CHAPTER III: PROCEDURES

Boards of Adjustment **must** follow certain steps to satisfy legal requirements for hearings and making decisions. Other steps **may** be required by the board to facilitate its business, but only those based on sound reasons should be added to the legal requirements. Administrative difficulties result from attempts to cover every possible action with a standardized procedure.

Any situation that is brought before a zoning board of adjustment goes through six steps:

1. Application;
2. Notification;
3. Public Hearing;
4. Findings of Facts;
5. Statement of Reasons; and
6. Decision.

Each step should be treated uniformly in every case the board handles. If the board mechanically and religiously sticks to this six-part routine time after time, no matter what kind of application is before the board, the board will be doing the town, the applicants, and the abutters a good service.

1. APPLICATION

RSA 676:5 Appeals to Board of Adjustment

I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

II. For the purposes of this section:

(a) The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

III. If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

The board can make its work easier and help the applicant understand the process by providing forms to be filled out for an appeal. See Appendix C.

The form and the board's rules of procedure should specify the *"reasonable"* period of time within which an administrative appeal must be brought. This is a crucial element, and one that is often overlooked by zoning boards of adjustment that can lead to significant problems if not addressed. If a reasonable time limit is not adopted, the town could find itself in expensive litigation about whether or not an application was or was not filed within a reasonable time period. To remove as much doubt as possible, a limit should be established.

The forms should ask for the particulars of the case such as the location and description of the property, the permit sought, the type of appeal, and any information required for the public notice. Copies of any previous applications concerning the property should also be requested. Information contained in subdivision or site plan review applications could be very helpful to the board. The form does not need to provide support for the request but should state the legal grounds on which the appeal is based. When the application is accepted, the case should be given a number that will identify it in all subsequent actions.

RSA 674:33, VI prohibits the ZBA from requiring submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

The chairperson, clerk, town planner or whoever reviews applications submitted to the board should consider whether or not the application has potential for regional impact. However, only the board makes the final determination concerning the potential for regional impact. This determination can be made at a regularly scheduled monthly meeting as an agenda item or the board could hold a special meeting solely to determine whether or not the application has potential for regional impact. If potential regional impact is determined, the board must follow the statutory notice procedures of RSA 36:57 as well as their local rules of procedure and the normal notice requirements of RSA 676:7.

It is a general principle of law that all administrative remedies must be exhausted before an appeal can be taken to a court. Although the board of adjustment occupies a position somewhere between an administrative body and a judicial body, it is good practice to require every applicant for a building permit to go to the zoning administrator (building/zoning inspector) first. This should be done even if it appears that the application will be denied. It is also advisable to do this when the application is for a special exception - an area in which the board of adjustment has original jurisdiction. By requiring everyone to go to the zoning administrator first, the board can be certain that the proposed action is not ordinarily permitted, and the official can inform the applicant of his rights to appeal, the grounds for appeal, and the procedure to follow. The board of adjustment could provide a statement on the appeal process for the administrator to give the applicant when a permit is denied.

The case must be heard whether or not the board believes the grounds for an appeal are sufficiently supported. If the application is not fully or correctly completed, the board can return it to the applicant. Presumably, if an applicant is seeking an action beyond the scope and authority of the board of adjustment, the application form could not be completed and there would not be a case for the board to hear. The board should note in its records the date of, and reasons for, returning an application.

The board should always consider whether the relief sought is needed.

"Given the complexity of zoning regulation, the obligation of municipalities 'to provide assistance to all their citizens seeking approval under zoning ordinances,' and the importance of the constitutional right to enjoy property, we cannot accept that the mere filing of a variance application limits the ZBA or superior court's consideration of whether the applicant's proposed use of property requires a variance in the first place." *Stephen Bartlett & a. v. City of Manchester*, **164 NH 634 (2013) (citations omitted).**

In *Bartlett*, the church had applied for a use in one of its buildings that the City said was not allowed, thus prompting the church to seek a variance which the ZBA granted. During the proceedings, it was noted that the use was actually accessory to the church as a whole and a variance was not needed. The superior court agreed but the supreme court remanded the case back to the superior court, with orders that it be sent down to the ZBA for a further hearing on the accessory use issue. When deliberating a variance, the board should always consider if the use might be allowed for some other reason and whether the variance is even needed. And applicants who are denied a building permit because the administrative official finds that the use is not allowed, should always be informed that they can appeal the administrative decision and need not go straight to a variance application.

PREVIOUS APPLICATIONS (THE *FISHER* DOCTRINE)

When an application is submitted, the files should be reviewed to determine if a previous application was denied for the same situation. If so, the board should determine if circumstances have changed sufficiently to warrant acceptance of a reapplication. If there has not been a significant change in circumstances, then the board should reject the application and end further consideration. This determination must, of course, be made at a meeting of the board following submission of the application and notice to the applicant, abutters and the public of a public hearing on the application. The board should review the previous applications and compare them to the current application to determine any differences and make the decision to proceed or not as soon as possible.

"When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan." *Fisher v. Dover*, 120 N.H. 187 (1980).

In *Transfarmations, Inc. v. Town of Amherst*, Case No. 2021-0214 the New Hampshire Supreme Court reiterated that when a denial identifies a lack of information as the deficiency in the initial application, the court has held that a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher* if the new application provides the information missing from the prior application.

PLOT PLAN REQUIREMENTS

A plot plan is recommended as part of the board of adjustment application. Since a similar plan is usually necessary for a building permit application or for planning board approval, the plan can serve multiple purposes. Lack of a plot plan could result in delay or misunderstanding of the written records.

Zoning ordinances, subdivision regulations, and building codes may require that a plot plan be prepared by a licensed engineer or land surveyor (RSA 310-A). Judgment should be used in applying this requirement; it may not be necessary in simple situations as different requests may warrant different levels of detail.

A completed plot plan is not always sufficient to show the situation. An engineer or land surveyor may need to appear as a witness in a zoning appeal, particularly if technical aspects are integral to the application. Local police, fire, or highway officials may also be asked to testify (or to provide written comments), especially if their knowledge has a bearing on conditions for a special exception.

A plot plan, for purposes of either a building permit or a complex zoning appeal, might contain the following features:

a. Be up-to-date and dated;

b. Drawn to scale, with drawing number and north arrow;

c. Signature and name of preparer and official seal of licensed engineer or surveyor, as necessary;

d. The lot dimensions and bearings and any bounding streets and their right-of-way widths or half sections;

e. Location and dimensions of existing or required service areas, buffer zones, landscaped areas, recreation areas, safety zones, signs, rights-of-ways, streams, drainage, easements, and any other requirements;

f. All existing buildings or other structures with their dimensions and encroachments;

g. All proposed buildings, structures or additions with dimensions and encroachments indicating "proposed" on the plan;

h. "Zoning envelope" made from setbacks required by zoning ordinance. Indicate zone classification and all setback dimensions including front yard for corner lots if a choice is allowed. Indicate any zone change lines.;

i. Computed lot and building areas and percentages of lot occupancy;

j. Elevations, curb heights and contours, if required or relevant;

k. Location and numbering of parking spaces and lanes with their dimensions. Indicate how required parking spaces are computed.;

l. Dimensions and directions of traffic lanes and exits and entrances;

m. Any required loading and unloading and trash storage areas.

The plot plan provides a visual presentation of the applicant's intentions and can help to alleviate the concerns of abutters and other interested parties. The plot plan should be retained on file for later reference. The use of photos is highly recommended and useful for the records of the zoning board of adjustment.

