

ZBA Decision Making Process

Presented by:

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Purpose of the ZBA

Constitutional “safety valve” to prevent indirect taking of private property for public use without just compensation (inverse condemnation). U.S.

Constitution, 5th Amendment; N.H.

Constitution, Part 1, Arts 2 & 12

Mechanism for relief via administrative appeal, special exception, variance and equitable waiver, RSA 674:33

ZBA - Judicial Function

- ZBA is not legislative (does not create or amend land use ordinances or regulations).
- ZBA is not executive (does not enforce its decisions).
- ZBA is quasi-judicial - it *interprets* the ordinance and regulations and applies that interpretation to the application before it.
- Someone's property is at stake, so procedural concerns are elevated.



If you remember nothing else...

- Read and follow statutory requirements.
- Read and follow your ordinance and rules.
- Be fair and reasonable.

Municipal Authority to Act

- All municipal authority to act comes from the legislature, *Girard v. Allenstown*, 121 N.H. 268 (1981)
- Must find a statute that authorizes the action or necessarily implies it
- May not rely on the absence of a statute that prohibits it
- Municipality/board may not have an ordinance, rule or procedure that isn't authorized or necessarily implied by a statute.

Relationship to the Public

- Procedural due process: citizens have right to notice and the opportunity to be heard.
 - *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- Municipalities have a constitutional obligation to provide assistance to all citizens with the **process**.
- It is a “reasonable” obligation, not a duty to educate beyond notices legally required.
 - *Kelsey v. Town of Hanover*, 157 N.H. 632 (2008)

ZBA: a Quasi-Judicial Board

- ZBA collects evidence and hears testimony
- From these, it finds facts (may use member knowledge, too, but within limits)
- Decisions based on the facts, applying legal tests to reach a decision
 - Approve, deny, modify, or impose conditions
- Burden of proof is on the applicant
- ZBA develops a record for possible court review

Constitutional Procedural Due Process

- To protect against the unfair loss of a property right, state and federal constitutions require at least:
 - *Notice* to affected persons of a proposed action
 - An opportunity to *be heard* at a public hearing
 - Ability to *appear and speak* through counsel
 - Decision by an *impartial* tribunal
 - Deliberation *based upon evidence and facts*
 - A *written decision* with reasons
 - *Appeal* to seek correction of error

NH Statutory Due Process

- Notice to affected people, RSA 676:7, I(a)
- Opportunity to be heard at a public hearing, to appear and speak through counsel, RSA 676:7, I and III
- Decision by an impartial tribunal, RSA 673:14
- Deliberation based on evidence and facts, RSA 674:33
- A written decision with reasons, RSA 676:3

Working with Other Boards

- When a proposal requires both ZBA and PB approval
 - Which board hears the case first?
 - Whose conditions prevail?
- Joint Meetings, RSA 676:2
 - Any land use boards may hold joint meetings to decide a case involving jurisdiction of both boards
 - Each board must comply with all legal requirements (notice, minutes, votes)
 - Can be very efficient for everyone (time, money and effort for applicant, abutters, boards and public)

One Bite at the Apple

- Usually, an applicant may not apply for the same thing over and over.
- 2nd application must be materially different in nature and degree from the 1st. *Fisher v. Dover*, 120 N.H. 187 (1980)
 - A change in applicable legal standard
 - Application changed to address reasons first was denied

Preparing for Success - Application

- Application can provide a road map for the board
 - What facts do you need to know? Ask for them in the application. If they aren't provided, you know what to ask about.
 - Require a description of the proposal and why it should be granted.
 - Note what they are requesting and the legal standards they must meet to help you make sense of the evidence at the hearing.

Timing of the Hearing

- ZBA hearing within 45 days of receipt of application, RSA 676:7, II.
 - Applicant is not entitled to the relief they seek merely because the time requirement isn't met.
- **HOWEVER** – although state law doesn't require the **decision** within a particular time, federal law may (e.g., telecom facilities).
- Notice of hearing: certified/verified mail to all parties at least 5 days before hearing, newspaper publication at least 5 days before hearing. RSA 676:7.
- You can always provide **more** notice, but not less.

Right to a Full Board?

- Not entitled to a hearing and decision by a full board, *Auger v. Strafford*, 156 N.H. 64 (2007)
 - Offer to wait until a full board is available – yes, but apply the policy evenly!
- Can you substitute someone after the process starts?
- Can a member vote if he/she missed one or more sessions of the hearing?
 - On both: If they can catch up by reviewing the record, yes, but it is better to avoid that situation if possible.

Participation in the Public Hearing

- Board members may ask questions of parties
- Alternates not sitting for someone else may participate in the hearing process if allowed by ZBA's rules, RSA 673:6, V.
- Disqualified members may participate in the hearing as parties (i.e., abutters) or as members of the public.
- Board must hear all parties, and may hear "such other persons as it deems appropriate," RSA 676:7, I(a).

