

The ZBA Decision Making Process

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JUDICIAL DECISION MAKING

- The Job of the ZBA is to Interpret.
- The ZBA Does Not Create, Rewrite, Implement or Enforce the Ordinance

ZBA IS A QUASI JUDICIAL BODY

- The ZBA decides , during a public meeting, conducted in accordance with RSA 91-A whether relief from the ordinance should be granted
- To do that ZBA collects evidence from written material and testimony presented
- Finds what facts are true or not true based on evidence
- Applies the legal tests from the statute to the facts
- Has final say on the meaning of the ordinance in affirming, overruling, or modifying the decision of the administrative official

AJUDICATION

- Conduct the proceedings in accordance with the Right to Know Law
- Deliberate in public and keep minutes
- Base the decision on the evidence
- Under RSA 674:33 III, need a minimum of 3 yes votes
- Applicant has the burden of proof

RULES OF PROCEDURE

- RSA 676:1 requires that each ZBA have a set of rules
- The rules need to be adopted at a public meeting; a copy needs to be kept on file with the town clerk
- Rules should address internal organization and quorum , when and how an alternate may participate , address how abutters are to be identified and notified and the order of business
- Adoption of the rules satisfies statute and ensures fairness and order during proceedings

PROCEDURAL DUE PROCESS

- Federal and State constitution provides protection of unfair loss of property rights without some minimum safeguards
- ZBA is the “safety valve” that provides protection to these constitutional rights

PROCEDURAL DUE PROCESS UNDER NH STATUTE

- Requires notice to affected persons, RSA 676:7 I (a)
- Requires opportunity to be heard at public hearing and to speak through counsel or an agent, RSA 676:7, I and III
- Requires decision making by board members who are impartial, RSA 673:14
- Requires a written decision indicating approval, approval with conditions or denial and appropriate explanations, RSA 676:3

RELATIONSHIP TO OTHER BOARDS

- Applicant can Request a joint hearing with ZBA and other Boards
- Can advise Planning Board of ambiguity or practical problems with ordinance as written
- Be cautious of advising administrative official on any course of action , could result in bias for future appeals

DUTY TO THE PUBLIC

- Constitutional obligation to provide assistance to all citizens
- Richmond Co. v. City of Concord , 149 NH 312 (2003)
- Obligation is a “ reasonable “ one, not a duty to educate public beyond that information which is in the legal notice
- Kelsey v. Town of Hanover, 956 A. 2d 297 (2008)

DUTIES TO THE APPLICANTS AND ABUTTERS

- Notice and an Opportunity to be heard
- Make a decision on the case
- Create a record for court review
- Follow rules of procedure adopted by board
- Create minutes of the proceedings and make available for public inspection

CONFLICT OF INTEREST AND DISQUALIFICATION

- Generally ZBA acts in Quasi Judicial Capacity
- New Hampshire law requires impartial ZBA members
- Impartiality defined as juror standard and general conflict of interest rule

JUROR STANDARD RSA 500-12

- A member should recuse if he/she :
- Expects to gain or lose upon disposition of the case
- Is related to either party
- Has advised or assisted either party
- Has directly or indirectly given an opinion or formed an opinion in the matter
- Is employed by or employs any party in the case
- Employs any of the attorneys in the case

CASE LAW

DEFINITION OF CONFLICT OF INTEREST

- Atherton v. Concord 109 NH 164 (1968)
- No official may vote if conflict of interest exists
- Conflict of Interest is a direct personal or financial interest in the outcome
- Interest must be “immediate, definite and capable of demonstration, not remote, uncertain, contingent or speculative.”

DISQUALIFICATION PROCEDURE

- Can be requested by interested party
- ZBA board can take an advisory vote when there is uncertainty about a conflict, RSA 673:14 II
- Issue of Conflict of Interest must be raised before the vote
- Chairman appoints alternate if there is conflict

THE DECISION MAKING PROCESS

- How to come to your determination

SCHEDULING OF HEARINGS AND DELIBERATIONS

- Rules of Procedure should indicate that the ZBA may continue a hearing until a different day
- May deliberate during the public meeting portion of the meeting (not the public hearing) and not required to deliberate at the close of the public hearing
- May deliberate on a different day than that of the public hearing

ADVICE FROM TOWN ATTORNEY

- Consultation with town attorney is not a “ meeting “ under RSA 91-A
- Written communication from town attorney can not be discussed in a non public session without having the town attorney present in person or by phone; subject to challenge as an illegal non public meeting
- Written communication can be private (marked attorney client/priveleged) , but discussion in public means that right to privacy may be waived

BOARD'S INDEPENDENT EXPERT

- Board may hire consultants and experts if funds are available, RSA 673:16
- RSA 676:5 allows ZBA to require applicant to reimburse Board for cost of 3rd party review
- But, coordinate with Planning Board who has similar authority, don't make the applicant pay twice for what could be substantially the same work

THE PUBLIC HEARING

- Don't close the public hearing prematurely
- Once the public hearing is closed, deliberations can begin
- Avoid interaction with applicant after public hearing is closed and have Board members ask all questions of applicant and public during hearing
- Voting members deliberate and vote
- Alternates deliberate , if allowed by rules , but do not vote

