

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26 Election of Officers- M. Gallagher nominated V. Keenan as Chair of the Zoning Board of  
27 Adjustment. J. Smith seconded. The nomination was approved, 4-0-1 (V. Keenan abstained).

28 M. Gallagher nominated M. Neuman as Vice Chair of the Zoning Board of Adjustment.  
29 J. Smith seconded. The nomination was approved, 4-0-1 (M. Neuman abstained).

30 J. Smith nominated L. O'Sullivan as Clerk of the Zoning Board of Adjustment. M.  
31 Neuman seconded. The nomination was approved, 5-0-0.

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33 Approval of amendments-

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35 1. Rules of Procedure; To reflect the change made to RSA 676:3, II regarding the  
36 issuance of decisions and minutes, the following amendments were proposed to the Rules of  
37 Procedure for the Town of Londonderry Zoning Board of Adjustment:

38 a. Page 4, "Decisions," the words "within 144 hours of the public meeting,"  
39 amended to "not more than 5 business days after the meeting."

40 b. Page 5, "Records," the words "within 144 hours after the decision is  
41 made" amended to "not more than 5 business days after the decision is made."

42 J. Smith made a motion to approve the amendments to the Rules of Procedure as  
43 proposed. M. Neuman seconded. The motion was approved, 5-0-0.

45 2. Variance application; R. Canuel explained that the revised variance application being  
46 proposed reflected changes to State statute 674:33 I(b) which became effective January 1, 2010  
47 with the passage of Senate Bill 147 in 2009.

48 Prior to 2010, RSA 674:33 I(b) gave all New Hampshire Zoning Boards of Adjustment the  
49 power to:

50 “I. (b) Authorize upon appeal in specific cases such variance  
51 from the terms of the zoning ordinance as will not be contrary  
52 to the public interest, if, owing to special conditions, a literal  
53 enforcement of the provisions of the ordinance will result in  
54 unnecessary hardship, and so that the spirit of the ordinance  
55 shall be observed and substantial justice done.”  
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57 SB 147 not only modified the presentation of the “five points of law” from a paragraph to  
58 separately numbered items (see below), it repealed the change to the unnecessary hardship  
59 criteria that was a result of NH Supreme Court Case of Boccia V. City of Portsmouth in 2004.  
60 That case produced a differentiation between “area” and “use” variances with regard to  
61 hardship which now no longer exists.

62 Instead, hardship is determined using criteria developed in the 2001 Simplex  
63 Technologies, Inc. v. Town of Newington Supreme Court case. The justification for hardship in  
64 all variance requests has reverted back to the applicant’s “reasonable use of the property” and  
65 the demonstration that “no fair and substantial relationship exists” between the general intent  
66 of the ordinance and the particular constraint affecting to the applicant’s property. The updated  
67 version of RSA 674:33 I(b) now reads as follows:

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69 “I. (b) Authorize, upon appeal in specific cases, a variance from  
70 the terms of the zoning ordinance if:  
71 (1) The variance will not be contrary to the public interest;  
72 (2) The spirit of the ordinance is observed;  
73 (3) Substantial justice is done;  
74 (4) The values of surrounding properties are not diminished; and  
75 (5) Literal enforcement of the provisions of the ordinance would  
76 result in an unnecessary hardship.  
77 (A) For purposes of this subparagraph, “unnecessary hardship”  
78 means that, owing to special conditions of the property that  
79 distinguish it from other properties in the area:  
80 (i) No fair and substantial relationship exists between the  
81 general public purposes of the ordinance provision and  
82 the specific application of that provision to the property;  
83 and  
84 (ii) The proposed use is a reasonable one.  
85 (B) If the criteria in subparagraph (A) are not established, an  
86 unnecessary hardship will be deemed to exist if, and only if,  
87 owing to special conditions of the property that distinguish it  
88 from other properties in the area, the property cannot be  
89 reasonably used in strict conformance with the ordinance, and  
90 a variance is therefore necessary to enable a reasonable use of it.”

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Subparagraph (5)(B), R. Canuel explained, will only be put into effect if the Board does not feel the applicant sufficiently addressed hardship under subparagraph (5)(A). This subparagraph actually applies the more stringent pre-Simplex standard resulting from the Governor's Island Club v. Gilford case of 1983.

M. Neuman made a motion to approve the amendments to the variance application. M. Gallagher seconded. Chair Keenan asked for any discussion on the motion.

A discussion ensued as to whether the application should include an explicit advisement to applicants that they should prepare to address (5)(B) if (5)(A) is not satisfied. R. Canuel clarified that the choice is solely the Board's as to whether (5)(A) or (5)(B) will apply after they have heard the applicant's entire presentation. It is not a choice of the applicant to address one subparagraph or the other, nor will they need to be mindful of a "failsafe" mechanism in the application. If they have not established any special conditions of their property that are distinct from surrounding properties under (5)(A.i), they will automatically have not met the burden of (5)(B) either.

It was then questioned whether the Board should enter deliberations after hearing the justification for points (1) through (5)(A) and then re-open the presentation to hear the argument for (5)(B) if they agreed (5)(A) was not fully addressed. R. Canuel replied that the applicant would present their entire argument and the Board would make a decision if one was needed during their deliberations. Chair Keenan advised that if board members are unclear on any of the applicant's testimony, they be sure to ask for clarification before deliberations commence.

Following this discussion, J. Smith moved the question. The motion to approve the amended variance application was approved, 5-0-0.

3. Ruling Requirements: The Ruling Requirements for the Town of Londonderry Zoning Board of Adjustment were amended on the same basis as the variance application, i.e. to reflect the aforementioned change in RSA 674:33 I(b). M. Neuman made a motion to approve the Ruling Requirements as amended. J. Smith seconded. The motion was approved, 5-0-0.

Chair V. Keenan asked for any further business from the Board. Seeing none, she entertained a motion to adjourn the meeting. J. Smith so moved. J. Green seconded. The motion was approved, 5-0-0.

The meeting adjourned at 7:45 PM.

RESPECTFULLY SUBMITTED,  
  
JAYE A TROTTIER  
SECRETARY

**APPROVED MARCH 17, 2010** WITH A MOTION MADE BY JIM SMITH, SECONDED BY MICHAEL GALLAGHER AND APPROVED 4-0-2 WITH VICKI KEENAN AND LARRY O'SULLIVAN ABSTAINING.