

# ZBA Decision Making Process

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# Purpose of the ZBA

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

Constitution, 5th Amendment; N.H.  
Constitution, Part 1, Arts 2 & 12

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

# ZBA - Judicial Function

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

If you remember nothing else...

- Read and follow statutory requirements.
- Read and follow your ordinance and rules.
- If you aren't sure, ASK.
- Be fair and reasonable.

# Municipal Authority to Act

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

# Relationship to the Public

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

# ZBA: a Quasi-Judicial Board

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

# Constitutional Procedural Due Process

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



# NH Statutory Due Process

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

# Working with Other Boards

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

# One Bite at the Apple

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

# Preparing for Success - Application

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

# Timing of the Hearing

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

# **NEW** – Time Period to Issue Decision

- RSA 674:33, VIII, effective 8/23/2022
  - ZBA is required to grant or deny an application within 90 days of receipt of the application
  - The applicant may waive this requirement and agree to an extension of the time period
  - If ZBA determines that it does not have sufficient information to make a final decision on an application within the time period, ZBA may deny the application “without prejudice”
  - In that case, the applicant can apply again for the same thing in the future (no Fisher v. Dover problem)

# Right to a Full Board?

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

# Participation in the Public Hearing

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



# Public Hearing

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

# Obtaining Legal Advice

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

# Deliberating

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

# Deliberating

- Deliberation is only among board members – no comments from parties or public
- Board should NOT ask questions of the parties during deliberations
- Minutes should reflect the deliberation discussions, and all members participate!

# Deliberating

- ▶ Review what relief is being sought (variance? Special exception? Appeal?)
- ▶ Go over the legal standards that apply
- ▶ Discuss how the evidence you have received fits with those standards
  - ▶ What facts do you find in this case?
  - ▶ Which facts support each of the conclusion you reach about each part of the legal standards?

# ***NEW*** - Findings of Fact

- As of 8/22/2023, RSA 676:3, I:
- All written decisions “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, unless the court determines that there are other factors warranting the disapproval.”

# Weighing Expert Evidence

- Board has considerable discretion to choose between competing expert opinions, *Richmond Co. v. Concord*, 149 N.H. 312 (2003).
  - Must have a reason for rejecting expert opinions (what is lacking in qualifications, methodology, data, conclusions?)
  - Minutes and decision should reflect the board's reason for not accepting expert opinion (personal feelings are not enough)
- General studies and articles may not be enough to contradict specific expert opinion.
- Lay opinions and anecdotes don't outweigh uncontroverted expert evidence. *Appeal of Town of Windham*, No. 2021-0473 (10/4/2022); *Trustees of Dartmouth College v. Hanover*, 171 N.H. 497 (2018); *Condos East Corp. v. Conway*, 132 N.H. 341 (1989)

# Motions

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



# Drafting a Motion

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

# Motions

- Text of the motion (also who made and seconded it) and what happens to it must be in the minutes.
- Give a written copy to the person taking the minutes.
- Motion should include the findings of fact in some manner.

# Conditions of Approval

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

# Conditions of Approval

- Variances run with the land, not the owner.
  - *Batchelder v. Plymouth ZBA*, 160 N.H. 253 (2010)
- Exception: variances for the disabled, RSA 674:33, V: ZBA may provide variance expires when the particular person has no more continuing need to use the premises.
- Exception: waiver from building and site requirements for agricultural uses, RSA 674:32-c:
  - ZBA shall grant waiver to the extent necessary to reasonably permit the agricultural use.

# Voting on Motions

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

# Voting on Variances

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

# Written Notice of Decision

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

## Notice of Decision to Include:

- The motion that was passed
- For a denial, decision must explain the reason(s). RSA 676:3
- All conditions of approval, clearly explained
- Findings of fact made by the ZBA which support each factor of the decision
- Any deadlines or milestones required



# Notice of Decision

- Written decision **and** meeting minutes must be publicly available within 5 business days after vote, RSA 676:3, II and RSA 91-A.
- If not: (a) violation of the Right to Know Law, and (b) if appealed to superior court, extra time for appeal to be amended.
- Must make “available” to applicant – choose a method and stick to it.

