

Meeting Mechanics of NH Land Use Boards

From start to finish, a land use board's review of an application should be fair, effective, and legal.

I. Overview

A. Planning Boards and Zoning Boards of Adjustment act as *quasi-judicial* bodies when reviewing land use and land development applications.

➤ *Remember: Any quasi-judicial decision of a land use board can be appealed to court (or in some instances, to the Housing Appeals Board). (RSA 677:4 & 677:15; and 679:6)*

B. Review procedures are established by statute (RSA 676:4 & 676:7) and by the board's rules (RSA 676:1). These procedures must be followed in order to achieve the overall goal of the land use board review process, which is to:

1. Ensure **fundamental fairness**.

- In reviewing an application, the Board must provide *procedural due process* to all parties to protect the applicant and other interested parties against unfair loss of a property right.
- Procedural due process means providing:
 - a. Notice of the hearing. (RSA 676:4, I & 676:7)
 - b. An opportunity to be heard by an impartial board at a public meeting. (RSA 676:7, 673:14, 674:33, and 91-A).
 - c. A decision in writing explaining the basis of the board's decision. (RSA 676:3)

2. Ensure **effectiveness** and efficiency by:

- Avoiding procedural mistakes resulting in appealable issues.
- Helping to create a complete and understandable record of the proceedings in case of an appeal.
- Instilling public confidence in the overall process and the decision itself.

3. Ensure the **legality** of the proceedings and of the outcome.

- Review must comply with statutory procedural requirements. (RSA 676:4 & 676:7)
- Board's decision must be based on testimony given and evidence submitted in light of the applicable regulations.

II. Pre-Meeting Administration

A. Application submission requirements should be clear and accessible. Boards should provide application forms, instructions, and submission checklists.

B. Notice requirements.

1. Purpose of requiring notice is to reasonably inform abutters of what's being requested.

2. The statute provides the *minimum* notice requirements that must be followed (RSA 676:4, I & 676:7):

- WHO: applicant, property owner, easement holders, professional representatives, and abutters.
- WHEN:
 - a. Zoning Board – Notice must be provided to abutters and published 5 days before the scheduled date of the hearing. (RSA 676:7)

- b. Planning Board – Notice must be provided, posted and published 10 days before the application is formally presented to the board. (676:4, I)

➤ *Practice point:* Local land use regulations may include notice requirements that exceed the statutory minimum. For example, notice could be sent to all property owners within a certain distance of the property, rather than to only abutters (as defined in RSA 672:3)

- HOW: Notice must be mailed via by “verified mail” (as defined in RSA 21:53).

➤ *Practice point:* Sending notice by certified mail (without return receipt) is recommended.

III. The Meeting

- A. Must be conducted in compliance with the “Right-to-Know” (or “Open Meetings”) law:

1. RSA 91-A:2, II: “all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public [...] no vote while in open session may be taken by secret ballot.”

- B. The Board’s Rules of Procedure must be followed.

1. Land use boards are required to adopt Rules of Procedure. (RSA 676:1)
2. The rules should be designed to fill in the gaps between the minimum statutory requirements.
3. Board members must be familiar with them and have them at hand.
4. Following established rules of procedure enables the proceedings to be conducted fairly.

- C. Opening the Meeting. The Chair should:

1. Have the agenda materials, rules of procedure, and RSAs at hand.
2. Introduce the members.
3. Appoint alternate(s) for meeting (or appoint alternates on a rotating basis for each hearing, whichever is required by the Board’s Rules of Procedure).
4. Give overview of process for scheduled hearings:
 - Explain the purpose of the public hearings.
 - Explain Board’s role and the general standards by which the Board is charged with evaluating the merits of an application.
 - Outline how each hearing will proceed (as may be prescribed by Rules of Procedure).
 - Explain role of alternates.

IV. Public Hearing Procedures

- A. Role of Chair and Staff:

1. Role of Chair.

- Directs and manages the proceedings, in accordance with the statute and the Board’s rules.
- Maintains order, control, and decorum of the meeting at all times.
- Testimony will often stray from legal relevance. The Chair should provide leeway and show patience, but should use good judgment in redirecting testimony as needed.

2. Role of Staff.

- Serves as impartial resource to provide helpful information and analysis.
- Advocacy only appropriate in the context of an administrative appeal.
- Prepares staff memo for the Board which should be delivered to the Board (with a cc to the applicant), together with the application materials, well in advance of the meeting.

