

NEW HAMPSHIRE MUNICIPAL ASSOCIATION



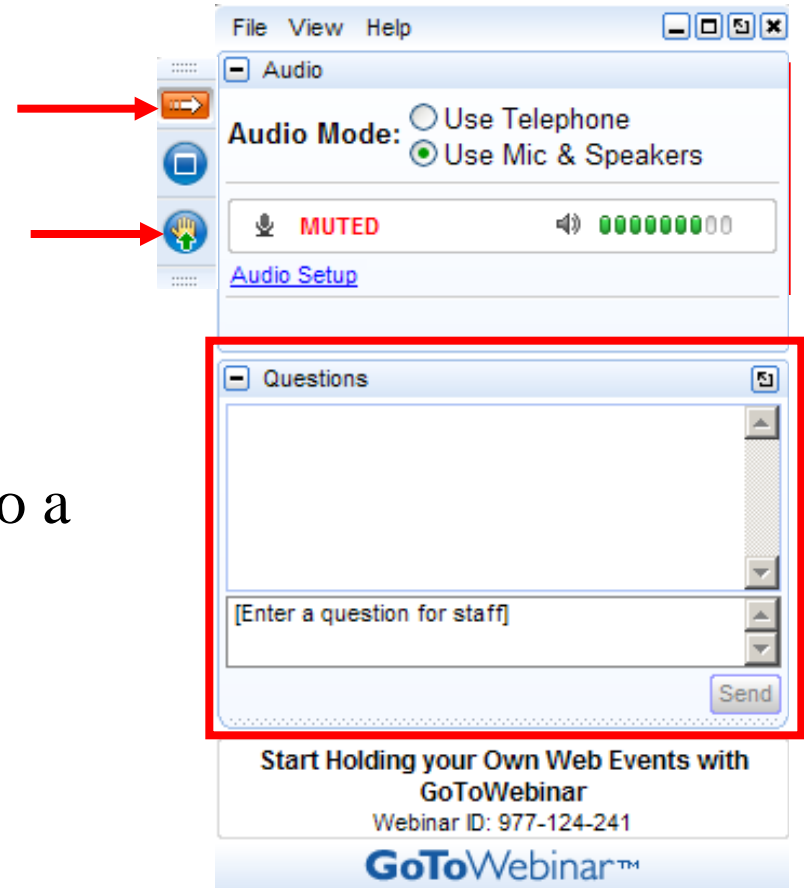
Preparing a Certified Land Use Record

Paul G. Sanderson, Esq.

C. Christine Fillmore, Esq.

How to Participate Today

- Open and close your Panel
- Submit text questions
- Q&A addressed at the end of today's session
- Raise your hand in *response* to a question



Land Use Boards

- RSA 673:1
 - Planning Board
 - Heritage Commission
 - Historic District Commission
 - Agricultural Commission
 - Housing Commission
 - Zoning Board of Adjustment
 - Building Code Board of Appeals

Duties

- Legislative
 - Master Plan, CIP, Ordinance proposals
- Adjudicative
 - Deciding the rights and obligations of landowners, abutters, other interested parties to use and enjoy property
 - Adjudicative matters involve constitutionally protected property rights

Due Process

- When dealing with fundamental property rights, parties have a right to:
 - Notice
 - Opportunity to be heard
 - Right to present evidence and appear by counsel
 - Written decisions with reasons
 - Appeal to the court system to correct errors

Appeals

- See RSA 677. Only afforded for adjudicative decisions of land use boards.
- RSA 677:6, the person complaining:
 - Has burden of proof
 - Board findings of fact deemed to be reasonable and lawful on their face
 - Must show errors of law
 - Must show the decision is unreasonable

Superior Court

- Not a “trial de novo”, but an evaluation of land use board action.
 - Lake Sunapee Protective Ass’n v. NH Wetlands Board, 133 N.H. 98 (1990)
- Clerk issues an “order of notice” requiring a “certified copy of the record” to be filed.
 - RSA 677:8

Have You Ever Been Involved in Submitting a Certified Record to Court?



Superior Court

- A land use appeal is a civil lawsuit.
- Exempt from the new rules of civil procedure, eff. 10/1/2013
 - Superior Ct. Admin. Order 2013-008
- An order of notice will define what the certified record should contain.
 - RSA 677:12 indicates “papers” and “other facts as show the grounds of the action appealed...”