# Motion for Rehearing

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

# Motion for Rehearing

- ZBA must grant or deny motion within 30 days, RSA 677:3.
- ZBA holds public **meeting** (not a hearing) to decide. Discussion and vote by board, no input.
- Avoid new findings of fact or new reasoning when denying a motion for rehearing (just say “denied”).
- New evidence submitted with motion for rehearing?
- Why grant rehearing? To correct a possible mistake (procedural or substantive).
- If motion is denied, next step is court or HAB

# Holding a Rehearing

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

# Appeals to Superior Court or Housing Appeals Board

- If motion for rehearing is denied:
  - Any person aggrieved may file a petition for appeal with the superior court within 30 days of the date of the board's vote. RSA 677:4.
  - If case involves “housing or housing development,” appeal may be filed instead with HAB within 30 days after the Board's vote. RSA 679:5 and :6.
  - The governing body may appeal on behalf of the town/city. *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003)
- Compile and preserve “the record” as completely as possible because it **is** the record the court will review.

# Appeals to Superior Court or Housing Appeals Board

- The “Certified Record” includes everything the ZBA has on the case.
  - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, notices, certified mail receipts.....
  - Must be filed with superior court within 30 days after town/city is served with the appeal by sheriff.
  - Must be filed with HAB within 30 days after the appeal is actually filed with HAB.
  - ZBA and staff should work with counsel to assemble it.

# Concluding Suggestions

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

# Thank you!

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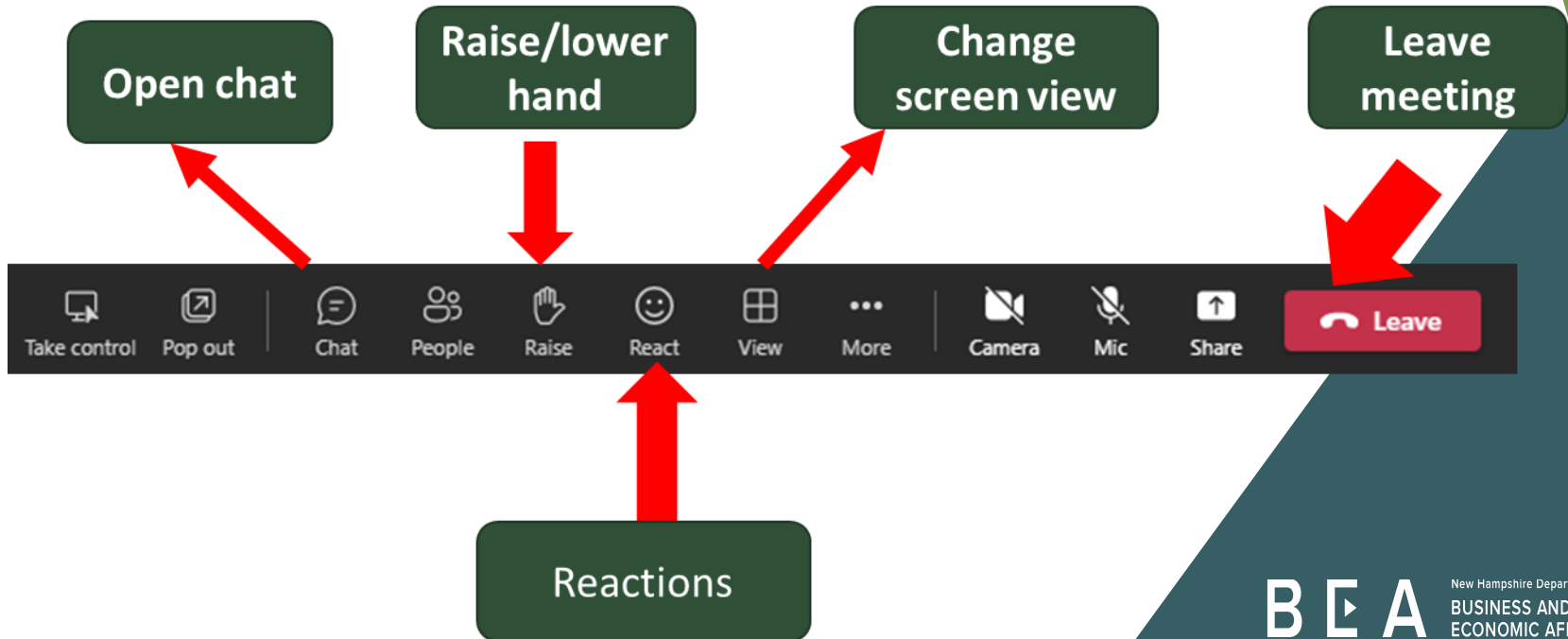
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# Session Controls

- Question and Answer session

- Type questions into Chat box
- Raise hand to be unmuted by moderator



# Thank you!

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

## **Feedback Encouraged!**

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

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TODAY!