

ZBA Decision Making Process

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Why is a ZBA established?

- RSA 673:1, IV, failure to include provision for a ZBA will render a zoning ordinance invalid.
 - *Jaffrey v. Heffernan, 104 NH 249 (1962)*
- A constitutional “safety valve” to prevent indirect taking of private property for public use without just compensation (inverse condemnation).
 - *US Constitution, 5th amendment*
 - *NH Constitution, Part 1, Articles 2 & 12*
- Provides a mechanism for relief via administrative appeal, special exception, variance and equitable waiver powers in RSA 674:33.

No Legislative or Executive Powers

- The ZBA *interprets* local land use documents as they exist, and does not *create or modify* the ordinance or implementing regulations.
- Daily decisions implementing the ordinances and regulations are made by:
 - Building Inspector for building permits and state building code decisions
 - Local fire chief for State Fire Code decisions
- The ZBA has no authority to enforce its decisions.

Relationship to the Public

- Municipalities have a constitutional obligation to provide assistance to all citizens.
 - Procedural due process, notice and the opportunity to be heard.
 - *Richmond Co. v. City of Concord, 149 NH 312 (2003)*
- The test is a “reasonable” obligation, not a duty to educate or inform beyond notices legally required.
 - *Kelsey v. Town of Hanover, 956 A.2d 297 (NH 2008)*

ZBA – Meetings

- Meetings “held at the call of the chairperson and at such other times as the board may determine”
 - No requirement for a monthly meeting
- A majority of the membership constitutes a quorum necessary to transact business
 - 3 votes needed to approve relief.
 - Chairperson designates which alternate sits for a member who is absent or who has recused herself,
 - Ex-officio from the governing body (if any) may only be replaced by person named by governing body

A Quasi-Judicial Body

- In a public meeting, the ZBA adjudicates:
 - Collects evidence, and finds the facts,
 - Decisions based solely on the evidence, not on the presence or absence of opposition,
 - Applies legal tests to determine if relief from the ordinance should be granted.
 - Develops a Record for Court review
- The burden of proof is upon the applicant.
 - ZBA interprets the ordinance and has the final say on the meaning of the language.

“Procedural Due Process”

- To protect against an unfair loss of a property right, the federal and state constitutions require minimum safeguards:
 - 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

N.H. Statute & Due Process

- Notice to affected persons
 - 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 upon evidence and facts
 - RSA 674:33 and RSA 91-A
- A written decision with reasons;
 - RSA 676:3

One Bite at the Apple

- Subsequent applications by unsuccessful petitioners are limited.
 - Second application must be materially different in nature and degree from the original application.
 - *Fisher v. Dover, 120 N.H. 187 (1980)*
- A change in applicable legal standards may be such a change.
 - A variance denied in 1994 was subject of 2009 reapplication, following substantial changes in both statute and case law relating to variances.
 - *Brandt v. Somersworth, 162 N.H. 553 (2011)*

Opportunity to be Heard and Notice

THE ADJUDICATIVE PROCESS BEGINS

The Road to Decision

- Application submitted to ZBA
 - Rules of procedure, RSA 676:1
 - Appropriate notice to parties and public
- Public meetings & public hearings
 - Consideration of disqualification
 - Right to Know Law and site views
- Adjudication that provides procedural due process
 - Clarity and ability to be reviewed
 - Rehearing, and the correction of errors

ZBA – General Provisions

- RSA 676:1; Rules of Procedure
 - Must adopt rules of procedure at a regular meeting of the board. Rules must be on file with the town clerk
- RSA 676:2; Joint Meetings
 - Any of the land use boards may hold joint meetings to decide cases involving jurisdiction of both boards
 - May notify the Planning Board of ordinance language that is unclear or difficult to apply in practice.
 - Attendance at RSA 675:3 public hearings on ordinance changes.