Board members should be familiar with the parcel under discussion and the basic characteristics of the area. Often this is most readily accomplished by scheduling an on-site visit. If such a visit is attended by a quorum of the board, it must be noticed as a public meeting, and the public has a right to attend.

EFFECT OF THE APPEAL

RSA 676:6 Effect of Appeal to Board

The effect of an appeal to the board shall be to maintain the status quo. An appeal of the issuance of any permit or certificate shall be deemed to suspend such permit or certificate, and no construction, alteration, or change of use which is contingent upon it shall be commenced. An appeal of any order or other enforcement action shall stay all proceedings under the action appealed from unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such officer, that, by reason of facts stated in the certificate, a stay would, in the officer's opinion, cause imminent peril to life, health, safety, property, or the environment. In such case, the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by the superior court on notice to the officer from whom the appeal is taken and cause shown.

Except in extreme cases, any construction underway or any change in use of the property should be stopped until the appeal process has been completed. If a stay in construction would cause imminent danger, a restraining order, as allowed in RSA 676:6 above, would be required to stop the work.

2. NOTIFICATION

A public hearing is required before the board of adjustment can take action on any application, whether it deals with an administrative appeal or a request for a variance, a special exception, or an equitable waiver of dimensional requirements. This provides an opportunity for anyone with a direct interest in the application to hear the facts in the case and offer comments for the board's consideration.

RSA 676:7 Public Hearing; Notice

I. Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows:

(a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by verified mail, as defined in RSA 451-C:1, VII, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal. The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board may hear such other persons as it deems appropriate.

(b) A public notice of the hearing shall be placed in a newspaper of general circulation in the area not less than 5 days before the date fixed for the hearing of the appeal.

II. The public hearing shall be held within 45 days of the receipt of the notice of appeal.

III. Any party may appear in person or by the party's agent or attorney at the hearing of an appeal.

IV. The cost of notice, whether mailed, posted, or published, shall be paid in advance by the applicant. Failure to pay such costs shall constitute valid grounds for the board to terminate further consideration and to deny the appeal without public hearing.

V. If the board of adjustment finds that it cannot conclude the public hearing within the time available, it may vote to continue the hearing to a specified time and place with no additional notice required.

The board of adjustment must provide personal notice of the time and place of the hearing to the applicant, holders of conservation, preservation, or agricultural preservation restrictions, and every

abutter as defined in RSA 672:3 or as defined in local regulations, if more inclusive than the statute.

This statute was amended in 2017 such that the notice must be sent by so-called verified mail (rather than certified mail), as such term is defined in RSA 451-C:1, VII, not less than five days before the date set for the hearing. The term "verified mail" is defined in RSA 451-C:1 to mean "any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides evidence of mailing." Verified mail includes, but is not limited to, certified mail.

The 2017 amendment also added RSA 676:7, V, which allows a board of adjustment to continue a hearing to a specified time and place without requiring any additional notice, if the ZBA finds that it cannot conclude the public hearing within the available time. This amendment codified an existing practice of many zoning boards.

It is important to note that every zoning board of adjustment must act in full compliance with RSA 91-A: Access to Governmental Records and Meetings (the Right to Know Law). In addition to statutory requirements, notice must be given 24 hours in advance of all meetings of the ZBA either by posting the notice in two public places or by publishing it in a newspaper readily available in the community. The calculation of the 24-hour time period does not include holidays or Sundays. It is recommended that the board post notice of all public hearings in two public places along with the other legal notice requirements of RSA 676:7.

RSA 672:3 Abutter

"Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356-B:3, XXIII. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

In addition to the direct notification, the public must be informed of the application by placing a notice in a newspaper that is circulated locally. To meet the five-day requirement, newspaper deadlines, especially for weekly publications, must be taken into consideration when the board sets its filing requirements. The applicant must pay all costs involved with the required notices in advance.

The board may choose to notify other municipal boards or departments with an interest in the particular case. An optional procedure to provide additional public information is to post a notice in a convenient place in the community. To help ensure fairness and consistency, the board should specify the filing requirements, the newspaper that will be used, and a location for public posting, if any, in its rules of procedures.

A record should be kept of how and when the notices were sent and be an official part of the proceedings. A copy of the dated newspaper with the legal advertisement and copies of the personal notices with certified mail receipts should be filed as part of the board's records. If the notice is posted, dates and places should be indicated on a copy of the public notice and placed in the file. Statements on how notice was given can then be read into the minutes of the public hearing.

The effectiveness of the public notice rests on two factors – how the notice is given and the information provided by the notice. The board of adjustment should use good judgment in choosing the newspaper and posting location. "Shoppers" and other advertising mailers are not considered adequate for these purposes since inclusion of the notice cannot always be guaranteed; nor can the delivery be assured. The information contained within the notice should be sufficient to alert everyone to the exact nature of the appeal. Courts have ruled that it is not enough simply to state that an appeal is being made concerning a particular property. The notice should state the action the petitioner wishes to take and the type of appeal being made.

RSA 676:7, II requires the hearing to be held within 45 days of receipt of the notice of appeal. This statute does not include a specific remedy (or penalty) for a board's failure to hold a hearing within such deadline. Case law (issued before the recent change from 30 to 45 days) indicates that the board's failure to hold a hearing within the statutory deadline does not constitute approval of an application.

> "The legislature has not seen fit to provide that a zoning board's failure to comply with RSA 31:71 II (Supp. 1979) [current RSA 676:7, II] will constitute approval of an application for a variance submitted to it. The express language of RSA 36:23 (Supp. 1979) [current RSA 676:4, I(c)] demonstrates that the legislature knew how to provide for automatic approval when that was its intention. The absence of such a provision in RSA 31:71 II (Supp. 1979) is a strong indication that the legislature did not intend the same result, and we will not judicially supply this omission in the absence of a legislative intent to do so. This omission, of course, means that zoning boards may lack adequate incentive to comply with the time requirement contained in RSA 31:71 II (Supp. 1979), but this is a legislative and not a judicial problem."

Barry v. Town of Amherst, 121 N.H. 335 (1981).

3. PUBLIC HEARING

The function and procedures of a hearing before the board of adjustment lie somewhere between a public hearing and a court session. The nature of local and state government in New Hampshire provides an opportunity for most residents to attend a public hearing; not as many have had reason to attend a court session.

It is perhaps unnecessary to point out that the public hearing is an extremely important activity of the board of adjustment. To a great extent, how the hearing is conducted and how the individual members conduct themselves at the hearing will determine the public's opinion of the board and its work (not to mention the validity of its decision, if appealed).

The hearing provides an opportunity for anyone concerned with the case to present evidence. While the points raised may be opinion rather than fact, they should relate to the grounds the board must consider in making its decision. The affect a proposal may have on surrounding property is one factor and abutters' opinions do have a bearing on this aspect. The board can avoid much criticism, however, by making it clear that this is not the only factor - especially when the facts of a case lead to a decision that is contrary to prevailing sentiment.

While the public hearing is not a completely open forum, neither is it a court, and no attempt should be made to make it so. The board is acting in a quasi-judicial capacity; therefore, it is not called on to follow court procedures. A hearing before an administrative body must be fair in all aspects and not a mere formality that precedes a predetermined result. The board has much more leeway than a court

of law. It can, and should, hear and weigh any pertinent facts and not attempt to bar evidence on technicalities. Proper procedures should be followed to ensure the legality of its actions and to maintain public confidence.

During the testimony, the board may, and should, ask questions. Although the burden of proof is technically on the person making the appeal, the board should determine to its satisfaction whether or not the case is sufficiently stated. In the questioning, care should be taken to avoid the appearance of trying to build a case for or against the petitioner. Only under the most unusual circumstances should a board member ask questions that do not have a legal bearing on the case. The board has no legitimate interest in whether or not the petitioner has a steady job or how many children s/he has, for example. Such a line of questioning can only lead to a belief that the board has the power to act on the basis of this type of information, which it does not.

