

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.
- 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, 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.
- 2nd application must be materially different in nature and degree from the 1st.
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.

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 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

- May deliberate 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

- Before making a decision, review everything
 - Relief sought
 - Legal standards
 - How the evidence fits with the legal standards
- Deliberation is only among board members – no comments from parties or public
- Board should NOT ask questions of the parties during deliberations.

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. *Trustees of Dartmouth College v. Hanover*, No. 2017-0595 (11/6/18); *Condos East Corp. v. Conway*, 132 N.H. 341 (1989)

Drafting a Motion

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- Can be a useful way to organize the Board's discussion, especially in more complex cases.
- 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)

Drafting a Motion

- Text of the motion (also who made and seconded it) and what happens to it should end up in the minutes.
- Give a written copy to the person taking the minutes.
- If meeting is being audio recorded, be careful to create an adequate record:
 - Read motion out loud, and
 - Require verbal vote from every member

Drafting a Motion

- The motion, once passed, is the essence of the decision.
- It is difficult for the enforcement authority to enforce conditions that are not clear, and if they aren't aware of them!
- Include conditions in the notice of decision.
- Distribute notice of decision to appropriate officials.
- If there are deadlines or milestones, do the appropriate people know about them?

Conditions of Approval

- Conditions “precedent”
 - Must be fulfilled before approval can become final. 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 find that variance shall survive only so long as the particular person has a continuing need to use the premises.
- Special rule for waiver from building and site requirements for agricultural uses under 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 of 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 Decision with Reasons

- Required by RSA 676:3.
- Purpose: to document the motion that was passed.
- Include the findings of fact that the board made.
- If the appeal/application is denied, written decision must include the reasons, RSA 676:3, I.
- ZBA relief runs with the land, so be precise.

Written Decision with Reasons

- Include all conditions, stated clearly so that they are easy to understand.
- Helps make a record for future enforcement actions.
- Complete written decision is also necessary for meaningful court review:
 - Communicate what was granted or why it was denied, clarify how expert opinions were used and relied upon (or rejected).
 - 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.

Written Decision with Reasons

- Written decision and meeting minutes must be on file for public inspection within 5 business days after the vote, RSA 676:3, II and RSA 91-A.
- If they are not, it is not only a violation of the Right to Know Law, it creates a longer period within which someone who appeals the decision to superior court can amend their appeal.
- Does your board mail or e-mail a copy to the applicant? Be consistent.

Motion for Rehearing

- Motion for rehearing must be filed 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:
 - If it could have been presented during original hearing, ZBA **may** consider it.

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

- 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.
 - 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

- 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.....
 - Court will set a date by which the "Certified Record" must be submitted, 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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