WEIGHING THE EVIDENCE

- Useful for one or more board members to verbally summarize testimony from various parties
- Analyze the testimony by weighing it against the actual terms of the ordinance
- Board can use its own personal experience and wisdom , but not at the expense of uncontradicted expert testimony and except with a written explanation
- *Condos East Corp v. Conway* 132 NH 431 (1989)
- Board can exercise discretion in choosing between competing expert testimony
- *Richmond Co. v. Concord* 149 NH 312 (2003)
- Use of generalized information to contradict expert opinion; court cases are mixed
- *Star Vector Corp v. Windham* 146 NH 490 (2001) says articles about hazards of shooting ranges good
- *Continental Paving v. Litchfield* 158 NH 570 (2009) says Audobon fact sheet inadequate relative to wetland scientist report

CONDITIONS

- ZBA may impose reasonable conditions on relief granted, both for variances and special exceptions
- Conditions, like variances, will run with the land
- Conditions have to serve legal purpose and should serve the general intent of the ordinance

CONDITIONS (cont.)

- Can be conditions which must be completed before issuance of permit
- Can be conditions which will operate once property is used, such as a restriction on hours of operation
- Conditions have to be activities which can be performed by applicant
- Tidd v. Alton , 148 NH 424 (2002), special exception case in which condition of approval that off site improvements to be completed by State; Court found unlawful

Drafting a Motion for Approval

- Variance runs with the land , so decision needs to be clear now and in future
- Be precise
- Reference relief requested in application, or as modified by Board

Motions

- Make them consistent with your rules of procedure
- Motion should be made to grant or deny the request
- Elements of variance can be addressed when person speaks to motion or during earlier deliberation

Failed Motion

- Address what to do in your rules of procedure
- Tie vote does not pass the motion, statute requires 3 affirmative votes
- Is tie vote a denial, or just a “do over?”
- No clear NH law, suggest rules of procedure address to give guidance to boards and participants
- OEP handbook suggests that matter be continued until 5th member can be in attendance
- Applicants are also entitled to request continuance if there is less than full board; rules of procedure should reflect this

FINDINGS OF FACT

- Important to set out the facts presented in testimony and evidence on which the decision is based
- Exercise is important for perception of fairness and to avoid possible decision by Court to remand if the findings are inadequate. *Kalil v. Dummer*

THE DECISION

- Needs to be in writing
- Meeting minutes and written decision need to be available to public within 5 business days

WORKING WITH OTHER BOARDS

- What happens if the applicant needs to go before the Planning Board as well as the ZBA
- Who goes first ?
- Joint meetings RSA 676:2
- Compatible conditions of approval
- RSA 676: 4 I (b) , planning board can not defer action until all permits in place, can act subject to receipt of all permits

THE SECOND CHAPTER

THE REHEARING

- Following the decision , a request for rehearing may be filed
- Must be filed within 30 days of ZBA decision, calendar days starting with date following date of decision RSA 677:2
- Request for hearing has to fully identify every ground which it claims that the decision is unreasonable or unlawful
- Rehearing request is mandatory to preserve the ability to appeal to Superior Court

MOTION FOR REHEARING

- ZBA must grant or deny the motion within 30 days
- Must have standing to make the challenge to the ZBA decision, so must be an aggrieved party
- Selectmen or any party to the action or any person directly affected can request a rehearing
- ZBA has authority itself to reconsider for any reason during the 30 day appeal period
- 74 Cox Street, LLC v. City of Nashua , 156 NH 228 (2007)

CONSIDERING THE REHEARING REQUEST

- Consideration is done at a public meeting, but not a public hearing
- ZBA deliberates and renders yes or no decision
- Public can listen , but no participation
- No new abutter notices required for consideration of request
- Purpose of consideration is for ZBA to determine whether an error may have been made
- May be occasion when multiple requests for rehearing are made , and granting any request will allow a rehearing

DECISION ON REHEARING

- If ZBA decides not to grant rehearing, make the decision based squarely on the request and avoid adding new reasons
- If ZBA decides to grant rehearing, try and grant without adding new reasons for making the original decision
- MacDonald v. Effingham ZBA, 152 NH 171 (2005)

REHEARING

- If the Board grants the rehearing request , then case is heard from beginning and in entirety
- Notice must be given again to abutters
- New record is being created , so have evidence from all sides be resubmitted and create the final decision from the resubmitted evidence

REHEARING PROCESS BEFORE THE ZBA IS COMPLETED

- What happens then?
- Whatever party is dissatisfied with the result has the option to appeal to Superior Court
- Appeal must be filed within 30 days of the decision
- Hearings at Superior Court based on record before the ZBA, rarely testimony
- Important that all materials presented to ZBA and all minutes be carefully preserved to present to Superior Court
- Requests for information can be made pursuant to RSA 91-A or through litigation requests
- Certified record can be expanded upon request

CONCLUSION

Making a decision on an application is difficult. It could result in someone being unhappy with the decision. The process of decision making can be just as important as the substance. Solid procedural rules will help to ensure that the process is smooth and fair to all