

New Hampshire Office of
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The Zoning Board of Adjustment
Procedures and Decision Making Process

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[Portions of this presentation are derived from prior OEP presentations by
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Today's Session

- ▶ Overview of law
- ▶ Nature of the ZBA & a ZBA proceeding
- ▶ Making & Recording a Decision
- ▶ Practical Guidance & Suggestions

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Nature & Purpose of the ZBA

- ▶ Zoning in NH & elsewhere is patterned after SZEAs; § 7 of which provided for board of adjustment to:
 - 1. Hear Appeals
 - 2. Grant Special Exceptions
 - 3. Grant Variances
- ▶ Incorporated into RSAs which mandate a ZBA if you have zoning. Remember *Dillon's Rule*.
 - OK, not that *Dillon*
 - This one.



ZBA Procedure and Practice:

- ▶ Why is procedure so important in a land use board proceeding?
 - Because the Legislature says so!
 - Because of the nature of rights at stake!
 - Because time is money!
- ▶ Land Use proceeding is a “quasi-judicial” proceeding, so procedural concerns are “elevated.”

A brief digression

- ▶ The power to grant variances was incorporated into SZEZ – at least initially – to address concern that zoning might constitute a taking of property without compensation.
- ▶ Over the years, legislatures, including NH General Court, have redefined variance authority, though appeal and SE functions have remained pretty much unchanged.

The Law & the ZBA’s Functions

- RSA 673:1, IV, failure to include provision for a ZBA → zoning ordinance invalid.
 - *Jaffrey v. Heffernan, 104 NH 249 (1962)*
- ZBA = constitutional “safety valve” to prevent indirect taking of private property for public use without just compensation (inverse condemnation).
 - *US Constitution, 5th amendment*
 - *NH Constitution, Part 1, Articles 2 & 12*
- Provides a mechanism for relief via administrative appeal, special exception, variance, and (now) equitable waiver powers in RSA 674:33.

▶ Go to today’s ZBA powers session for more!

Cautions

- ZBA *interprets* local land use documents as they exist, and *does not create or modify* the ordinance or implementing regulations.
- Daily decisions implementing the ordinances and regulations are made by:
 - Building Inspector/Administrator for building permits & state building code decisions
 - Local fire chief for State Fire Code decisions
- ZBA has no authority to enforce its decisions.



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Now, back to this session's topic;
ZBA Procedures & the Decision-Making Process

Why not be a "Nike" ZBA, and just "Do It!"?



RSA says ZBA has to have rules and follow those rules and procedures. (Mr. Dillon, reappears)

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Is there a basic rule that governs everything?

- ▶ There are actually two basic rules:
 1. Read and follow statutory requirements
 2. Be fair and reasonable
- ▶ Now, that's not so hard after all.

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Potential Pitfall/Problem/Trap Areas:
Can They Be Turned into Solutions?

- ▶ Applications
- ▶ Notices
- ▶ Processing and Handling Applications
- ▶ Hearings
- ▶ Conflicts of Interest and Disqualification
- ▶ Right-to-Know Law and Recordkeeping
- ▶ Making and Recording Decisions

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Relationship to, & with, the Public

- Municipalities have a constitutional obligation to provide assistance to all citizens.
 - Procedural due process, notice and the opportunity to be heard.
 - *Richmond Co. v. City of Concord, 149 NH 312 (2003)*
- The test is a “reasonable” obligation.
 - Not a duty to educate or inform beyond notices legally required.
 - *Kelsey v. Town of Hanover, 157 N.H. 632 (2008)*

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ZBA = A Quasi-Judicial Board

- In all of its functions, ZBA is “sort of like a judge” (that’s why it’s “quasi-judicial”).
- ▶ This means the ZBA decides issues, sometimes involving disputed positions.
 - It adjudicates matters that come before it.
- ▶ ZBA does not “initiate” a proceeding:
 - A matter comes to the ZBA;
 - ZBA does not “go” to the matter.

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ZBA – as a Quasi-Judicial Board

- In a public meeting, the ZBA:
 - Collects evidence & hears testimony, receives documents;
 - From these, it **finds facts**;
 - But, may use member knowledge, too (within limits).
- Decisions based on facts obtained and by applying the law.
 - Not on the presence or absence of opposition.
 - Applies legal tests to determine nature of decision.
 - Approve, deny, modify, or impose conditions.
- Develops a Record for possible court review.
- Burden of proof is upon applicant.
- ZBA interprets ordinance and has the “final” **local** say on the meaning of the language.

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ZBA – Meetings

- Held at the call of chairperson and at such other times as Board may determine.”
 - No requirement for a monthly meeting.
- Majority of the membership constitutes a quorum necessary to transact business.
- 3 votes needed to approve application.
- Chairperson designates which alternate sits for an absent or recused member.
 - Ex-officio member from the governing body (if any) may be replaced only by person named by governing body.

