

DrummondWoodsum
ATTORNEYS AT LAW



Meeting Mechanics for Land Use Boards

Presented by:
Matthew R. Serge
C. Christine Johnston
Saturday, November 16, 2024 | 10:15 AM
NH Municipal Association (NHMA) Land Use Conference



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TODAY'S TOPICS

- Preliminary Matters
- Getting Organized
- Holding Meetings and Hearings
- Deliberation and Decisions
- Decorum and Public Participation

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PRELIMINARY MATTERS – NO HOME RULE

- No home rule in New Hampshire
- Must find a statute that expressly or impliedly grants the authority you want to exercise
- Can only exercise authority in the way(s) that the statute permits

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PRELIMINARY MATTERS – FOLLOW THE LAW

Review of applications is governed by statute (RSA 676:4 and 676:7) and board rules (RSA 676:1) to create a process that is:

- Fundamentally fair: procedural due process to prevent unconstitutional taking of property rights. Notice of application and hearing (RSA 676:4, 676:7); opportunity to be heard by impartial board at hearing (RSA 676:7, 673:14, 674:33, RSA 91-A); decision in writing explaining the basis of the board's decision.
- Effective: avoid procedural mistakes which create appealable issues, create a complete and useful record in case of appeal, and uphold public confidence.
- Legal: comply with legal requirements to render decision based on the evidence in light of the legal standards.

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PRELIMINARY MATTERS – CREATING A RECORD

- Land use boards need to create a **record** of the proceedings
- **Legislative:** amending zoning ordinances, building codes and regulations to withstand legal challenges and (for building codes) review by state building code review board
- **Judicial:** Appeals to superior court and Housing Appeals Board are usually heard only on the record from the local land use board(s) – not on witness testimony or other documents.
 - If your meeting minutes aren't clear and complete, your actions may be ***difficult to defend***.

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PRELIMINARY MATTERS – RSA 91-A

- Land use boards are subject to RSA 91-A, NH's Right to Know Law
 - Are you having a meeting? (Quorum of members convening to talk business)
 - Notice (at least 24 hours for a meeting, but more for public hearings)
 - Posted in at least 2 public places (plus mailed and published, for hearings)
 - Public must be permitted to attend (including site visits if quorum of board is there)
 - Minutes kept of all meetings/hearings
 - Special rules for posting notices and meetings on website if you have one
 - Minutes available within 5 business days after meeting
 - Records of land use boards are almost all public (except most attorney-client material)
 - Non-public sessions only for reasons listed in RSA 91-A:3, II, and special procedures

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PRELIMINARY MATTERS – MEETING v. HEARING

- MEETING: purpose is for board to conduct its business. Includes discussions, workshops, motions, voting, etc.
 - Governed by RSA 91-A and the board's own rules of procedure for notice, posting, etc.
 - Meetings must be open to the public, who can record, take notes, photos, and videos.
 - No one has the right to speak unless the board grants them that right.
- HEARING: always occurs *during* a properly-held public meeting.
 - Governed by RSA 91-A, board rules, plus whatever statute applies to that hearing
 - Follow all of the most stringent requirements (notices, minutes, etc.)
 - Must be open to the public just like meetings, consult the statute to see who has a right to speak (may be everyone, may be only certain parties)
 - Be clear about when hearing opens and closes (we will get to that in a little bit)

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GETTING ORGANIZED – RULES OF PROCEDURE

- Legally required, RSA 676:1
- Adopt at a public board meeting, file copy with clerk
- Design them to fill in the gaps in minimum statutory requirements (and include a waiver provision!)
- All board members should be familiar with them, have copies on hand
- Rules must be followed (explain why if they are waived)
- Apply the rules evenly to all

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GETTING ORGANIZED - AGENDAS

- No requirement to post it (but you may, and should be consistent)
- No requirement to follow it (but you should try, and explain why if not)
- Rules of procedure should address who calls a meeting and how, who can add to agenda and how, who prepares agenda
- Consider the order – Quicker things first? Availability constraints?
- Don't put a specific starting time for hearings or items within the agenda; do include a disclaimer that the board may choose to deviate from the agenda as needed.

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GETTING ORGANIZED – DEVIATING FROM AGENDA

- If agenda specifies starting time for hearings within a meeting, follow it. (Suggestion: just have meeting start time, not individual hearing times.)
- Never start meeting earlier than advertised time.
- No legal requirement to follow the agenda
- You can add things on the fly, skip things, and change the order if needed.
- Make a good faith effort to stick to it. Explain changes.
- If your rules of procedure address this, follow your rules!

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GETTING ORGANIZED – MEETING PREPARATION

- Circulate materials to members in advance
- Make being prepared for meetings part of board culture (all must read the packet, emphasize at orientation, thank people for doing it!)
- Encourage members to think about their questions and comments before the meeting, write them down and bring them or submit to staff
- Use care circulating comments, drafts, etc. outside a meeting (“distribution” v. “exchange”)
- Is the meeting packet public? Assume it is, as soon as it has been “made available to” a quorum of members. RSA 91-A:1-a, III.