Remember that this is a public meeting and the public has a right to attend and even record or video tape the meeting without the board's permission. However, the public does not have a right to disrupt the proceedings so if they wish to record or tape the meeting, the chair has the authority to ensure that it is not done in a disruptive manner and could, for example, require a camera to be set up off to one side so it does not block the view of the board from other members of the public in the audience. See *The State of New Hampshire v. John Dominic*, 117 N.H. 573 (1977).

If the board holds regularly scheduled meetings, the public hearings may be held at that time, with special sessions scheduled as the occasion arises. Whether the hearing is held as a part of the business meeting or as a separate session, the chairperson should call the hearing to order and request the clerk to take the roll of the board so that a quorum will be shown on the records.

Following the roll call, the chair may make a brief statement of the general principles involved in the appeal process and explain the purpose of the public hearing. The chair should then outline the rules governing the hearing and call for the first case. The following procedures are suggested:

1. Announcement by the clerk of the case and the stated particulars.
2. Report by the clerk of how notice was given.
3. Petitioner's presentation of the case.
4. Testimony by those in favor of the appeal.
5. Testimony by those opposed to the appeal.
6. Rebuttal by the petitioner.
7. Rebuttal by the opposition.

The chair may wish to summarize the case. If anyone wishes to dispute the accuracy of the summary, they should be given an opportunity to do so as this will be an important record in the event the decision is appealed.

If the board finds that they cannot conclude the public hearing within the time available, they may vote to continue the hearing to a specific time, place and date with no additional notice required so long as they make the formal announcement before voting to continue the hearing. If the board just votes to continue the hearing without announcing the specific time, place and date when the hearing will resume, they will be required to provide formal notice of the reconvened hearing as was done originally. Upon its conclusion, the hearing should be officially closed before the board begins its formal deliberations.

RSA 673:15 Power to Compel Witness Attendance and Administer Oaths

The chairperson of the zoning board of adjustment or the chairperson of the building code board of appeals or, in the chairperson's absence, the acting chairperson may administer oaths. Whenever the board exercises its regulatory or quasi judicial powers it may, at its sole discretion, compel the attendance of witnesses. All expenses incurred under this section for compelling the attendance of a witness shall be paid by the party or parties requesting that a witness be compelled to attend a meeting of the board.

Although state law permits the chair to swear in witnesses, it is not mandatory. Using this formal procedure may have the practical effect of discouraging witnesses who wish only to say they are for or against the appeal. Whether or not a witness is sworn in, he should be asked to state his name and address and interest in the case.

As a general rule, cross-examination should be discouraged. Rules of testimony, cross-examination, and representation by counsel do not apply to public hearings before the board and it may prove difficult for the chairperson to keep the questioning within the limits of legality and propriety. In the absence of a formal request to cross-examine, the chairperson could ask that all questions be in writing and directed through the chair. Any attempt to short circuit the board by asking questions directly of the witness should immediately be ruled out of order.

The board of adjustment must keep minutes of its meetings in accordance with the requirements of RSA 91-A:2, II. Minutes must include the names of members, persons appearing before the board, a brief description of the subject matter discussed, names of board members who made or seconded each motion and any final decisions.

A verbatim transcript is not necessary but the record (or summary of all the evidence taken in, considered, and used in reaching the decision) should contain sufficient evidence to show how the board reached its decision. A board may make an audio recording of the meeting to use in preparing the minutes or to supplement the notes taken by the secretary. Minutes of the meeting must be promptly recorded and open to public inspection not more than 5 business days after the meeting.

Public bodies (all boards, commissions, committees, etc.) must either post its meeting notices on its internet website, if it maintains a website, "in a consistent and reasonably accessible location" or post and maintain a notice on the website stating where meeting notices are posted. Approved minutes must also be posted on the website in a consistent and reasonably accessible location, or a notice must be posted and maintained on the website stating where minutes may be reviewed and copies requested.

It is essential to record the description of the case, the names and interests of those who testify, and the summary made by the chairperson which should contain the facts of the case and the claims made by each side. Any written or documentary evidence, including the plot plan, should be recorded and filed.

CONSIDERATION OF EVIDENCE AND TESTIMONY

Boards must consider the source of the evidence presented and give due weight to what is presented. General information presented cannot be considered the "personal knowledge" of the members.

In *Continental Paving v. Town of Litchfield*, 158 N.H. 570 (2009), the zoning board of adjustment denied a special exception in part based on general information contained in a conservation fact sheet from the NH Audubon Society and discounted expert testimony from witnesses for the applicant. The supreme court vacated the denial and remanded the issue back to the zoning board of adjustment with an order to grant the special exception. The court reasoned:

> "We have previously held that in arriving at a decision, the members of the ZBA can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Thus, ZBA members may base their conclusion upon 'their own knowledge, experience, and observations,' in addition to expert testimony. We reject, however, the Town's contention that information contained in exhibits before the ZBA is transformed into 'personal knowledge' through individual ZBA members using such information to 'educate themselves.' Rather, the exhibits were simply evidence before the ZBA."

(Internal quotations and citations omitted.)

COLLECTION AND EXPENDITURE OF FEES BY THE BOARD OF ADJUSTMENT

RSA 673:16 Staff; Finances; Fees

II. Any fee which a local land use board, acting pursuant to this title, collects from an applicant to cover an expense lawfully imposed upon that applicant, including but not limited to the expense of notice, the expense of consultant services or investigative studies under RSA 676:4, I(g) or RSA 676:5, IV, or the implementation of conditions lawfully imposed as part of a conditional approval, may be paid out toward that expense without approval of the local legislative body. Such fees:

(a) Shall, whenever held by the municipality, be placed in the custody of the municipal treasurer, subject to the same investment limitations as for other municipal funds.

(b) Shall be paid out only for the purpose for which the expense was imposed upon the applicant.

(c) Shall be held in a separate, non-lapsing account, and not commingled with other municipal funds; provided, however, that such fees may be used to reimburse any account from which an amount has been paid out in anticipation of the receipt of said fees.

(d) Shall be paid out by the municipal treasurer only upon order of the local land use board or its designated agent for such purpose. This paragraph shall not apply to application, permit, or inspection fees which have been set by the local legislative body as part of an ordinance, or by the selectmen under RSA 41:9-a. Notwithstanding RSA 672:7, a building inspector shall not be considered a "local land use board" for purposes of this section.

III. Any fee which a city or town imposes on an applicant pursuant to this title shall be published in a location accessible to the public during normal business hours. Any fee not published in accordance with this paragraph at the time an applicant submits an application shall be considered waived for purposes of that application. A city or town may comply with the requirements of this section by publicly posting a list of fees at the city or town hall or by publishing a list of fees on the city or town's Internet website.

A separate document labeled as "Notice of Land Use Board Fees under RSA 673:16, III" should be created that provides a complete listing of fees charged for land use board applicants before the planning board, zoning board of adjustment, historic district commission, building inspector, and building code board of appeals.

RSA 676:5 Appeals to Board of Adjustment

IV. The board of adjustment may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.

V. (a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.

(b) A board of adjustment retaining services under subparagraph (a) shall require detailed invoices with reasonable task descriptions for services rendered. Upon request of the applicant, the board of adjustment shall promptly provide a reasonably detailed accounting of expenses, or corresponding escrow deductions, with copies of supporting documentation.

