

INSTRUCTIONS TO APPLICANTS APPEALING TO THE BOARD OF ADJUSTMENT

The Board strongly recommends, before making any appeal, you become familiar with the Middleton Zoning Ordinance (<http://nhplanning.com/Middleton/regulatory.htm>), with the New Hampshire Statutes TITLE LXIV, RSA Chapters 672- 677 covering planning and zoning, with RSA 483-B, the comprehensive Shoreland Protection Act available for review at the Municipal Building or on the Web at <http://www.gencourt.state.nh.us/rsa/html/nhtoc.htm>, and with the maps of the pertinent overlay district, available for review at the Municipal Building.

The **four types of appeals** that can be made to the board of adjustment are:

Variance	permission to use a specific piece of property in a more flexible manner than normally permitted by Ordinance
Appeal from an Administrative Decision	appealing an order, requirement or decision made in the enforcement of the Zoning Ordinance, that you feel was made in error
Special Exception	exceptions to the terms of the Ordinance made in accord with the general purpose, intent and rules contained in the Ordinance
Equitable Waiver of Dimensional Requirements	waivers only from existing physical layout and mathematical or dimensional requirements contained in the Ordinance, but not from use restrictions

The applicant must decide **which appeal** applies to his/her situation. The following information addresses these appeals in detail and states what you, the applicant, need to do to bring your appeal before the Board of Adjustment.

VARIANCE: A **variance**, which may be granted under certain circumstances, is an authorization to use your property in a way that is not permitted under the strict terms of the Zoning Ordinance. If you are applying for a **variance**, you must first have some form of determination that your proposed use is not permitted without a variance. Most often, this determination is a denial of a building permit. A copy of the determination must be attached to the application.

For a variance to be granted, **you must show** that your proposed use meets **all five** of the following conditions:

1. The proposed use would not diminish surrounding property values.
2. Granting the variance must not be contrary to the public interest.
3. Denial of the variance would result in unnecessary hardship to the owner. **Hardship**, as the term applies to zoning, results if a restriction, when applied to a particular property, results in an arbitrary or confiscatory limitation, or is unduly oppressive **because of conditions of the property that distinguish it from other properties under similar zoning restrictions**. Hardship, under zoning law, has nothing to do with the physical or economic condition of the owner.

The NH Supreme Court has established the following test for unnecessary hardship for a **Use Variance** consisting of three elements:

- a. that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;
- b. that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- c. that the variance would not injure the public or private rights of others.

For an **Area Variance**, an applicant can demonstrate unnecessary hardship by establishing that:

- a. special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and
- b. the applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.

4. Granting the variance would do substantial justice.
5. The proposed use is not contrary to the spirit of the ordinance.

APPEAL FROM AN ADMINISTRATIVE DECISION: If you have been denied a building permit or are affected by some other decision regarding the administration of the Town of Middleton Zoning Ordinance, and you believe that **the decision was made in error** under the provisions of the ordinance, you may appeal the decision to the Board of Adjustment. The appeal will be granted if you can show that the decision was indeed made in error. If you are **appealing an administrative decision**, a copy of the decision appealed from must be attached to your application.

SPECIAL EXCEPTION: Certain sections of the Zoning Ordinance provide that a particular use of property in a particular zone, will be permitted by **Special Exception** if specified conditions are met. The necessary conditions for each Special Exception are given in

the ordinance. Your appeal for a Special Exception will be granted if you can show that the conditions stated in the Zoning Ordinance are met.

If you are applying for a **Special Exception**, you may also need site plan or subdivision approval, or both, from the Planning Board. Even in those cases where no Planning Board approval is needed, presenting a site plan to the Planning Board will assist in relating the proposal to the overall Zoning Ordinance. This should be done **before** you apply for a Special Exception.

EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS: The Board may grant an equitable waiver only for existing dimensional nonconformities provided the applicant can meet the following required standards:

- a) The nonconformity was not discovered until after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser; and
- b) The nonconformity was not an outcome of ignorance of the law or bad faith but was instead caused by a legitimate mistake.
- c) If the violation has existed for 10 years or more with no enforcement action commenced by the town, including written notice, then the applicant has met the criteria for an Equitable Waiver of Dimensional Requirement.

If the above conditions (a) and b) or c)) are satisfied, the applicant must then demonstrate to the Board:

- a) The nonconformity does not constitute a public or private nuisance nor diminish the value or interfere with future uses of other property in the area; and
- b) The cost of correction would far outweigh any public benefit to be gained.