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Procedural “Due Process”

- To protect against an unfair loss of a property right, the federal and state constitutions require minimum safeguards:
 - **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

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N.H. Statutes & Due Process

- Notice to affected persons
 - 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 upon evidence and facts
 - RSA 674:33 and RSA 91-A
- A written decision with reasons
 - RSA 676:3

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One Bite at the Apple

- Subsequent applications by unsuccessful applicants are limited.
 - Second application must be materially different in nature and degree from the original application.
 - *Fisher v. Dover, 120 N.H. 187 (1980)*
- A change in applicable legal standards may be such a change.
 - A variance denied in 1994 was subject of 2009 reapplication, following substantial changes in both statute and case law relating to variances.
 - *Brandt v. Somersworth, 162 N.H. 553 (2011)*

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ZBA – General Provisions

- RSA 676:1 Rules of Procedure
 - Must adopt rules of procedure at a regular meeting of the board. Rules must be on file with municipal clerk
- RSA 676:2 Joint Meetings
 - Land use boards may hold joint meetings to decide cases involving their jurisdiction
- ZBA may notify Planning Board of ordinance language that is unclear or difficult to apply in practice.
- Attendance at RSA 675:3 public hearings on ordinance changes.
 - But, watch out for what a ZBA member says!

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Working With Other Boards

- When a proposal requires both ZBA action and Planning Board subdivision or site review approval:
 - Who hears the case first?
 - Whose conditions prevail?
- These are cases where joint meetings (RSA 676:2) may be helpful:
 - To the applicant, saving time and money;
 - To the land use boards, in that a single presentation from a single set of plans is heard;
 - To abutters and public.

BUT, don't become disqualified by what is said at joint or other board's proceeding!

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Right-to-Know Law/Recordkeeping

- ▶ RTK or Land Use Laws?
 - Whichever requires greater notice/more access
- ▶ Meetings
 - Notice
 - Access
 - Hearing v. Meeting
- ▶ Records
 - Availability
 - Timeliness



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Right to Know Law Applies

- Right-to-Know Law, RSA 91-A, applies
 - No secret votes permitted, either as to the organization of the board, or on any case.
- Scheduled site walks are public meetings.
- Beware communications outside of meetings, either in person or electronically, RSA 91-A:2-a.
- All deliberations must occur in public.
 - **You mean they get to know how we think!**
- Written notes, audio or video recordings, etc. used to create the minutes, as well as any document provided to a quorum of the board may be governmental records subject to disclosure, and may become part of the RECORD.

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Road to a Decision – Applications

- ▶ Use the Application
 - Provides basics of who, where, why, what, and when.
 - Includes description of nature of application and why applicant says it should be approved.
 - Can provide “blueprint” for proceeding.
 - What to look for and what facts are important.
- ▶ Don’t just file it in a file cabinet!

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Road to Decision: Proper Notice

- Minimum notice to the public in accordance with RTK Law is required, (24 hours, 2 public places, 1 of which may be municipal website)
- Notice to parties and public via newspaper is an **additional requirement**, RSA 676:7
 - Certified Mail to parties, 5 days prior to hearing
 - Newspaper publication, 5 days prior to hearing
- **Hearing** held within 30 days of receipt of notice of appeal
- **Decision** may not be required within a set time (under state law), but perhaps under federal law (e.g., telecom facility)

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Some things to notice about notices

- ▶ What municipality is it?
- ▶ Does the notice tell someone why they should care that a board is meeting?
- ▶ Notice is not a social invitation
 - “You are cordially invited to”

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Notices

- ▶ **The Bad:**
 - Missing legal requirements
- ▶ **The Ugly:**
 - Too little information
 - Too much information
- ▶ **The Good**
 - Little Red Riding Hood says "It's just right!"



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Road to Decision – Hearings

- ▶ **Review Due Process Guidance**
- ▶ ZBA must hold the public hearing within 30 days of receipt of application; RSA 676:7, II.
 - Applicant is not entitled to the relief sought merely because this time requirement is not met by the board.
 - *Barry v. Amherst, 121 N.H. 335 (1981)*
 - **But, beware of federal requirements!**
- ▶ Party is not entitled to insist upon hearing and decision by a **full** board.
 - "[T]he Constitution does not [necessarily] require that all members of an administrative board must take part in every decision, or that the failure of one participating member to attend one hearing vitiates the entire process."
 - *Auger v. Strafford, 156 N.H. 64 (N.H. 2007)*

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A complete (& fair) hearing?

- Don't close public hearing too soon
 - What if board members want to ask additional questions during the deliberation?
 - Fairness to those who may have left after the public hearing closed?
- Alternates can participate in the public hearing process (if allowed by rules)
- Disqualified members can participate in the public hearing process if they have standing (e.g., abutters) - but **not** as board members
- What if a party/interested person wishes to supplement their testimony in writing, or to provide an expert opinion to the board?

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Proceedings: Hearings/Meetings

- ▶ **Don't Rush a Decision**
 - But, don't unnecessarily delay
 - ZBA not required to deliberate at the close of the public hearing.
 - May deliberate some or all cases at the end of the hearing/meeting, or on a different day – but only at a public meeting.
 - May continue a hearing or deliberation to a different day.
- ▶ **Do not allow ex-parte contact with board members.**
- ▶ **Observe the right to know law:**
 - Deliberate in public, RSA 673:17.
 - Members must not discuss the case between themselves in person, by phone, or by e-mail.