RSA 673:16, II provides a useful and potentially important financial tool for the board of adjustment. It allows local land use boards to collect fees from an applicant to cover an expense lawfully imposed upon the applicant, such as the expense of consultant services or investigative studies under RSA 676:5, IV, or the implementation of conditions lawfully imposed as part of a conditional approval, and then to pay out those funds towards that particular purpose without having the funds first raised and appropriated by the town meeting. In other words, all of this activity can occur "off-budget" and without impacting any amounts appropriated for the operations of the board of adjustment by the annual town meeting.

The statute goes on to provide that such fees:

a. Shall be placed in the custody of the municipal treasurer;

b. Shall be paid out by the treasurer only for the purpose for which the expense was imposed upon the applicant;

c. Shall be held in a separate, non-lapsing account and not commingled with other municipal funds (but such fees may be used to reimburse any account from which an amount has been paid in anticipation of the receipt of such fees);

d. Shall be paid out by the municipal treasurer only upon the order of the board of adjustment or its designated agent for such purpose.

Such fees do not include the regular application fees, permit fees or inspection fees that are set by the local legislative body as part of an ordinance, or by the selectmen under the authority of RSA 41:9-a. Given the possibility that redundant studies may be requested of the same application, both zoning and planning boards are limited to assessing fees where it will not "substantially replicate a review and consultation obtained by" the other board.

DISQUALIFICATION

No Public Official may vote on any matter in which he or she has a conflict of interest. The general rule is that a conflict of interest requiring disqualification will be found when an official has a direct personal or pecuniary (financial) interest in the outcome. That interest must be "immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative." *Atherton v. Concord*, 109 N.H. 164 (1968).

As the court in *Atherton* explained, "The reasons for this rule are obvious. A man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a personal financial interest which is, or may be, in conflict with the public interest."

It is a question of degree, and all the circumstances need to be considered in each case. However, the standard is objective: Would a person of "ordinary capacity and intelligence" be influenced by the financial interest?

RSA 673:14 Disqualification of Member

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairperson shall designate an alternate to act in the member's place, as provided in RSA 673:11.

Any member of a board of adjustment who has a direct personal or financial interest in an appeal brought before the board should excuse themselves from participation in that hearing. The chairperson, when informed of this fact, would designate an alternate member of the board to act in place of the disqualified member. The records of the hearing should clearly note the disqualification and replacement by an alternate member. A recused member may wish to leave the meeting room for the duration of the public hearing and deliberations to quell even the notion of participation by the disqualified member.

The legislature, in 1988, extended the provisions of RSA 673:14 to planning boards and historic district commissions. At the same time, the non-binding process in paragraph II was added to allow any member of the board to seek clarification of a potential conflict. The prerogative to request a vote rests with a member of the board unless the local zoning ordinance or the board's rules of procedures provide otherwise.

The New Hampshire Supreme Court, in a discussion of the test for disqualification of board of adjustment members, said "...they (must) meet the standards that would be required of jurors in the trial of the same matter... A juror may be disqualified if it appears that he or she is 'not indifferent'." *Winslow v. Town of Holderness Planning Board*, 125 N.H. 262 (1984) (citations omitted). In that case the decision reached by the board was ruled invalid even though the disqualified member's vote was only one of six affirmative votes, because "it was impossible to estimate the influence one member might have on his associates." *Id.*

How to Recuse Oneself Properly

If a member does recuse himself or herself, how should they behave at that point? It is critical to note that simply saying "I recuse myself" is not enough. The member must take steps to make the recusal effective - literally. The member should immediately leave their seat at the board table, and preferably, leave the room until the board moves on to the next subject. If the member remains in the meeting room, taking a seat with the general public is appropriate. These actions make it clear to all in attendance that the official is, for all purposes, no different from any member of the public in relation to this matter.

Of course, a person does not lose their status as a citizen when they become a local official, and a recused board member may wish to be heard on the matter just like any other member of the public. In some cases, the member may be a party to the action if, for example, they are the applicant in a land use case or an abutting landowner. Parties to the case have a legal right to be heard on the application, so they may certainly participate in that capacity. In most cases, the member with the conflict is not a party to the case. In that situation, the better practice (both legally and for the sake of appearances, which matter in these situations) is for the member to remain quiet if they stay in the room. However, if they feel strongly about the matter, they have the right to speak during the time set aside for public comment or testimony. If a recused member does this, they should begin with a statement that they are speaking on their own behalf as a citizen and not as a member of the board. This helps solidify the understanding that the member is not participating in the board's consideration of the matter.

In any case, if the member remains in the room, they should not act in any way as a member of the board. It would be improper, for example, for the member to ask questions of the parties (other than at times when the general public is permitted to do so), engage in discussion that is occurring only among board members, or vote on the matter. This is just as risky as remaining at the table or failing to recuse oneself in the first place. "[M]ere participation by one disqualified member [is] sufficient to invalidate the tribunal's decision because it [is] impossible to estimate the influence one member might have on his associates." *Winslow v. Town of Holderness Planning Board*, 125 N.H. 262 (1984). It is also advisable to refrain from using body language to indicate an opinion or try to influence a decision of the board. Remember, appearances count in this situation. Members should be concerned not only about the legal ramifications, but the political consequences of questionable behavior.

From "Conflicts and Ethical Considerations for Land Use Boards," NHMA Law Lecture #2, Fall 2013.

RSA 500-A:12 Examination

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

4. FINDINGS OF FACTS

RSA 676:3, I Written Findings of Fact

I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulations and checklist requirements for the findings of fact portion of the approval. Findings of fact should not replace conditions of approval. For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board. The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact.

At the conclusion of public testimony but before the public hearing is closed, the board should begin to deliberate, in public, and in a manner such that all discussions can be heard by the public on the essential facts that the testimony has established. This practice is helpful should the board have any additional questions for the applicant or if they need clarification about any evidence or testimony presented while establishing the facts of the case. An example of fact finding would be if a variance has been requested and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood. The board should vote to find, as a fact, that values either will or will not be diminished and why (because of increased density, noise, congestion, traffic, or what have you). The court has strongly recommended, and has required in many instances, that specific findings be stated.

In the case of *Alcorn v. Rochester*, 114 N.H. 491 (1974), the supreme court remanded a decision of the

board of adjustment stating that "... the failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review."

In that decision, the supreme court cited, as authority, Anderson, American Law of Zoning where it is stated at 20.41 (1977): "In general, a board of adjustment must, in each case, make findings which disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded if the board fails to make findings which disclose a basis for its determination."

Since the Alcorn case, the New Hampshire Supreme Court has specifically required that findings of fact be made by other administrative bodies. In each case the findings were not required by statute, but the court indicated that there could be no meaningful review without them. In the case of *Trustees of Lexington Realty Trust v. Concord*, 115 N.H. 131 (1975), the court pointed out that the requirement to make findings of fact is part of the common law even though the board of taxation is not required by statute to do so. In *Society for the Protection of NH Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975), the court again indicated that findings of fact were necessary in order for decisions to be made by a state board. The supreme court in *Foote v. State Personnel Commission*, 116 N.H. 145 (1976) stated that findings of fact must be made even though not required by the Administrative Procedure Act, RSA 541-A:36, because the "…reviewing court needs findings of basic facts so as to ascertain whether the conclusions reached by it (the administrative board) were proper."

In *NBAC v. Town of Weare*, 147 N.H. 328 (2001), it's clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time. The important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good, but you have to have the conclusions on the record - say what you mean, and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason.")! Local boards must give any and all reasons.

See Findings of Facts form in Appendix C.