“Papers”, Think Due Process

- Request to come before the board:
 - Preliminary review, conceptual
 - Design Review
 - Application, receipt
- Notice:
 - Proof of publication, certified mail
 - Correspondence, to and from all parties
 - Determination that application is complete

Due Process, continued

- Opportunity to be heard, and to submit evidence:
 - Written reports of experts/reviewers whether of applicant, town, or abutter
 - All versions of plans as filed
 - Request for waivers, with decisions rendered
- Minutes of all meetings and public hearings where the matter was discussed

Due Process, continued

- Written decision(s)
 - If relief is denied, reasons for denial
 - If approved, vote of the board together with:
 - Conditions precedent to grant of permit
 - Conditions subsequent to grant of permit
 - Findings of fact, rulings of law
- Has someone sought reconsideration by motion?
- Are efforts at reconsideration timely?

“Other Facts”

- A video recording of meetings; yes, but if not certified and accompanied by a typed transcript, court may choose to exclude.
 - Motorsports Holdings v. Tamworth, 160 N.H. 95 (2010)
- Photographs
- Expert opinions offered by abutters or others

Anything Else?

- No. This is a record of what actually happened, not what might have happened.
- Even if other information is relevant, court is looking at what land use board did with the information it had.
- Even if other steps could have been taken, court is looking at what land use board and parties actually did.

Who:

- Compiles “the record”?
 - Staff of the land use board working in coordination with the town’s attorney
- Certifies the record as correct?
 - A member of the board, acting in coordination with the town’s attorney
- Pays the cost of compilation?
 - The municipality, since they have the records, can certify the records, and are a party to the litigation

Copies and Format

- Copies are needed for:
 - Court
 - Parties who appear in the case
 - Town Attorney
- Can this be done electronically?
 - Statute and rules are unclear
 - May be done by agreement of the parties and as the court directs

Does Your Board Have a Rule of Procedure About Who Can Sign a Certified Record?



Right to Know Law

- Once compiled, can the record be the subject of a Right to Know law request?
 - Yes
 - Work with town attorney to see if any redactions required
 - Would be allowed to charge for actual cost of creating this copy, RSA 91-A:4, IV

Possible Remedies, RSA 677:11

- Superior Court has the ability to:
 - Affirm the underlying decision; the appealing party still has appeal to Supreme Court
 - Vacate the underlying decision, and grant relief sought; municipality appeals to Supreme Court
 - Vacate in whole or in part and remand (send back) to land use board for further proceedings

A Good Record is Helpful

- Errors are either procedural (the board skipped a step) or substantive (the board applied the wrong facts or the wrong legal standard).
- Procedural error can often be fixed while the case is ongoing.
- Substantive error can be avoided by seeking legal advice and being careful to relate a finding of fact to the evidence submitted.

Mistakes are Expensive

- Appeals are often not resolved quickly
- Errors often require new hearings, new findings, new experts
- Litigation involves attorneys fees to all
- Board members may change, facts may change, expert opinions may change, results of hearings may change
- Creating a record is time consuming, often expensive, and hard work if the original records are in disarray or missing

Pointers

- The record begins on the day the first paper is received and the file is opened
- Update the land use file as soon as possible after every meeting that involves the matter
- File copies of minutes about the matter in the file, do not attempt to extract them from the file of all board minutes later in the process.

Pointers

- Assure that any non-employee who reviews or uses the file is supervised, and that the materials are returned in a complete and orderly fashion
- Never let any portion of the file be taken out of the office by a non-employee for use or copying
- Keep a record of who used the file, and when they accessed the material (could be a sign-in sheet inside the file)

Electronic Records

- A matter for the certified record, the Municipal Records Act, and the Right to Know Law.
- Most land use records are permanent, and must be reduced to a paper format
- Electronic records must be kept “available”, meaning on media and software that still exist in the office and can be used

Controlling Litigation

- The governing body manages litigation
- A good record helps them to support the work of the land use boards
 - They can then understand why decisions were made
 - They can understand the implications if the decision is reversed
 - They can understand why land use boards need resources for training and expert assistance

Summary

- If the hearing was difficult the first time, it is more difficult if it comes back from appeal
- A good record starts on the day of first contact
- A sloppy record increases the likelihood of reversal and imposes far more expense into the process
- Land use boards work hard to make good decisions, they must learn to document their hard work in order to preserve their decisions