Public Hearing

- Continuing a hearing to another day – no additional notice required if time, date and place of next session are stated before first session ends. RSA 676:7, V
- No contact between parties and board members in the interim days.
- Don't close hearing too soon – has everyone been heard? Has the board asked all of its questions of the parties?

Obtaining Legal Advice

- Consultation with legal counsel: not a “meeting” under RSA 91-A
 - No posting, no notice, no minutes.
 - Attorney must be actively participating
- Reviewing legal advice without the attorney is *not* “consultation with legal counsel,” so must review either in public session (thus waiving attorney-client privilege) or in nonpublic session – RSA 91-A:3, II(1)

Deliberating

- May deliberate immediately, or at the end of the meeting, or on a different day, may continue over more than one session.
- If you need to get legal advice before deciding, you should do that.
- Deliberate only in public, RSA 673:17.
- Deliberation is at a public meeting, not a hearing – so no personal notice to anyone is required (but it is a good idea).

Deliberating

- Before making a decision, review what relief is being sought, the legal standards that apply, how evidence fits with the standards
- Deliberation is only among board members – no comments from parties or public
- Board should NOT ask questions of the parties during deliberations
- Minutes should reflect the deliberation discussions, and all members participate!

Weighing Expert Evidence

- Board has considerable discretion to choose between competing expert opinions, *Richmond Co. v. Concord*, 149 N.H. 312 (2003).
 - Must have a reason for rejecting expert opinions (what is lacking in qualifications, methodology, data, conclusions?)
 - Minutes and decision should reflect the board's reason for not accepting expert opinion (personal feelings are not enough)
- General studies and articles may not be enough to contradict specific expert opinion.
- Lay opinions and anecdotes don't outweigh uncontroverted expert evidence. *Trustees of Dartmouth College v. Hanover*, No. 2017-0595 (11/6/18); *Condos East Corp. v. Conway*, 132 N.H. 341 (1989).

Motions

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- May a member draft (but NOT circulate) a motion ahead of time?
- A motion can be amended, but keep track!
- Only ONE motion before the board at a time.

Drafting a Motion

- Begin with what the applicant has asked for, but the board is not required to grant exactly what the applicant seeks; craft the relief you find appropriate.
- Include conditions in the motion (this may be where the motion gets amended over the course of the deliberations).
- Be careful incorporating codes by reference into your decision, because it may incorporate things you don't expect.
 - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)

Motions

- Text of the motion (also who made and seconded it) and what happens to it must be in the minutes.
- Give a written copy to the person taking the minutes.
- If meeting is being audio recorded, be careful to create an adequate record:
 - Read motion out loud, and
 - Require verbal vote from every member

Conditions of Approval

- Conditions “precedent”
 - Must be fulfilled before approval can become final. Consider placing a time limit on satisfying them.
- Conditions “subsequent”
 - Restrict use of the property going forward (ex., hours of operation)
- May not delegate or assign duties to other boards or agencies, only to the applicant.
 - ZBA approval that was subject to off-site improvements to be completed by the State. Held, special exception was unlawful. *Tidd v. Alton*, 148 N.H. 424 (2002)

Conditions of Approval

- Variances run with the land, not the owner.
 - *Batchelder v. Plymouth ZBA*, 160 N.H. 253 (2010)
- Exception: variances for the disabled, RSA 674:33, V: ZBA may find that variance shall survive only so long as the particular person has a continuing need to use the premises.
- Exception: waiver from building and site requirements for agricultural uses, RSA 674:32-c:
 - ZBA shall grant waiver to the extent necessary to reasonably permit the agricultural use.

Voting on Motions

- ▶ Must have at least 3 concurring votes to take any action (regardless of how many members are seated). RSA 674:33, III.
- ▶ Failed motion: if you don't get 3 votes in favor of the motion, is that a denial of the appeal or application, or is this a non-decision? Your rules of procedure should answer this question.

Voting on Variances

- Applicant must satisfy *all 5 criteria* in RSA 674:33 to obtain a variance, and must receive at least 3 votes in favor.
- Board should discuss all 5, but there are varying opinions on whether to vote separately on each one.
- ZBA must use one voting method for all variances until it formally votes to change the method. RSA 674:33, I(c)
 - Change in voting method takes effect in 60 days and doesn't affect pending cases.

Written Notice of Decision

- Required by RSA 676:3.
- Guides current/future use of the property
- Relied upon by enforcement officials
- Reviewed by judge in an appeal:
 - How expert opinions were relied upon (or rejected), what evidence was important, facts found
 - Although a one-line written decision combined with meeting minutes has been found acceptable in the past, NH courts strongly recommend specific findings of fact be stated in written decision to avoid a remand.