5. STATEMENT OF REASONS

The board of adjustment, after conducting the hearing, could simply vote to approve or disapprove the application. General fairness to all parties concerned, however, reinforced by New Hampshire Supreme Court decisions, strongly indicates that the board should prepare a statement of its reasons. Since the decision of the board of adjustment is so important, it is necessary for both the appealing party and the municipality to have a clear record of what occurred. The court has stated it does not feel the entire record should have to be reviewed to determine whether or not the action of an administrative board is appropriate.

As a source of documentation for the community's position in a given case, the board should state all of the reasons for its decision to allow for proper review if that should be necessary (see Work Sheet: Statement of Reasons form in Appendix C). The reasons may be found defective if they omit an issue

essential to the decision made by the board. The courts generally are unwilling to assume that a basic issue was resolved unless the reasons for the decision are clearly stated.

This requirement means the board must do more than state the conclusions in general terms. It is not sufficient for the board to simply use the language of statute and say, for example, that there is "unnecessary hardship." Appendix C contains guidelines for developing the decision statement.

6. DECISION

RSA 674:33 Powers of Zoning Board of Adjustment

III. The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

Before making its decision, the board must determine the facts of the case and apply what it understands to be the proper meaning and intent of the zoning ordinance and map. When the board exercises its power of interpretation, it must be guided by the letter and spirit of the ordinance.

Prior decisions of the ZBA are not precedent and do not bind future boards to reach the same conclusions on similar applications. Every application to the board is unique and should be reviewed on its own merits given the particular circumstances of the property in question. This is particularly true for variance applications. Variances require a finding of hardship, and hardship depends (among other things) on the uniqueness of the property, which is a factual determination. It would be a contradiction to determine a property is unique based on the precedent of the "uniqueness" of a different property.

On the other hand, some other aspects of a variance determination have more to do with interpreting the zoning ordinance. For example, if the board finds that a particular kind of use is reasonable in a particular district (another element of the hardship determination) it would raise questions if the board found that the same kind of use was not reasonable in the same area in a later case.

Appeals of administrative decision tend to be more about what the ordinance means as it applies to a particular property, and once the board has decided what a particular word, sentence, or paragraph means, it may be inappropriate to decide differently in the future. Part of the point of an administrative appeal is not just to resolve a particular dispute, but to provide guidance to the administrative official in the future.

Special exceptions are specific uses allowed in a district provided they meet the criteria specified in the ordinance and the nature of one proposed use may not be exactly the same as another use which may meet the review criteria. Therefore, it is important that the board review each application individually on its own merits and come to a decision based on the specific facts of that application.

The board can simplify matters by considering each requirement necessary for the granting of a variance or special exception separately rather than treating the question as a whole. With this done, there should not be any confusion as to whether the final decision was based on legal grounds.

Caution, however, should be exercised not to treat the decision-making process merely as a tabulation of votes on the various approval requirements by each member. Failure to satisfy any one of the review criteria is grounds for denial and that "passing" on 3 of the 5 variance criteria should not result in an approval of the appeal. There should be one clearly stated motion to "approve for the following reasons…" or to "disapprove for the following reasons…," duly seconded, discussed, and voted upon

by the whole board. If the motion fails, members have the ability to make a different motion to then act upon. Failure of a motion does not mean that the opposite prevails.

The legislature codified this principle in 2018 with revisions to RSA 674:33, III. Whereas the prior version of the statute required three votes to reverse an administrative action or to approve an application, it was silent on denials. As now drafted, three concurring votes are required "to take any action on any matter on which it is required to pass."

In other words, if a motion to grant a variance fails by a 2 in favor, 3 opposed margin, that does not mean that the variance is automatically disapproved. In such a case, one of the three members who disapproved the motion should now propose their own new motion to disapprove the application stating the reasons for denial. The board should then vote on that motion which would likely pass, 3-2. This is especially important when there are fewer than 5 board members present since motions could result in a tie. Alternate motions should be put forward but if the board truly cannot find something at least 3 members can agree on, the meeting should be continued until a fifth member can be present.

Since three votes are necessary to take any action, if there is not a full board, even with alternates serving, the chair should give the applicant the option of postponing the hearing until five members are present and available to vote. If the applicant chooses to proceed with the hearing, he/she should be advised that a hearing before a 3- or 4-member board will not be grounds for a rehearing in the event the application is denied. The vote should be made on a motion to approve or disapprove the appeal and should incorporate all of the reasons for the decision. If a motion to approve does not receive three votes, the application is not automatically denied. A further motion, with reasons for the denial, should be offered and another vote taken. The applicant and others should be able to understand the reasons for the decision even though they may not agree with it.

In determining the effect on the "neighborhood," the ZBA is not limited to consider the effect only on owners or occupants of adjacent property. The ZBA members can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc. resulting from their familiarity with the area involved. The resolution of conflicts is a function of the ZBA. See *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632 (1994).

The following excerpt was taken from *Attaching "Conditions" to Approvals in Land Use Boards*, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.

II. Improving the Quality of Motions and Decisions

The language of your decisions is not being drafted for the benefit of those who are in the room making the decision; the language is drafted for those who will use the decision in the future to implement the approved project, or to take enforcement action if the landowner or a successor owner fails to live up to the conditions imposed upon the project. Remember, the relief offered by land use boards runs with the land, and is not personal to the person who initially sought the relief, unless you are dealing with the special disability exception for variances contained in RSA 674:33, V. Here are some thoughts:

A. A motion should be clearly stated, and a written copy should be provided to the person who is taking the minutes, when possible. Think about how many times each of you as board members has seen a situation where a discussion of an issue ends

with a member stating, "Are we all agreed?," followed by heads nodding in unison. How is the person taking the minutes to record that action? What are the chances that at least one member perceives the "agreement" differently from at least one other member? How are the parties and the public to understand the action that has been taken? Please stop, and assure that all motions are clearly and verbally stated. When possible, a written copy should be provided to the person taking the minutes, to reduce the chances of error and misunderstanding.

B. The motion should describe the plan set submitted by the applicant that is actually being used to craft the approval. As projects become more complex, the number of submissions of different versions of the plans, in both paper and electronic formats, steadily increases. Thus, for the benefit of future officials and board members, the motion should describe the plan set being used as the basis of the motion. Often the engineer or surveyor will include a project or file number, and a block with the date of the latest revisions. Refer to that information in your motion. Don't grant a final approval until the plan set that is to be recorded at the Registry of Deeds agrees in all respects with the motions and conditions of approval imposed along the way. That is, be sure that the "final approval" of the final plan set really does reflect completion of all of the "conditions precedent."

C. Be careful that the words you use accurately describe what you want to accomplish. For example, don't say, "I move to approve the ten foot variance." While it may be clear to everyone in the room that night what the board is attempting to accomplish, how can a building official determine what that means five years later when a surveyor requests information to create a plot plan that will be used as part of the landowner's mortgage closing process?
Instead, say something like, "I move to approve the applicant's request for a variance from section _____ of the zoning ordinance to permit the construction of a single family structure that is located twenty feet from the easterly sideline of the land shown on Tax Map ____ Lot ____ when thirty feet is required, in accordance with a plan entitled, _____ as drawn by _____, dated ____, and submitted by the applicant as part of this hearing, with the following conditions: _____."

D. Don't expect the parties to draft the language that you want. If the parties are represented by lawyers, you can expect to receive a written proposed motion to support the view of the party being represented, and a written request for findings of fact. The lawyers are approaching the case as litigators and advocates for their client's position, not necessarily from the viewpoint of board members.