- B. To begin consideration of an application, the Chair should:
1. Read aloud the hearing notice and state for the record how notice was provided.
 2. If needed, appoint alternates (if appointing alternates on a per-hearing basis).
 3. Ask the members if there are any recusals. (RSA 673:14) Members should bear in mind that:
 - Applicants have a right to be heard by an impartial tribunal.
 - It is the member's decision whether or not to recuse themselves (although prejudgment/bias and direct abutter status are automatic disqualifiers).
 - Member can request a non-binding advisory vote from the Board.
 - If a member recuses themselves, they should step down from the table and sit in the audience.
 4. Clarify who the voting members are, if necessary.
 5. Open the hearing and ask the applicant to come forward.
 - If less than a full member board is present, offer applicants the option of postponing the hearing.
- C. Applicant's presentation.
1. Board may ask questions at any time, but should wait until conclusion of applicant's presentation if possible.
 - Questions should have legal bearing on the matter.
 - Should be posited as impartially as possible.
 - TRY TO AVOID CREATING a basis for appeal by introducing factors that are irrelevant to the application.
 - Ask any and all questions that the board members have regarding the application.
- D. Abutter/other interested party testimony.
1. Questions should be directed to the Chair and answered by applicant during rebuttal. Cross examination of applicant (and vice versa) should not be permitted.
 2. Chair should accept exhibits but allow the applicant an opportunity to review.
 3. Chair should not allow personal attacks.
 4. Standing (persons with a "direct interest"/ "persons aggrieved"). (RSA 677:4 & 15)
 - Abutters have automatic standing.
 - Chair should err on allowing testimony when standing is suspect, but board members should give due weight to the value of such testimony.
- E. Applicant rebuttal.
1. Chair should impartially restate questions raised by abutters/others.
- F. Optional: abutter/other interested party rebuttal, and additional applicant rebuttal.
- G. Final questions from Board to Applicant.
1. Avoid negotiations; however, it is permissible to explore with the Applicant possible conditions of approval needed to address legitimate concerns, or to ensure compliance with the regulations.
- H. Prior to closing the public hearing, the Chair should:
1. Confirm that all of the Board's questions have been answered. All questions for the applicant must be asked and answered before the hearing is closed
 - PLEASE NOTE: this is the last chance for the Board members to ask questions of the Applicant as there should no interaction with the Applicant or anyone else (aside from discussion amongst board members) upon entering deliberations.

2. Confirm the Board has sufficient information to make a decision. If not:
 - Ask for a motion that (i) specifies precisely what additional information the Board requires; and (ii) continues the hearing to a date certain, if possible.
 - a. If the hearing is continued to a specific day and time, no further notice is required.

I. Close the hearing.

V. **Deliberation**

- A. Must be conducted in public pursuant to NH RSA 91-A (“right to know” law).
- B. In making a decision, Board members should:
 1. Evaluate all testimony/evidence presented, as well as all materials included in the application.
 2. Give due weight to relevant testimony given by: abutters, other interested parties, and competing expert testimony.
 3. Weigh hearsay evidence by considering the source and credibility of the testimony.
 4. Base a decision on relevant testimony only, no matter how passionately irrelevant testimony is made.
 - *Note:* Personal knowledge may be used, but not normally to counterbalance relevant expert testimony.
 5. Make a determination on the criteria only.
 6. *Avoid abstaining from votes relating to an application:* Even if unsure as to the appropriate outcome, a Board member needs to make a decision. Abstaining from tough decisions is unfair to all involved.
 7. Each board member should participate in the deliberation to help make clear basis of board’s decision.
- C. All criteria for granting an approval should be discussed as thoroughly as possible.
 - *Practice point:* For variance applications or other requests for relief where there a number of conditions to be met, Board should vote on each individual criteria.
- D. Reopening the hearing (only if absolutely necessary).
 1. Will have to provide all parties an opportunity to speak.
 2. May need to re-notice if anyone in the audience has already left.
- E. Draft motions:
 1. Chair may direct a Board member and/or staff to prepare a draft motion; deliberation would then be continued to the following meeting.
 2. Draft motions may also be prepared prior to the hearing by staff, a Board member or legal counsel.

VI. **Decision**

- A. The Board must issue a written decision that clearly explains the basis for the decision. (RSA 676:3)
 - *Practice point:* The decision must include findings of fact and conclusions of law (HB1661).
- B. Zoning Board: to pass, a motion requires approval by a majority vote of the 5-member Board, even if less than a quorum is present (i.e. 3 votes needed even if only 3 members present). (RSA 674:33, III)
 - *Practice point:* If less than a full board is present, and no motion has been approved with at least 3 votes, deliberation may need to be continued until a full board is present.
- C. Planning Board: a simple majority of members present is needed to pass a motion.