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STATUTORY REQUIREMENTS: NOTICE

- Purpose is to reasonably inform people of the application
- Minimum requirements in RSA 676:4 and 676:7:
 - WHO: applicant, property owner, easement holders, professional representatives, and abutters ** (New definition of abutter, 672:3)
 - WHEN: notice must be sent, posted and published:
 - ZBA: at least 5 days before hearing date
 - Planning Board: at least 10 days before application is formally presented to board (considered for completeness)
 - HOW: at least “verified mail” (RSA 21:53), but certified mail (with or w/o return receipt) satisfies requirement and is recommended

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HOLDING THE MEETING

- Chair should have agenda, rules of procedure, and RSAs at hand.
- Chair introduces members, notes who is absent.
- Chair appoints alternate(s) for the meeting (or specific hearings)
- Chair provides overview of the process that hearings will follow:
 - Explain purpose of the hearings
 - Explain Board's role, general standards by which it must evaluate application
 - Outline how each hearing will proceed, who speaks when
 - Explain the role of alternates

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HOLDING MEETINGS

- Allow for good minutes.
 - One person speaks at a time, make sure minute-taker can hear (or sound quality on recording is good), repeat and/or spell things.
- It is not necessary to read things "into the record" at the meeting or hearing.
- RSA 91-A:2, II: "...no vote while in open session may be taken by secret ballot."

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HOLDING MEETINGS

- Nonpublic sessions – use a checklist, be sure you are following all legal requirements and only doing this when legally allowed. RSA 91-A:3.
- Remote attendance: address this in rules of procedure.
 - RSA 91-A:2, III boards may let members attend remotely, but there are limits and special procedures to follow (usually a quorum must still be physically present).
 - Meetings may be made available on Zoom, Youtube, Facebook, telephone, but this is not required, don't have to let anyone speak remotely, must still have physical meeting.

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CONDUCTING HEARINGS

- Role of Chair:
- Direct and manage proceedings, following statutes and Board rules
- Maintain order, control and decorum
- Testimony may not all be relevant, so chair should provide some leeway but use good judgment in redirecting testimony as needed
- Role of Staff:
- Impartial resource for information and analysis (might advocate in appeal)
- Prepare staff memo for board as part of pre-meeting packet

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CONDUCTING HEARINGS

To begin the proceeding, Chair should:

- State which application is being considered, how notice was provided
- Ask members if there are any recusals (RSA 673:14)
 - Recusal is up to each member; they can request a non-binding Board vote on it
 - Recused member must sit with audience (or leave the room)
- Appoint alternates if needed for that hearing (if not already done)
- Formally open the hearing and ask the applicant to come forward
- If less than a full board is present, offer applicant option to postpone

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CONDUCTING HEARINGS

Applicant's Presentation:

- Allow the applicant to present the application
- Board may ask questions at any time, but try to wait until applicant finishes their initial presentation
- Questions should be relevant, impartial, and respectful
- Don't introduce irrelevant facts or issues (it just creates appeal issues)
- Board members should ask whatever relevant questions they have – this is your chance to do it, and you can't do it after the hearing is closed.

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CONDUCTING HEARINGS

Testimony from other interested parties (abutters and others):

- Chair explains how testimony will work (is there a microphone? How will people be recognized? Is there an order, such as abutters, those in favor, those opposed?)
- Questions should all be directed to the Chair. Answers from applicant are given during their rebuttal. No cross-examination or back and forth.
- Chair accepts any documents that are submitted, applicant may review and have copies
- No personal attacks, no irrelevant testimony.
- Err on the side of allowing comment from all, not just abutters or residents.

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CONDUCTING HEARINGS

Applicant rebuttal:

- Chair should impartially remind applicant of questions raised by others
- Applicant may respond to questions and testimony of others

Optional – rebuttal by abutters (but still give applicant the last word)

Board questions:

- Throughout, board members should be asking questions
- Board may explore possible conditions of approval with the applicant that are needed to address relevant concerns, make proposal comply with standards

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CONDUCTING HEARINGS

Before closing the hearing:

- Chair should confirm all board questions of applicants and other parties have been asked and answered – last chance.
- Chair should confirm the board has all the information it needs to enter deliberations and make a decision.
- If not, solicit a motion (a) stating the specific information that is required and from whom, and (b) to continue the hearing to a specific date so that information can be submitted.
 - In this case, do not close the public hearing; continue to a future meeting.