If the parties are primarily represented by an engineer or a surveyor, the Board will receive a great deal of graphical evidence (plans), and perhaps written reports that describe the outcome of wetland studies, drainage calculations, or traffic counts or traffic movements during a study period. That is, don't expect the lawyers to create graphical plans, and don't expect the engineers to craft a motion and request for findings of fact that would satisfy the Board. It is not realistic, except in the most straightforward of uncontested matters, for the members to simply attend a Board meeting and hope that one member will be able to immediately craft a clear motion for approval with accurate, complete and meaningful conditions that capture all of the thoughts of the Board. A well-crafted decision takes time, and advance preparation. It need not be completed in a single meeting if the Board needs to consider drafts of the decision, or to obtain legal advice regarding aspects of the decision.

Please do not say to the person taking the minutes or the chairperson, "You know what I mean, just clean it up for the minutes and notice of decision."

It is perfectly lawful to request a party to file proposed documents, or to request staff for the board to prepare a proposal in advance, or for a board member to craft and bring a proposal to a meeting to use as a basis for discussion. (See *Webster v. Candia*, 146 N.H. 430 [2001].) What is not lawful is to deliberate as a board on such proposals outside of a public meeting, either by holding an unnoticed meeting of the members, or through e-mail. See RSA 91-A:2, and RSA 91-A:2-a. Your discussions on the proposed documents must take place only within a duly noticed and convened public meeting, and not otherwise.

E. Be very careful before incorporating any codes or other requirements by reference if the Board does not have a clear understanding of the implications of the action. For example, Boards will often require an applicant to "meet the requirements of the Police and Fire Departments." This can have unexpected consequences.

See *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012), where that type of requirement was added as a condition of approval. Once the applicant met with the Fire Chief, the unusually steep nature of the lot and its driveway caused the chief to require the installation of residential sprinklers in a house, since the fire equipment could not get close enough to the house itself to provide service. The landowner balked at the requirement, altered the structure and took residence without an occupancy permit. In an enforcement action, the landowner defended by citing to a state statute that prohibited a planning board from imposing such a condition. The supreme court found that the requirements of the State Fire Code controlled the situation, and not the planning board statute.

SPECIAL CONSIDERATIONS WHEN VOTING ON A VARIANCE

When considering the language of variance votes, it is suggested to mimic the language of the statute (RSA 674:33) as closely as possible and structure each prong – whether the board is voting on them individually or as a group – such that a "yes" vote will be a vote in favor of the variance and a "no" vote is for denial.

For example: Will granting the variance…

1. Not be contrary to the public interest?
2. Observe the spirit of the ordinance?
3. Do substantial justice?
4. Not diminish the values of surrounding properties?
5. Prevent unnecessary hardship that would be caused by literal enforcement of the ordinance?

The more the board strays from the language of the statute, the more the board might get it wrong and end up having a decision reversed on appeal. In *Gray v. Seidel,* 143 N.H. 327 (1999), the board denied the variance request because the plaintiffs failed to show that "[g]ranting the variance would be of benefit to the public interest." The New Hampshire Supreme Court rejected that language because the statute only requires a demonstration that the variance **will not be contrary** to the public interest, not that the variance **would be of benefit** to the public interest (meaning that even if the variance would be only neutral on the question, then it should be granted). The court concluded that the board was placing a higher burden on the applicant than was required by statute.

When voting on the 5 variance criteria, different boards utilize different voting methods. Some vote on each of the five criteria separately and if one fails to pass, then the variance is denied. Others vote on the entire block in one vote. Neither is right or wrong, but, as a practical matter, they may yield differing results.

The legislature addressed this concern in 2018 with the addition of RSA 674:33, I(c), which requires that the ZBA

> **"shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change."**

RECOMMENDATION ON THE TIMING, THE WRITING, AND THE VOTE

674:33 90-Day Timeline

VIII. Upon receipt of any application for action pursuant to this section, the zoning board of adjustment shall begin formal consideration and shall approve or disapprove such application within 90 days of the date of receipt, provided that the applicant may waive this requirement and consent to such extension as may be mutually agreeable. If a zoning board of adjustment determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may, in its discretion, deny the application without prejudice, in which case the applicant may submit a new application for the same or substantially similar request for relief.

RSA 674:33, VIII stipulates that a upon receipt of an application a ZBA has 90 days to begin formal consideration and approve or disapprove of an application, unless the applicant agrees to an extension. If the ZBA determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may deny the application without prejudice, allowing the applicant to reapply for the same relief.

The board does not need to reach a decision on the same night as the hearing was held and can take time to consider the evidence and testimony and render a decision at a later time. This is especially helpful in contested cases following a controversial hearing where a "cooling off period" might be needed. To make a sound decision, the board needs to create a carefully worded and well thought out written motion, which can be difficult to do following a lengthy hearing.

Once the evidentiary portion of the hearing is concluded, the evidence presented and testimony complete, the board may want to keep the public hearing portion of the meeting open as they begin deliberations. This would allow the board time to start talking about the case while allowing an opportunity for the applicant or abutters to provide clarification about the evidence or testimony and answer any questions the board may have.

The board should close the public hearing only when they feel all the necessary information to reach a decision has been gathered. At that point, the board could continue deliberations without the possibility of further participation by the applicant, abutters, or the public, or could recess the deliberations to a future meeting.

One practice the board could use would be to assign the task of drafting a motion to approve or disapprove the application to one or more board members. The member(s) would then take the intervening time between meetings to draft a motion for action and bring it to the next meeting where

the full board would discuss the motion, make any amendments necessary and vote on the motion, or make alternative motions to consider. The point is that the board need not feel compelled to reach a decision immediately upon the close of the hearing but can take time to consider what they have learned and develop a well thought out decision. Care must be taken, however, to not discuss the case with each other during this time to not run afoul of the Right to Know Law.

RSA 676:3 Issuance of Decision

I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

II. Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which such vote is taken, including the written decision containing the reasons therefor and all conditions of approval, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote. Boards in towns that do not have an office of the board that has regular business hours shall file copies of their decisions with the town clerk.

III. Whenever a plat is recorded to memorialize an approval issued by a local land use board, the final written decision, including all conditions of approval, shall be recorded with or on the plat.

Whether an application is approved or denied, the board's decision must be in writing and given to the applicant. All of the reasons should be stated both on the record and to the applicant. In the event the denial is appealed, the board's decision could be affirmed even if one of the reasons was found to be invalid. "... if any of the board's reasons support the denial, then the plaintiff's appeal to the superior court must fail." *Davis v. Barrington*, 127 N.H. 202 (1985).

By statute, the board should also provide written findings of fact for approval. The degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulation and checklist requirements for the findings of fact portion of the approval. The board would be better able to defend their position if appealed by an abutter, would instill public confidence and would allow future boards and interested parties a better understanding of how the decision was reached. When an application is approved with conditions, those conditions must be included in the written decision and included with or on any plat recorded to memorialize an approval as contained in RSA 676:3, III. Findings of fact should not replace conditions of approval.

For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board.

The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, unless other grounds exist for disapproval.

The written decision, along with the minutes of the meeting at which the vote was taken, must be on file for public inspection within 5 business days of such vote. If the board does not maintain an office with regular business hours, the municipal clerk should be given a copy of the decision in order to assure the required public access. The board's Rules of Procedure should specify the distribution of the decision and the posting/publication requirements. It is good practice not only to give a copy of the decision to the applicant as required, but also to notify the public by posting in two places.