Forms:

For any appeal, the application form must be properly filled out. The application form is intended to be self-explanatory, but be sure that you include:

- **Who** owns the property? If the applicant is not the owner, this must be explained. A letter of authority must be provided by the owner stating that the applicant is acting in behalf of the Owner.
- **Where** is the property located?
- **Description of** the property including area, frontage, side and rear lines, slopes and natural features, etc.
- **What** do you propose to do? Attach sketches, plot plans, pictures, construction plans, or whatever may help explain the proposed use. Include copies of any prior applications concerning the property.

- **Why** does your proposal require an appeal from the Board of Adjustment?
- **Why** your appeal should be granted?
- **A list** of all abutting property owners attached to your application. This information can be obtained from the map files at the Municipal Building. If you have any difficulty preparing the abutters list, you may consult the tax assessor's office, but the accuracy of the list is **your** responsibility.

Certified Plot Plan:

A Certified Plot Plan is recommended as part of the Board of Adjustment application. Since a similar plan is usually necessary for a building permit application, the plan can serve both purposes. Lack of a plot plan could result in a delay or misunderstanding. If the Board decides a Certified Plot Plan is required, the following additional information must be shown on that plan at the discretion of the Board:

- distance between septic system and wetlands
- wetlands must be delineated with soil types identified
- distance between proposed septic system and wetlands on abutting properties
- distance between proposed septic system and well(s) on abutting properties
- topography contours to indicate the direction of water runoff from the proposed septic
- topography contours between any wells within 75 feet and/or any wetlands within 100 feet of a proposed septic system
- maximum height of water table between proposed septic system and wetlands
- seals of all persons providing information shown on the plan must appear on plan
- other information as required by the Board

Note that a Certified Plot Plan must accompany any application for an area variance involving a septic design.

Board members of the Middleton Zoning Board of Adjustment and/or their representatives may request access to the subject property (site visit) for the purpose of obtaining information on areas directly related to the appeal, as well as those areas which could be indirectly affected by an approval.

Costs:

Mail or deliver the completed application, with all attachments to the Selectmen's Secretary.

- A \$100.00 fee will be charged to cover the cost of the application process and legally required newspaper notices.
- In addition, a certified mailing fee will be required for notification of each abutting property owner. The fee is presently \$6.11 per notification (\$0.46 Base Rate + \$2.90 Certified Mail + \$2.75 Return Receipt).
- It is the responsibility of the applicant to obtain and fill out the Certified Mail Receipt (PS Form 3800) and the Domestic Return Receipt (PS Form 3811) for each abutter; No. 10 envelopes must also be made out for each abutter, indicating the Municipal Offices as the

return address. Certified Mail and Return Receipt forms are available at any Post Office. (Example: the total check amount for a variance application on a property with six (6) abutters will be $\$100.00 + 6 \times 6.11 = 136.66$).

- Make the check payable to The Town of Middleton and remit with your application.

Your Appearance Before The Board:

Applicants are encouraged to informally present their application to the Board for initial review. This initial review will not result in a decision but will give the Board the opportunity to advise the applicant if their application is complete. There is no charge for this review and no penalty if the application is incomplete. Once an application is deemed complete, it will be scheduled for hearing.

The Board meets at 6:30 PM on the second Tuesday of each month unless otherwise noted. Public notice of the hearing will be posted and printed in a newspaper, and notice will be mailed to the applicant, all abutters and to other parties whom the Board may deem to have an interest, at least five days before the date of the hearing. The applicant and all other parties should appear in person or by agent or counsel to state reasons why the appeal should or should not be granted.

After the public hearing is complete, the Board will reach a decision. The applicant and all other parties to the case will be sent a **notice of decision**.

Appealing The Board of Adjustment Decision:

If the applicant believes the Board's decision is wrong, he/she has the right to appeal. The Selectmen, or any party affected, have similar rights to appeal the decision in a case. To appeal, the applicant must first ask the Board for a rehearing. The **motion for rehearing** may be in the form of a letter to the Board. The motion **must be made within 30 days after the decision is filed and first becomes available for public inspection in the Board's office**, and must set forth the grounds on which it is claimed the decision is unlawful or unreasonable. The Board may grant such a rehearing if, in its opinion, good reason is stated in the motion. The Board will not reopen a case based on the same set of facts unless it is convinced that an error would be created by not doing so. Whether or not a rehearing is held, **you must have requested one before you can appeal to the courts**. When a rehearing is held, the same procedure is followed as for the first hearing, except public notice and notice to abutters will be at the Town's expense. See RSA Chapter 677 for more detail on rehearing and appeal procedures.