Working With Other Boards

- When a proposal requires both ZBA relief and Planning Board subdivision or site review approval:
 - Who hears the case first?
 - Whose conditions prevail?
- These are the cases where joint meetings (RSA 676:2) are most helpful
 - To the applicant, saving time and money
 - To the land use boards, in that a single presentation from a single set of plans is heard

Right to Know Law Applies

- Right-to-Know Law, RSA 91-A, applies
 - No Secret Ballots permitted, either as to the organization of the board, or on any case.
- Scheduled site walks are public meetings.
 - Beware communications outside of meetings, either in person or electronically, RSA 91-A:2-a.
- All deliberations must occur in public.
 - Written notes, audio or video recordings, etc. used to create the minutes, as well as any document provided to a quorum of the board are governmental records subject to disclosure.

Providing Proper Notice

- Notice to the public in accordance with the Right to Know Law is required, (24 hours, 2 public places, 1 of which may be municipal website)
- Notice to parties and the public via newspaper is an additional requirement, RSA 676:7
 - Certified Mail to parties, 5 days prior to hearing
 - Newspaper publication, 5 days prior to hearing
 - Hearing held within 30 days of receipt of notice of appeal

The Right to an Impartial Board

CONFLICT OF INTEREST AND DISQUALIFICATION

Types of Decisions

- Land Use Board Cases: RSA 673:14, I
- When acting in a “judicial capacity”, must recuse with
 - Direct personal or pecuniary interest in the outcome, or
 - Would be disqualified to act as a juror in an action at law
- “Direct personal interest” means:
 - Interest must be “immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.”
 - *Atherton v. Concord*, 109 N.H. 164 (1968)

Types of Decisions

- Judicial or Quasi-judicial Capacity
 - ZBA almost always acts in a judicial capacity when acting on applications before it
 - Public hearings – hearing the parties and considering evidence
 - Joint meetings with other boards on a pending case
- Legislative or Administrative
 - Preparing rules of procedures
 - Considering zoning amendments

Juror Standard: RSA 500-A:12

- Ultimate question: whether the land use board member is “not indifferent”
 - Expects to gain or lose upon disposition of case;
 - Is related to either party;
 - Has advised or assisted either party;
 - Has directly or indirectly given opinion or formed opinion;
 - Is prejudiced to any degree; or
 - Is employed by or employs any party in case;
 - Employs any of the counsel appearing in the case

Reasons for Disqualification

- Business relations
 - “It is not every business relation that disqualifies a juror”
 - *McLaughlin v. Union Leader Corp.*, 99 N.H. 492 (1955)
- Family relations
 - Member whose wife leading effort to block project not disqualified.
 - *Webster v. Candia*, 146 N.H. 430 (2001)
- Employment relations
 - Full-time employee in a small business vs. an employee of one division of a large company

Reasons for Disqualification

- Abutters
 - Always disqualified from acting on the application
- Prior Expression of opinion
 - Member expressed opinion of case before he was a board member – disqualified
 - *Winslow v. Holderness*, 125 N.H. 262 (1984)
 - Timing is important: One week after public hearing closed, board member came to the meeting with written memo detailing reasons to deny the application; Court held, “His motion was not evidence of ‘prejudgment’ but of judgment exercised at the appropriate time and place.”
 - *Webster v. Candia*, 146 N.H. 430 (2001).

Finding the Facts, Applying the Law

A DELIBERATION BASED UPON EVIDENCE

The Public Hearing

- ZBA must hold the public hearing within 30 days of receipt of notice to appeal. RSA 676:7, II.
 - Applicant is not entitled to the relief sought merely because this time requirement is not met by the board.
 - *Barry v. Amherst*, 121 N.H. 335 (1981)
- No interested party is entitled to insist upon a hearing and decision by a full board.
 - "[T]he Constitution does not [necessarily] require that all members of an administrative board must take part in every decision, or that the failure of one participating member to attend one hearing vitiates the entire process."
 - *Auger v. Town of Strafford*, 156 N.H. 64 (N.H. 2007)

Closing the Public Hearing

- Don't close public hearing too soon
 - What if board members want to ask additional questions during the deliberation?
 - Fairness to those who may have left after the public hearing closed?
 - Alternates can participate in the public hearing process (if allowed by rules)
 - Disqualified members can participate in the public hearing process if they have standing (abutters)
- What if a party/interested person wishes to supplement their testimony in writing, or to provide an expert opinion to the board?