ATTACHING CONDITIONS AND TIME LIMITS

RSA 674:33 Powers of Zoning Board of Adjustment

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

A zoning board of adjustment has the ability to attach conditions to any relief that is within its jurisdiction in accordance with decisions of the New Hampshire Supreme Court. "While there is no express statutory provision permitting a zoning board to place conditions on the granting of a variance, we have previously held that a board's extensive powers include the authority to attach reasonable conditions where they are necessary to preserve the spirit of the ordinance." *Michelle J. Robinson v. Town of Hudson*, 149 N.H. 255 (2003). Note that the conditions must be reasonable, and relate to the spirit of the ordinance in question and the actual use of the land, and not to the person who is to be using the land. See *Wentworth Hotel v. New Castle*, 112 N. H. 21 (1972) and *Peabody v. Windham*, 142 N.H. 488 (1997).

The exception to this rule is found at RSA 674:33, V, relating to approving reasonable accommodations to persons with physical disabilities, which can be conditioned to expire only as long as the named person has a need to use the premises.

Conditions must relate to the land and are usually designed to remove features of the proposed use which are legally objectionable. For example, the board could not grant a variance to reduce the lot size requirements on the condition that the applicant builds a house with a cost in excess of a certain figure. That condition would not serve a legal purpose under the zoning statute. A board could vary the requirements of a lot size on condition that the applicant limit the height of the structure. This would ensure that abutters are not deprived of light and air - the preservation of which is a legal purpose of zoning and one of the reasons for requiring a minimum lot size.

While conditions may be attached to modify objectionable features, all other requirements for a variance or special exception must be present. The appeal cannot be granted simply because, by attaching the condition, "no harm will be done."

In *Sklar Realty, Inc. v. Merrimack and Agway, Inc.v*, 125 N.H. 321 (1984), the New Hampshire Supreme Court discussed planning board procedures when conditions are set as part of approval of an application. While implications for a board of adjustment are not clear, it is worth summarizing the major points made in the case. The court distinguished between "conditions precedent" that must be fulfilled before approval is final and "conditions subsequent" that deal with issues in effect after development has occurred such as hours of operation, control of traffic, noise levels, and emissions.

The court said, "[i]n a functional sense, when an applicant claims to have fulfilled a condition attached to an application, that condition has become a part of the application itself. An opportunity to testify

on the applicant's fulfillment of such a condition is in reality, then, an opportunity to testify on the factual basis for the application as it must finally be approved or denied. Without that opportunity, the statutory right to be heard would be a limited right indeed." A compliance hearing was required to give abutters an opportunity to be satisfied that all the conditions precedent were met.

The Legislature modified the decision in 1986 by amending RSA 676:4 to say that a compliance hearing is not required if the conditions are minor or administrative or involve permits issued by other agencies or boards.

The following excerpt was taken from *Attaching "Conditions" to Approvals in Land Use Boards*, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.

> Since the land use boards clearly have the ability to add conditions to their decisions, what is the difference between a "conditional approval" and a "final approval?" The supreme court has indicated that the purpose of allowing conditional approvals is to avoid a requirement that any impediment to full approval must result in a formal disapproval of the application and the wasteful necessity of starting all over again. *Sklar Realty v. Merrimack*, 125 N.H. 321 [1984]
>
> Therefore, "conditional approval" is an *interim step* in the process of the board's consideration of the application. A "final approval" cannot be given to the applicant until all of the "conditions precedent" have been met by the applicant. *Simpson Development Corp. v. Lebanon*, 153 N.H. 506 [2006]
>
> What is the difference between a "condition precedent" and a "condition subsequent?" The Court has defined it this way. A "condition precedent" is some action that has to be taken by the applicant in order to remove an impediment to "final approval." These are the things that need to be done before the town will take the additional step of granting "final approval." A "condition subsequent" defines an action or behavior that binds the applicant, but does not need to be accomplished before "final approval" is granted. *Property Portfolio Group, LLC v. Derry*, 154 N.H. 610 (2006).
>
> A subdivision plan or site plan cannot be recorded at the Registry of Deeds, and land cannot be conveyed by reference to such a plan, until "final approval" has been granted. When economic conditions are good, and demand for the new product is high, there is generally a short period between the entry of a "conditional approval" and the achievement of "conditions precedent." When economic conditions are less favorable, the gap may extend over a period of years, and on occasion are never achieved. For this reason, many boards now impose time limits upon applicants to achieve conditions precedent to final approval, and require applicants to return to them in the event the time limits are not achieved.
>
> There is also a potential need to schedule a further public hearing in the Planning Board prior to issuance of a "final approval." The Planning Board must hold an additional public hearing on the matter unless the conditions precedent are "minor," "administrative," or involve "possession of permits and approvals granted by other boards or agencies." It is not unusual for the permits or approvals granted by other agencies to require some substantive change in the plans conditionally approved by the Planning Board or Zoning Board of Adjustment. If plans must change substantively in order to comply with these other approvals, a public hearing on the changes must be held with appropriate notice to all interested parties. RSA 676:4, I(i).

A board of adjustment is authorized to place conditions on a variance and failure to comply with those conditions may be a violation. See *Healey v. New Durham ZBA*, 140 N.H. 232 (1995). If conditions are included as part of an approval, they must be recorded with or on the plat. RSA 676:3, III. The applicant must know what the conditions are to be able to comply with them and the town must know in order to be able to enforce the conditions, as well. See *Geiss v. Bourassa*, 140 N.H. 629 (1996). A provision can also be included which outlines the conditions under which a use allowed by special exception may be lost due to abandonment.

RSA 674:33, I-a provides a 2-year window within which a variance remains valid (unless further extended by the local ordinance or by the board of adjustment for good cause). Recognizing that variances are often part of a larger development plan, this statute further provides that no variance will expire within six months after the resolution of a planning board application that is filed in reliance on the variance.

JOINT MEETINGS AND HEARINGS

RSA 676:2 Joint Meetings and Hearings

I. An applicant seeking a local permit may petition 2 or more land use boards to hold a joint meeting or hearing when the subject matter of the requested permit is within the responsibilities of those land use boards. Each board shall adopt rules of procedure relative to joint meetings and hearings, and each board shall have the authority on its own initiative to request a joint meeting. Each land use board shall have the discretion as to whether or not to hold a joint meeting with any other land use board. The planning board chair shall chair joint meetings unless the planning board is not involved with the subject matter of the requested permit. In that situation, the appropriate agencies which are involved shall determine which board shall be in charge.

II. Procedures for joint meetings or hearings relating to testimony, notice of hearings, and filing of decisions shall be consistent with the procedures established by this chapter for individual boards.

III. Every local land use board shall be responsible for rendering a decision on the subject matter which is within its jurisdiction.

When the situation requires permits or approvals from more than one board, holding a joint meeting can provide the boards with an opportunity to hear the same presentation and, perhaps, get a more complete picture of what is being proposed. This procedure can also simplify and streamline the process for the applicant. Each local land use board retains responsibility for rendering a decision on the subject matter within its jurisdiction. Before a board can participate in the joint meetings process, it must adopt rules of procedure that meet minimum statutory requirements. In a particular case, each board would decide whether or not to agree to a joint meeting. See Appendix A for sample rules.

The board of adjustment and the planning board should meet periodically (ideally once a year) to review the zoning ordinance to keep it current and maintain administrative efficiency. By analyzing the types of cases that come before it, the ZBA can advise the planning board on weaknesses or inconsistencies within the ordinance itself that might otherwise not be recognized. An amendment to the ordinance might be appropriate where the problem is a function of the wording of the ordinance or where an alternative procedure might eliminate the need for action by the board of adjustment.

The board of adjustment should keep track of requests for administrative appeals; repeated requests regarding the same subject point to a weakness in the zoning ordinance. The same is true for a large number of requests for similar types of variances.

