

Senate Election Law and Municipal Affairs Committee

Jessica Bourque 271-2104

SB 435, relative to the zoning board of adjustment variance criteria.

Hearing Date: January 13, 2026

Time Opened: 9:16 a.m.

Time Closed: 9:45 a.m.

Members of the Committee Present: Senators Gray, Lang, Rochefort, Perkins Kwoka and Long

Members of the Committee Absent: None

Bill Analysis: This bill removes the hardship requirement from the authorization of zoning variances.

Sponsors:

Sen. Abbas

Sen. Gannon

Sen. Sullivan

Sen. Birdsell

Sen. Innis

Sen. Murphy

Who supports the bill: Senator Abbas, Tom DeRusa (NH Housing Action), Joanie McIntire (NH Realtor Association)

Who opposes the bill: Margaret Byrnes (NH Municipal Association), Diana Luszc

Summary of testimony presented:

Senator Daryl Abbas, Prime Sponsor

- There are five criteria landowners must meet to be granted a property variance. This bill removes the fifth criterion, which is hardship.
- Some boards struggle to define what qualifies as a hardship.
- The abutter is protected by the other four criteria; the fifth does not. Whether there is a hardship or not doesn't affect the abutter.
- This would not remove local control.
- Senator Abbas believes this will lead to fewer lawsuits.

Senator Lang said the hardship requirement is often used when the master plan or zoning laws have set requirements, but a landowner is seeking a variation because they don't meet the requirement. One reason you might not meet it is the property layout. Senator Lang used wetlands as an example because wetlands are probably the most common case, which, because of the land's layout, creates a hardship when there is an encroachment at say eight feet when the regulation is 10 feet.

Senator Abbas disagreed, noting that someone could build a smaller house to meet the criteria. People request variances, but they aren't always necessary.

Senator Lang followed up and noted that they sometimes waive the 10-foot setback, reducing it to eight feet. The zoning board he served on focused on the nature of the property owner's land, not the rights of the abutter.

Senator Abbas responded that the landowner still needs to satisfy the remaining four criteria and noted significant confusion about how to apply the fifth criterion. Senator Abbas also mentioned that people are losing trust in the process.

Senator Lang asked what the point of zoning ordinances is.

Senator Abbas stated that the variance can be granted, with or without the hardship, as long as the other criteria are satisfied.

Margaret Byrnes, NH Municipal Association

- NHMA is opposed to this bill.
- Variances serve as a safety valve; they are not supposed to be easily granted because the property owner is requesting an exception to laws that everyone else must follow.
- The five criteria are designed to identify special cases, with unnecessary hardship being a key part of the test because it links an ordinance to a specific property and makes sure variances are not granted arbitrarily and that there is a justifiable reason for granting the variance.
- Unnecessary hardship isn't clear language on its own, but it becomes clearer as you read the statute further.
- During the bill presentation, there was some discussion about how the other variance criteria focus more on the abutter, and there are considerations related to that within the first four criteria, but that is why the fifth criterion is so important. This is because the zoning board examines the specific circumstances of this particular property to decide whether it should be granted or not.

Senator Perkins Kwoka said she is intrigued by the piece of Ms. Byrnes' testimony that discussed that the criteria ties the decision to the land, and asked Ms. Byrnes to elaborate.

Ms. Byrnes said it ties the decision to the property's specific circumstances by asking why, in this circumstance, the property or its owner should be allowed to deviate from the rules that apply to everyone else.

Senator Perkins Kwoka said Ms. Byrnes is probably more familiar with the case law and asked whether the case law results in a reasonable balance in applying unnecessary hardship, or if there is some room for improvement.

Ms. Byrnes said this is a complicated area, but the case law is fairly extensive. There are many clear, well-reasoned Supreme Court decisions that offer guidance to zoning boards on how to apply the criteria. It does require some training and study to fully understand the criteria, but the decisions provide considerable guidance in this area.

Senator Perkins Kwoka inquired about the cases Ms. Byrnes mentioned.

Ms. Byrnes stated that *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), and *Harborside Associates v. Parade Residence Hotel*, 162 N.H. 508 (2011), are two examples where guidance has been established.

Senator Long said the applicant must demonstrate how unique their property is to obtain a variance, so that if the legislature were to eliminate the hardship, it would be less about the property.

Ms. Byrnes said that, in a way, it would be, because they wouldn't be establishing why, if they aren't given this permission, they would suffer a taking of their property essentially by having to comply with the zoning ordinance.

Senator Rochefort said that he has served on these types of boards for many years. The four criteria before this one are pretty clear; this one is tough, and we got caught up a lot. Is there a way we could clarify that?

Ms. Byrnes said that many smart people have worked on this, but there might be room for improvement. She is willing to help try to clarify it and believes it is important not to repeal it entirely.

Senator Gray said he is interested in grandfathering in the future. It seems to him that the condition of the land would suggest we should change the regulation, also offers insight into future decisions about what will be grandfathered for that land.

Ms. Byrnes requested clarification.

Senator Gray stated that when a variance is granted, it remains with the land. To understand the current hardship, it helps to clarify what is happening. If the fifth criterion is removed, does a homeowner still understand what is grandfathered?

Ms. Byrnes said she wouldn't use grandfathering in that situation because once permission is granted, it becomes part of what you are allowed to do with the property. Usually grandfathering applies when an act predates a regulation, allowing you to continue it even after the regulation is in place.

Joanie McIntyre, NH Association of Realtors

- The most frustrating barrier for real estate agents and buyers is the hardship criterion.
- Ms. McIntyre thinks it should be the first criterion.

- The hardship criterion is very difficult for a homeowner to understand.
- Most variances are requested for minor issues.
- Realtors believe that property owners should have the freedom to use their property in a way that suits them.

Diana Luszczyk, Raymond

- Former planning board chair.
- Raymond received five requests for variances in 2025, and four of them were approved.
- She had to apply for a variance when she moved to Raymond, and the town was helpful. It can be confusing for people requesting a variance.
- Doesn't believe the hardship component is a huge hurdle for people to overcome.
- She believes this bill could lead to overcrowding.
- We have regulations because everyone needs to live here, and it benefits the community to ensure land is used properly.
- There is extensive training for zoning board members.
- When she was on the planning board, they often had discussions about adding a warrant article if the same variance kept recurring.

Senator Perkins Kwoka stated that, given the housing shortage, the State aims to ensure the best use of our lots. She asked Ms. Luszczyk whether she believes this balance is maintained if this criterion is upheld, since a housing development might not meet a requirement due to a minor issue that prevents the project from moving forward.

Ms. Luszczyk said she doesn't believe most of these variances involve developers. For example, she thinks it's homeowners who might be unable to build a garage because of too much ledge or something similar. Developers are a completely different matter; they have engineers and contractors who can modify the land and typically don't need variances.

Senator Long asked what the one variance not granted in Raymond was and whether it was the hardship that was denied.

Ms. Luszczyk said she didn't have that information.