Board's Independent Expert

- All land use boards may hire consultants, experts RSA 673:16, if funds available.
- Effective Sept. 11, 2010
 - RSA 676:5
 - ZBA may require applicant to reimburse Board for cost of 3rd party review
 - Planning Board and ZBA can't require review of substantially same topics – applicants pays once
 - Applicant is protected by ability to review invoices and have the board assure the services were fairly rendered.

Weighing the Evidence, Experts

- Board has considerable discretion to choose between competing expert opinions.
 - *Richmond Co. v. Concord*, 149 N.H. 312 (2003).
- Uncontradicted expert testimony overcomes general member knowledge,
 - *Condos East Corp. v. Conway*, 132 N.H. 431 (1989).
- General studies, and articles may not be enough to contradict specific expert opinion:
 - Yes: articles about hazards of shooting ranges.
 - *Star Vector Corp. v. Windham*, 146 N.H. 490 (2001)
 - No: General Audubon fact sheet re: vernal pools.
 - *Continental Paving, Inc. v. Litchfield*, 158 N.H. 570 (2009)

Weighing the Evidence

- Board may rely on personal knowledge of the area
 - Member should state area of expertise
 - Bring this fact out during public hearing so all sides have opportunity for rebuttal
 - Members should demonstrate their knowledge and experience by intelligent questioning of experts during public hearing
- Board must attack expert's qualifications, methodology, data, conclusions
- Minutes and decision should reflect board's reasons for not accepting expert opinion

Multiple Hearings at Meeting

- Not required to deliberate at the close of the public hearing.
 - May deliberate some or all cases at the end of the meeting, or on a different day.
 - May continue a hearing or deliberation to a different day.
 - Do not allow ex-parte contact with board members in the interim days.
 - Observe the right to know law:
 - Deliberate to decision in public, RSA 673:17.
 - Members must not discuss the case between themselves in person, by phone, or by e-mail,

Obtaining Legal Advice

- Consultation with counsel is not a “meeting”.
 - Need not be posted.
 - No minutes are required.
- What if the board meets to review a letter from counsel? Is this “consultation”?
 - No. *Ettinger v. Town of Madison*, 162 N.H. 785 (2011)
 - If the board meets to review the letter, without the presence of counsel, the meeting is open to the public, and the attorney client privilege will be waived.

Action that runs with the land, and may well control its use for many years to come

A WRITTEN DECISION WITH REASONS

Written Decision is Required

- If a denial, the reasons must be specified, RSA 676:3, I
 - Decision and meeting minutes must be on file for public inspection within 5 business days of vote.
 - RSA 676:3, II and Right to Know Law compliance.
- The written decision is necessary for review by Court
 - Communicates what relief was granted, or why a request was denied, clarifies how expert opinions used.
 - Creates a record for future local officials to use in understanding what relief was granted to an applicant.
 - Court has strongly recommended specific findings of fact be stated to avoid a remand

Pointers

- ZBA relief runs with the land, so be precise.
 - Don't say: "Move to approve a 10 foot variance..."
 - Do say: "Move to grant a variance from section ___ to allow a side setback of 10 ft. where 20 ft. is required..."
 - Refer to the number and date of the plan set revision you are using
- Give a written copy to the person taking the minutes
- If the meeting is being audio recorded, be sure to create an adequate record:
 - Read the motion out loud, and
 - Do not allow votes to be taken by members nodding approval, or other silent expressions of action

Drafting a Motion

- Don't expect the parties to draft the language of a motion for the board.
 - Board is not required to grant what the applicant seeks; craft the relief you feel is appropriate
- Be careful before incorporating codes by reference into your decision.
 - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)
 - Incorporated State Fire Code into a decision, leading to fire chief requiring residential sprinklers in a house, which result was neither discussed with or contemplated by board making the decision

Motions

- Motions should be made in accordance with your rules of procedure.
- Failed Motion: if you fail to receive 3 votes in favor, is this a denial, or is this a non-decision? Clarify in the rules of procedure.
- We suggest that ZBA's do not take separate votes on each element of a request, but instead create a motion to grant or deny the entire request.
- Why?, the 3 affirmative vote rule of RSA 674:33,III

Example: Was This Variance Granted?