NONPUBLIC SESSIONS

RSA 673:17 Open Meetings; Records

Each local land use board shall hold its meetings and maintain its records in accordance with RSA 91-A.

The application of the Right to Know Law to Local Land Use Boards can create thorny legal questions. Remember to consult with your municipal attorney when legal issues arise.

New Hampshire's Right to Know Law, RSA 91-A:1, requires all meetings of public bodies to be open to the public. The board of adjustment, in compliance with this statute, cannot meet, take testimony, deliberate, or make its decisions in nonpublic sessions. The board may only enter into nonpublic session for those reasons contained in RSA 91-A:3, II. The board would rarely, if ever, need to consider or act on any of the matters that would warrant entering into nonpublic session with the exception of the need to consider legal advice provided by legal counsel, either in writing or orally, to one or more members of the board, even where legal counsel is not present.

The decision to hold a nonpublic session must be included in the minutes of the open session. Minutes also must be kept of the nonpublic session. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes of nonpublic sessions shall include the names of members, persons appearing before the board, and a brief description of the subject matter discussed and final decisions.

In 2023 paragraph IV was added to RSA 91-A:3, III, requiring public bodies to either develop their own process to review minutes or to follow a statutorily created process. Either way, public bodies are required to review all nonpublic minutes that were previously sealed and determine whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. That review process must take place within 10 years of October 3, 2023. Meeting minutes that were kept from the public that are not reviewed by the public body or agency on or before October 3, 2033 shall be subject to public disclosure without further action of the public body.

The board may meet at any time to discuss legal matters with their legal counsel physically present or by electronic, contemporaneous means (conference or video call, etc.) and this is not considered a "meeting" subject to the provisions of the Right to Know Law. This is often referred to as a "non-meeting" and there are no posting or notice requirements, minutes need not be kept, and the public has no right to attend.

In 2017, RSA 91-A:2, II-a was amended to give a member of a public body the right to object to a discussion in a meeting of the body, including nonpublic sessions, if the member believes the discussion violates the Right to Know Law. Upon request of the member who is objecting to the discussion, the public body shall record the member's objection in its minutes of the meeting. The member may then continue to participate in the meeting without being subject to penalties under the law.

Decisions made by the board of adjustment affect the property rights of the citizens within its jurisdiction. To ensure full public acceptance and to meet the legal requirements, the powers of the board must be exercised at open public meetings where each board member announces his vote, which is duly recorded by the clerk.

RECORDS

The records of the board of adjustment should be complete and accurate. The records should include the application; a copy of the hearing notices and the list of abutters and applicants to whom the notices were given with copies of newspaper notices or postings showing the date and location; the agenda for the hearing; and the minutes of the hearing including any maps, plans, photographs or other documents submitted for consideration. The assistance of paid clerical staff allows board members to participate fully in the hearing and decision process.

When the decision is reached, the vote of the board (exact wording of the motion and how each member voted) should be recorded, along with any conditions that are attached to the decision and all of the reasons as determined by the board. This is especially important if the decision is appealed to superior court. The court will base its review on the written record, provided the basis for the decision is clear and complete.

INTEGRATED LAND DEVELOPMENT PERMIT

In 2013, RSA 674:21 was amended to add an "integrated land development permit option" as an optional land use control to allow a project to proceed, in whole or in part, as permitted by the NH Department of Environmental Services (DES) under RSA 489.

An applicant for approvals or permits under two or more programs within the DES may apply for an integrated land development permit in lieu of all individual permits such as wetlands, shoreland, and alteration of terrain permits. The amended statute allows municipalities to participate in the process with the consent of the applicant and/or at the invitation of DES. The new law also authorizes a municipality to adopt an innovative land use control ordinance allowing the planning board to approve a project that does not fully conform to the local zoning ordinance if it has been approved by DES under the integrated land development program. Municipalities interested in enacting a local provision to participate in this program should check with DES to determine when the program will be fully operational.

Municipalities may adopt an innovative land use control ordinance pursuant to RSA 674:21, authorizing the planning board to allow a project that does not fully conform to the local zoning ordinance to proceed as approved by the department under this chapter, provided the planning board makes a finding that such a project meets the criteria of paragraph I. (RSA 489:9, V).

After being suspended from 2014 to 2017, in 2017 the integrated land development permit program was again suspended for the biennium ending June 30, 2019.

SUMMARY

The board of adjustment must act on the evidence presented and base its decision on legal grounds. The board cannot deny or approve an application based on a judgment of what it considers the best interest of the area or neighborhood. The legislative body, in passing the ordinance and map, has already decided what zoning controls it believes to be best for the municipality and has determined what restrictions will be applied. The board of adjustment must act within the limits set by the ordinance and map and cannot enlarge, restrict, or disregard these limits. The board of adjustment cannot be given legislative powers. It cannot do anything that would, in effect, be rezoning.

Because of the limitations on the board's powers, it cannot make blanket rulings such as deciding that

it will not permit any more gas stations in a certain section, or that it will, in the future, allow certain industries to locate anywhere. This would constitute a legislative act and is beyond the board's scope of authority. The board of adjustment was created to handle individual cases, so each case must be examined on its own merits.

Boards of adjustment should also remember that although they have quasi-judicial powers, they are not a duly constituted court and cannot rule on points of law. That is, the board cannot declare an ordinance invalid because it appears to be improperly drawn or enacted or violates state or federal law. It must assume that the ordinance is legal unless declared otherwise by a court.

When a case comes before the board of adjustment, it might be helpful to run through the following checklist:

Is the application an appeal from an Administrative Order?
If so...

- What is the meaning of the provision in question?
- Does the appellant meet the terms?

Is the application a request for a Special Exception?
If so...

- Is the exception allowed by the ordinance?
- Are the specified conditions present under which the exception may be granted?

If the answer to both of these questions is yes, the exception **must** be granted. "If the board finds that all the requirements are met, it must grant the special exception. However, if the applicant is not able to demonstrate that each of the requirements are met, the ZBA must deny the special exception." *Jensen's v. City of Dover*, 130 N.H. 761 (1988).[12]

Is the application a request for a variance?
If so...

- Would granting the variance not be contrary to the public interest?
- Could the variance be granted without violating the spirit of the ordinance?
- Would granting the variance do substantial justice?
- Could the variance be granted without diminishing the value of abutting properties?
- Would denial of the variance result in unnecessary hardship to the owner?

If the answer to all five questions is yes, the variance should be granted. If the applicant fails to meet any ONE of the five variance requirements, it cannot be legally granted and should be denied.

Is the application a request for an Equitable Waiver of Dimensional Requirements?

- Does the request involve a dimensional requirement, not a use restriction?
- If the answer is yes, the board can move on to the specific findings to grant the waiver.
- Has the violation existed for 10 years or more with no enforcement action, including written notice, commenced by the town?

[12] The Pit & The Pendulum, Attorneys Bates and Mitchell, New Hampshire Municipal Association, Municipal Law Lecture Series, Lecture #3, 1995, pg. 16.

or

- Was the nonconformity discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser, and was the violation not an outcome of ignorance of the law or bad faith but as the result of a legitimate mistake?

If the answer is yes to either, the board can move on to the additional findings to grant the waiver:

- Does the nonconformity not constitute a nuisance or diminish the value or interfere with future uses of other property in the area?
- Would the cost of correction far outweigh any public benefit to be gained?

If the answer to each of the above is yes, the board shall grant an equitable waiver.

The power to grant appeals should be treated with respect and with the knowledge that the task of the board of adjustment is to correct inequities, not to create them.