

Rehearings and Appeals: Being a 'Party to the Action or Proceedings'

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There are some events that you just can't attend if you're not on the guest list: the State of the Union Address, the Governor's Inaugural Ball or a black-tie wedding to name a few. Likewise, you'll need to be on the guest list, otherwise known as having standing, in order to appeal a decision of an administrative officer to the zoning board of adjustment (ZBA) and ultimately, to the superior court. If you haven't been invited, you won't be able to attend.

This article will examine who can appeal to the ZBA under RSA 676:5; who can apply for a rehearing under RSA 677:2; and who may ultimately file a case in superior court under RSA 677:4. A person who can appeal is said to have "standing." Standing means that a party has the right to make a legal claim or seek judicial enforcement of a duty or right. In order for the ZBA, or a court, to hear a case they must be satisfied that the person putting forth the appeal has standing. How do they determine if a party has standing? They look to the law that allows an appeal to be taken.

Step 1: RSA 676:5

The first step in appealing a decision of an administrative officer is to make an appeal to the ZBA under RSA 676:5. Under this statute appeals 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. In order to have standing to appeal, the person must fit into one of the two categories allowed by the statute: 1) any person aggrieved, or 2) any officer, department, board or bureau of the municipality. The second category listed is pretty straight forward—town officials and boards. But exactly who is a "person aggrieved"?

There may be many who are aggrieved by a decision of code enforcement official, board of selectmen, or land use board. Public hearings can be vocal and contentious with many citizens voicing concerns and disagreements over a proposal. Often the board conducting the hearing will allow members of the public to speak, whether they are abutters or not, in the interest of a gathering as much information as they can and to allow a free and open discussion of issues.

Does the act of speaking at a public hearing give a person the right to appeal the board's decision? No, that alone will not give the person the standing that is required — he or she must be a "person aggrieved" in the legal sense. To be aggrieved, one must be more than mad or upset—he or she must have a right or interest that has been injuriously affected. For example, an abutter has a property interest that is injured, if a proposed use by a neighbor results in a lowering of his property values. This abutter would be considered a "person aggrieved" because he could demonstrate that he has been injuriously affected by the decision. However, a citizen who lives miles away from a proposed new super store who feels that approving the store would be bad for the town, would not have sufficient interest in the matter to be considered a "person aggrieved." In the case of *Nautilus of Exeter, Inc. v. Town of Exeter* 139 NH 450, 451 (1995), the ZBA decision finding that the applicants did not have standing to appeal because they were not "persons aggrieved" was upheld. The New Hampshire Supreme Court found that the applicants' status as citizens of the town, property owners, taxpayers and owners of a business in the commercial zone did not make them persons aggrieved under the statute.

Step 2: RSA 677:2

Applicants who are not satisfied with the result of his appeal under RSA 676:5, must look to RSA 677:2 (Motion for Rehearing), to see if they may appeal further. Here the statute spells out who can appeal, and those who may appeal are different from those in Step 1: "the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing..." In order to appeal to superior court, and ultimately to the New Hampshire Supreme Court, an applicant must first appeal under RSA 677:2 and to do that, he or she must have standing. The three categories

of persons who can appeal are: 1) the selectmen, 2) any party to the action or proceedings and 3) any person directly affected.

The first category, the selectmen, is easy enough to determine. The other two categories are not as clear-cut.

Who is a party to the action or proceedings? In legal terms, "party" refers to those by or against whom a legal suit is brought. For example, a plaintiff and defendant, petitioner and respondent, appellant and appellee, or an applicant in the case of municipal proceedings. Given this definition, we might be tempted to conclude that anyone who can bring an appeal to the ZBA under RSA 676:5 would then be able to file a motion for rehearing, but this is not the case. In [Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment](#), the New Hampshire Supreme Court examined the issue of who is a party to the action or proceeding. In that case, the Hooksett Conservation Committee appealed a decision of the code enforcement officer to the ZBA under RSA 676:5. So far so good; the law allows appeals by an officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. The ZBA, finding that the conservation commission had standing to appeal the decision of the code enforcement officer, heard the appeal and denied it. When the conservation commission made a motion for rehearing under RSA 677:2, the ZBA ruled that the conservation commission did not have standing to appeal. The board ruled that only the selectmen, and no other town boards, could appeal under RSA 677:2. The Supreme Court agreed.

The Court first pointed out that just because the conservation committee was the entity that first brought the appeal to the ZBA, it did not make it a party per se. *Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment*, 149 NH 63, 66 (2003). Further, the Court pointed out that the legislature, by including only the selectmen, did not intend for other town boards to be able to apply for a rehearing in every instance. *Id.* The Court spent time discussing policy issues that led it to conclude that the legislature did not intend to allow all municipal boards to motion for a rehearing, pointing to issues such as: 1) the use of public funds to pay for both sides of a court case when one board appeals another board's decision; 2) the need to minimize fighting among boards and departments within a municipality; and 3) the slow-down in the prompt and orderly review of land use applications that would result, as reasons why the legislature did not intend to allow all municipal boards to apply for a rehearing. *Id.*

The last category of those with the ability to make a motion for rehearing is "any person directly affected thereby." Note that this is a different category than is allowed in the first step of appeal, RSA 676:5, or the third step under RSA 677:4, which allows, "any person aggrieved" to appeal. The statute does not define "person directly affected" nor is there case law that addresses that issue directly. It will be up to the ZBA, based on the facts before it, to decide whether the person before it is directly affected by the order or decision being appealed. Applicants unsatisfied with the ZBA's finding may seek judicial review by filing a petition for writ of certiorari with the superior court.

Step 3: RSA 677:4—On to Superior Court

Any person aggrieved is the category for standing in this last step in the rehearing and appeal procedures. Here though, the statute spells out exactly who "a person aggrieved" is: "any party entitled to request a rehearing under RSA 677:2." Thus, if a person does not have standing to request a rehearing under RSA 677:2, as was the case for the Hooksett Conservation Commission, he or she will not be able to appeal to the superior court under RSA 677:4.

Summary

As with other important and special events, you need to be on the guest list to attend. To participate in an appeal of an administrative order or decision, the guest list will include only those who have standing to appeal. The invitees include those who are a party to the action or proceedings, a person aggrieved by a decision, a person directly affected by the decision, the selectmen, and, depending on the level of the appeal, any officer, department, board or bureau of the municipality. A close reading of the statute authorizing the appeal is needed to determine who is, and who is not, invited to attend.