

DrummondWoodsum
ATTORNEYS AT LAW

Cordell A. Johnston
Attorney at Law

ZBA Decision Making Process

Subvnhqwhg e |=
Dw|1FrughøD1M.kqvwrg
Dw|1F1Fkukwqh M.kqvwrg

R fwrehu54/5356
Q K P D Odqg X vh Frqihuhqfh

4

1

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

2

2

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.

3

3

If you remember nothing else...

- Read and follow statutory requirements.
- Read and follow your ordinance and rules.
- Be fair and reasonable.

4

4

Municipal Authority to Act

- All municipal authority to act comes from the legislature, *Girard v. Allentown*, 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.

5

5

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 access and notice.
 - *Kelsey v. Town of Hanover*, 157 N.H. 632 (2008)

6

6

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

7

7

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

8

8

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, including “specific findings of fact”, RSA 676:3

9

9

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)

10

10

Fisher v. Dover – 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; otherwise, board will not hear it. *Fisher v. Dover*, 120 N.H. 187 (1980)
 - A change in applicable legal standard
 - Application changed to address reasons first was denied

11

11

Fisher v. Dover, cont'd

- But a “denial without prejudice” allows applicant to come back and try again.
- *Fisher v. Dover* doctrine may not be used offensively—*i.e.*, applicant who has previously received approval but failed to develop project is not entitled to automatic approval of new project that is substantially similar. *Appeal of Chichester Commons*, 175 N.H. 412 (2022).

12

12

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 and discuss with the applicant at the hearing.
 - Put the elements of the legal standard for what they are requesting right in the application, and ask the applicant to explain why and how the proposal meets each part of that standard.

13

13

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.
- As of 8-23-2022, ZBA must approve or disapprove applications within 90 days after receipt. Applicant may waive this, or ZBA may deny "without prejudice" if it has insufficient information to decide.
- 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.

14

14

Right to a Full Board?

- Not entitled to a hearing and decision by a full board, *Auger v. Strafford*, 156 N.H. 64 (2007)
 - Can you 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.

15

15

Participation in the Public Hearing

- Board members may ask questions of parties (and should!)
- 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).

16

16

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?

17

17

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)

18

18

Deliberating

- When? Immediately, or at the end of the meeting, or on a different day, and it 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).

19

19

Deliberating

- Deliberation is only among board members – no comments from parties or public
- Board should NOT ask or answer questions of the parties during deliberations
- Minutes should reflect the deliberation discussions, and all members participate!
 - Comprehensive minutes may be critical if decision is appealed.

20

20

Deliberating

- Review what relief is being sought (Variance? Special exception? Appeal of admin. decision?)
- Go over the legal standards that apply
- Discuss how the evidence you have received fits with the standards
 - What facts do you find in this case?
 - Which facts support which conclusions you reach about each part of the legal standard?

21

21

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*, 171 N.H. 497 (2018); *Condos East Corp. v. Conway*, 132 N.H. 341 (1989).

22

22

Motions

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- 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.

23

23

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).

24

24

Motions

- Text of the motion (also who made and seconded it) and what happens to it must be 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

25

25

Conditions of Approval

- Conditions “precedent” – these must be fulfilled before approval is final and plan is recorded. Consider placing a time limit on satisfying them.
- Conditions “subsequent” – these restrict use of the property going forward (*e.g.*, hours of operation).
- Conditions must be “reasonable” and necessary for the observance of the spirit of the ordinance.
- Conditions must relate to the use of the land, not the person who will be using it.

26

26

Conditions of Approval

- General rule: land use approvals and conditions run with the land, not the owner, and don't usually expire.
 - *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.
- Exception: variances and special exceptions which are not exercised expire after 2 years, unless extended by the zoning ordinance or by the ZBA for good cause. RSA 674:33, I-a and IV.

27

27

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.

28

28

Voting on Variances

- Applicant must satisfy *all 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.

29

29

Written Notice of Decision

- Required by RSA 676:3. A record of the vote in the meeting minutes is NOT enough.
- Purposes:
 - To guide current/future owners in the permitted use of the property
 - Relied upon by enforcement officials
 - Reviewed by judge in an appeal

30

30

Notice of Decision Includes:

- The motion that was passed
- If the application/appeal was denied, decision must explain the reason(s). RSA 676:3
- All conditions of approval, clearly explained
- **Specific findings of fact** the ZBA made which support the decision (approved OR denied)
- Any deadlines or milestones required

31

31

Notice of Decision

- 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: (a) violation of the Right to Know Law, and (b) if appealed to superior court, extra time for appeal to be amended.
- Does your board mail or e-mail a copy to the applicant? Be consistent.

32

32

Motion for Rehearing

- This is a legally required step for anyone who wants to appeal from the ZBA's decision.
- 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.

33

33

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 deciding a motion for rehearing (just say "granted" or "denied").
- Why grant rehearing? To correct a possible mistake (procedural or substantive).
- If motion is denied, the next step is appeal to superior court or Housing Appeals Board.

34

34

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.
- Follow all the same procedures required for the original hearing.

35

35

Appeals to Superior Court or Housing Appeals Board

- If motion for rehearing is denied:
 - Any person aggrieved may file a petition for appeal with the superior court within 30 days after the board's vote. RSA 677:4.
 - If case involves "housing or housing development," appeal may be filed instead with HAB within 30 days after the board's vote. RSA 679:5 and :6.
 - 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; this is the record the court or HAB will review.

36

36

Appeals to Superior Court or Housing Appeals Board

- The “Certified Record” includes everything from the ZBA case.
 - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, written decision, notices, certified mail receipts.....
 - Must be filed with superior court within 30 days after the date the town/city is served with the appeal by the sheriff.
 - Must be filed with the HAB within 30 days after the appeal is actually filed with the HAB.
 - ZBA and its staff should work with counsel to assemble it.

37

37

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.

38

38



Thank you!

Cordell A. Johnston
33 Maple Street, P.O. Box 252
Henniker, NH 03242
603-748-4019
cordell@cajohnston.com

C. Christine Johnston
Drummond Woodsum
670 N. Commercial Street, Suite 207
Manchester, NH 03101
603-792-7417
cfillmore@dwmlaw.com

39