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminished Value	All 5 Elements
1	Y	N	Y	N	Y	N
2	Y	N	N	N	Y	N
3	Y	Y	N	Y	Y	N
4	N	Y	Y	Y	N	N
5	N	Y	Y	Y	N	N
# Members Favor this Element	3	3	3	3	3	0

Conditions May Be Added

- Conditions “precedent”
 - Must be filled before approval is final
 - Consider putting a time limit to satisfy
- Conditions “subsequent”
 - Restrict use of property going forward
 - Ex: hours of operation
- Cannot delegate or assign duties to other boards or agencies, only to the applicant.
 - ZBA approved subject to off site improvements to be completed by the State. Held, special exception unlawful.
 - *Tidd v. Alton*, 148 NH 424 (2002)

Conditions

- Exceptions to the rule
 - Granting Variances for the Disabled
 - RSA 674:33, V
 - ZBA may find that the variance shall survive only so long as the particular person has a continuing need to use the premises
 - Waiver for Agricultural Uses
 - RSA 674:32-c
 - ZBA shall grant waiver to extent necessary to reasonably permit the agricultural use

An Opportunity to Correct Error, A Right to Review for
the Correction of Error

REHEARINGS

Motion for Rehearing, RSA 677:2

- RSA 677:2, a motion or request for rehearing must be filed with ZBA within 30 days after any order or decision
 - Period is calculated in calendar days “beginning with the date following the date upon which the board voted to approve or disapprove the application.”
 - The time is measured from when it is announced, not when it is reduced to writing.
- The ZBA may reconsider its decisions on its own motion within the 30 day limit to correct error(s).
 - *74 Cox Street, LLC v. City of Nashua, 156 N.H. 228 (2007)*

Motion for Rehearing

- ZBA must grant or deny motion within 30 days of receipt
- Not a public hearing – but IS a public meeting
- No new notices to abutters required
- No testimony or comments from public permitted
- Avoid new findings of fact or new reasoning when denying motion for rehearing
- If new grounds for initial decision have been identified – better to grant rehearing motion, and hold new hearing to create a more complete record.
 - *MacDonald v. Effingham ZBA*, 152 N.H. 171 (2005)

Rehearing

- If granted, case begins from the beginning, not just on the issues originally identified in the motion(s) for rehearing.
 - All parties must be notified again, who pays for this is often a disputed issue.
 - Require all parties to present all information again, and create a new decision on the new record.

We Denied a Rehearing, What Happens Now?

- If motion for rehearing is denied –
- Affected party with standing may appeal to Superior Court within 30 days
- Be sure to compile and preserve “the record” as completely as possible.
- Requests for information may be made under the Right to Know Law. Don’t destroy any records in any format before consulting town counsel.
- If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.

Appeals to Superior Court

- RSA 677:4,
- “any person aggrieved by any order or decision” of ZBA may file petition w/ Superior Ct within 30 days of date of vote to deny request for rehearing.
- “Person aggrieved” includes any party entitled to request a rehearing under RSA 677:2
- Only the governing body may appeal on behalf of the municipality, not other boards
 - *Hooksett Conservation Comm’n v. Hooksett ZBA*, 149 N.H. 63 (2003)

Conclusion

- Making an adjudicative decision is difficult.
- Often impossible to make everyone happy
- Process is important - Superior Court will be interested in assuring that the decision was reached fairly.
- Good procedural rules will result in better decisions, and reduced conflict.