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CONDUCTING HEARINGS

- Continuing hearing to another day: no additional notice is required if time, date and place of next session are stated before first session ends. RSA 676:7. However, you certainly *can* provide notice.
- No contact between parties and board members in the interim days
- If hearing is closed and deliberations will occur on a future date (or if deliberations begin at one meeting and will continue on a future date), no personal notice to anyone is required because no one has the right to participate. Deliberations are not part of the hearing.

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DELIBERATION AND DECISIONS

- Chair states that the hearing is closed (clearly note in minutes).
- Deliberations on an application are always in public. RSA 673:17
- Can deliberate immediately, or later in the meeting, or on another day.
- During deliberations, no one speaks except board members.
 - No questions may be asked of or answered by applicant or public
 - No new information may be submitted by applicant or public
 - Board may ask questions of staff and legal counsel if needed
- Reopening public hearing (only if absolutely necessary):
 - All parties must be allowed to speak
 - If anyone has left the room/meeting, must wait, renounce, and do at future date

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DELIBERATION AND DECISIONS – WHAT TO CONSIDER

- Start with the criteria for the application
- Evaluate the testimony/evidence that is relevant to each criterion
- Give testimony/evidence the weight it is due (source, credibility, relevance)
- Ignore irrelevant testimony/evidence
- Decision must be based on the criteria and the evidence, or lack thereof – not on any other factors.
- All board members should participate in deliberation – everyone speaks. Chair should prompt those who haven't spoken. Judge needs to know that the board's decision was based on the criteria and evidence, and they won't know unless you TALK about it and it is in the minutes.

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DECISIONS

Motions:

- Chair may direct staff/legal counsel to prepare draft motion, board continues deliberations to next meeting.
- Draft motions may also be prepared before the meeting by staff/legal counsel or board member
- NEVER circulate these prior to deliberations.

Written decision: must clearly explain the basis for the decision, must include reasons for a denial, must include findings of fact, and must be made available to applicant within 5 business days of the vote. RSA 676:3.

RESPECT AND DECORUM

- It all starts with the board.
- The board will be expected to behave reasonably EVEN IF OTHER PEOPLE DO NOT.
- Board culture should be professional, courteous, and respectful.
- Resist getting defensive. It takes two people to argue.
- Cell phone etiquette is important.
- Assume you are being recorded and that the recording will be shared.
- Imagine your meeting from the observer's point of view.

PUBLIC PARTICIPATION

When is it required?

- Public hearing: applicant, abutters, those with a direct interest, and anyone else board allows (err on the side of yes)
- Public meeting: Not required unless the board allows it

Establish rules:

- Explain rules at every meeting, repeat as necessary
- Apply rules fairly, equally, consistently

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PUBLIC PARTICIPATION – FIRST AMENDMENT

- Public hearing:
 - “Limited public forum” (limited to discussion of the specific application), all viewpoints on it must be allowed.
 - Reasonable time, place and manner restrictions are allowed.
- Public meeting:
 - “General public forum” – all subjects and viewpoints must be allowed, may impose reasonable time, place and manner restrictions are permitted, but may not restrict the content of the speech.
 - “Limited public forum” – may limit to specific subjects, with reasonable time, place, and manner restrictions.

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PUBLIC PARTICIPATION – PERMISSIBLE RESTRICTIONS

- Specific topics (“comments on agenda items only” or “comments on proposed amendments to rules of procedure”)
- Time limits (3-5 minutes per person is commonly accepted)
- Requiring a sign-up sheet or lining up at microphone
- Requiring everyone who wants to speak to have one turn before anyone gets a second turn
- Not allowing repetitive comments (multiple people saying the same thing, one person repeating the same thing over and over)
- Not straying off-topic if comment is allowed only on a particular topic

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PUBLIC PARTICIPATION – IMPERMISSIBLE RESTRICTIONS

- “Only positive comments”
- Prohibiting swearing or obscenity (but may prohibit specific threats of harm and speech likely to immediately incite violence or injury)
- Prohibiting a particular person or group of people from speaking
- Preventing certain attire or demonstrative behavior that doesn’t actually disrupt the conduct of the meeting/hearing (t-shirts with slogans, silently holding up a sign)

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PUBLIC PARTICIPATION – DIFFICULT PEOPLE

- Board members aren't required to answer questions. Just listen.
- Remain calm. Practice your "neutral face".
- Chair should calmly ask people who are violating rules to stop, remind them of rules, give them another chance.
- Try a 5-10 minute recess to allow things to cool off.
- Board can vote to continue the hearing/meeting at another time.
- Person who persists and is disrupting the business of the meeting or hearing may ultimately be removed by law enforcement. This is the very last resort. *State v. Dominic*, 117 N.H. 573 (1977). **Use sparingly.**

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Questions?

Thank you!



C. Christine Johnston
cjohnston@dwmlaw.com | 603.716.2895



Matthew R. Serge
mserge@dwmlaw.com | 603.716.2895

800.727.1941 | dwmlaw.com

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