Notice of Decision to Include:

- The motion that was passed
- If the application/appeal was denied, decision must explain the reason(s). RSA 676:3
- All conditions of approval, clearly explained
- Findings of fact that the Board made
- Any deadlines or milestones required

Notice of Decision

- Written decision and meeting minutes must be on file for public inspection within 5 business days after the vote, RSA 676:3, II and RSA 91-A.
- If they are not: (a) violation of the Right to Know Law, and (b) if appealed to superior court, extra time for appeal to be amended.
- Does your board mail or e-mail a copy to the applicant? Be consistent.

Motion for Rehearing

- Must be filed with ZBA w/in 30 days after order or decision. RSA 677:2
- Who can file? Select board, any party, anyone “directly affected” by the decision or order.
- Even without a motion, ZBA may reconsider its decision within that 30 day period to correct error(s). *74 Cox Street, LLC v. Nashua*, 156 N.H. 228 (2007)
- Motion must state every reason the decision was unlawful or unreasonable. RSA 677:3.

Motion for Rehearing

- ZBA must grant or deny motion within 30 days, RSA 677:3.
- ZBA holds public **meeting** (not a hearing) to decide. Discussion and vote by board, no input.
- Avoid new findings of fact or new reasoning when denying a motion for rehearing (just say “denied”).
- New evidence submitted with motion for rehearing:
 - If it could have been presented during original hearing, ZBA **may** consider it.

Holding a Rehearing

- If motion for rehearing is granted, the case begins again. Schedule hearing, send notices, all parties present all information again and a new decision is made based on this new record.
- Rehearing is not limited to the issues originally identified in the motion for rehearing.

Appeals to Superior Court

- If motion for rehearing is denied:
 - Any person aggrieved may file a petition for appeal with the superior court within 30 days of the date of the board's vote. RSA 677:4.
 - The governing body may appeal on behalf of the town/city. *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003)
- Compile and preserve “the record” as completely as possible because it **is** the record the court will review.

Appeals to Superior Court

- The “Certified Record” includes everything the ZBA has on the case.
 - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, notices, certified mail receipts.....
 - Court will set a date by which it must be submitted. Your board and staff should work with counsel to assemble it.

Concluding Suggestions

- Encourage all members and staff to learn about laws, ordinances and rules.
- Stay up to date on changes in the law – are your procedures current?
- Stay in touch with enforcement officials and Planning Board – are you helping or hindering one another?
- See how other boards in your municipality and in other municipalities do things.



Thank you!

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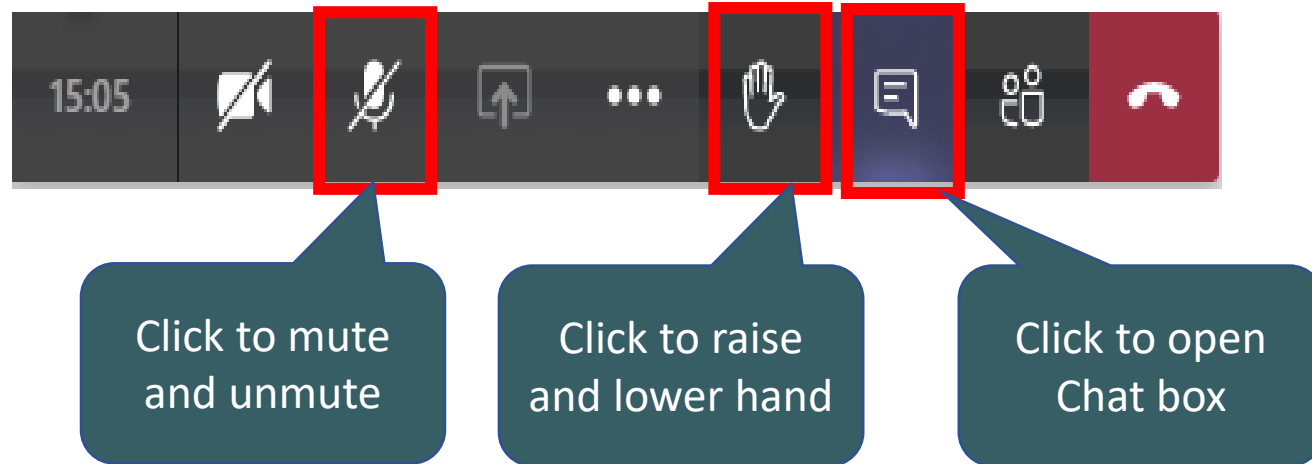
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Questions and Answer Section

- ▶ If you would like to ask a question, please either raise your hand and we will give you the ability unmute yourself or type your question in the Chat box. If on the phone, lines have been unmuted



Thank you!

- All Conference Session slides and recordings will be available next week

Feedback Encouraged!

- Please fill out the anonymous evaluation form that can be found at link below

[Click Here for Feedback Survey](#)

**THANK YOU FOR
JOINING US TODAY!**

**Next Conference is
May 7, 2022
9:00 AM-Noon**

Planning Board, ZBA, and Housing Tracks