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Conduct of Hearings

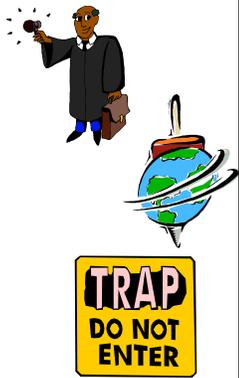
- ▶ **Dealing with Attorneys, Gadflies, and Other Undesirables**
- ▶ **Requests for Findings & Rulings**
- ▶ **Know the Rules & Follow Them**
- ▶ **Keep it Civil**



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Conflicts of Interest and Disqualification

- ▶ **The Legal Standard**
 - Conflicts
 - Incompatibility
 - Bias
 - Prejudgment
- ▶ **The Real World**
 - Board Member's General Views
 - Personal Knowledge
- ▶ **The Effects of Participation**



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Due Process – Conflict of Interest and Disqualification

- ▶ **Board’s role affects standard**
 - Adjudicatory v. legislative.
 - But, ZBA is usually adjudicatory,
 - So, stringent standards normally apply.
- ▶ **Case law prohibits direct personal or pecuniary interest in the outcome**
 - “Direct personal interest” means:
 - Interest must be “immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.”
 - *Atherton v. Concord*, 109 N.H. 164 (1968)

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Conflicts – Statutory Standard

- ▶ **Statutes also impose “juror standard”**
 - ▶ See RSA 500-A:12
 - Ultimate question: whether the land use board member is “not indifferent.” Some “tests”:
 - Expects to gain or lose upon disposition of case;
 - Is related to either party;
 - Has advised or assisted either party;
 - Has directly or indirectly given opinion or formed opinion;
 - Is prejudiced to any degree;
 - Is employed by or employs any party in case; or
 - Employs any of the counsel appearing in the case

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Conflicts – Some examples

- **Business relations**
 - “It is not every business relation that disqualifies a juror”
 - *McLaughlin v. Union Leader Corp.*, 99 N.H. 492 (1955)
- **Family relations**
 - Member whose wife led effort to block project not disqualified.
 - *Webster v. Candia*, 146 N.H. 430 (2001)
- **Employment relations**
 - Full-time employee in a small business vs. an employee of one division of a large company.

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More on conflicts

- Abutters
 - Always disqualified from acting on the application
- Prior expression of opinion
 - Member expressed opinion of case before he was a board member – disqualified
 - *Winslow v. Holderness, 125 N.H. 262 (1984)*
- Timing is important.
 - One week after public hearing closed, board member came to meeting with written memo detailing reasons to deny the application. Court held:
 - “His motion was not evidence of ‘prejudgment’ but of judgment exercised at the appropriate time and place.”
 - *Webster v. Candia, 146 N.H. 430 (2001).*

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Experts

- › Understand their role and their qualifications
 - Pro- or con- experts can be questioned.
- › ZBA may retain “experts” (RSA 673:16, within available funds).
- Also, under RSA 676:5, ZBA may require applicant to reimburse for cost of 3rd party review
 - Planning Board and ZBA can’t require review of substantially same topics – applicant pays once.
Applicant is protected by ability to review invoices and have the board assure the services were fairly rendered.

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Evaluating the experts

- Board has considerable discretion to choose between competing expert opinions.
 - *Richmond Co. v. Concord, 149 N.H. 312 (2003).*
- Uncontradicted expert testimony overcomes general member knowledge.
 - *Condos East Corp. v. Conway, 132 N.H. 431 (1989).*
 - Be careful of **not** following ZBA’s retained expert!
- General studies, and articles may not be enough to contradict specific expert opinion:
 - Yes: articles about hazards of shooting ranges.
 - *Star Vector Corp. v. Windham, 146 N.H. 490 (2001)*
 - No: General Audubon fact sheet re: vernal pools.
 - *Continental Paving, Inc. v. Litchfield, 158 N.H. 570 (2009)*

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Evaluating Expert & Other Evidence

- Board may rely on personal knowledge of the area & subject:
 - Member should state area of expertise;
 - Bring this fact out during public hearing, so all sides have opportunity for rebuttal;
 - Members should demonstrate their knowledge and experience by intelligent questioning of experts during public hearing;
 - Board must attack expert's qualifications, methodology, data, conclusions;
 - Minutes and decision should reflect board's reasons for not accepting expert opinion.

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Getting Legal Guidance

- Consultation with counsel is not a "meeting."
 - Need not be posted.
 - No minutes are required.
 - Limits on what constitutes consultation.
- Can Board meet privately to review a letter from counsel? Is this "consultation"?
 - No. *Ettinger v. Town of Madison, 162 N.H. 785(2011)*
- If the board meets to review the letter, without the presence of counsel, the meeting is open to the public, and the attorney-client privilege likely will be waived.

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Making & Recording Decisions

- When & How to Make a Decision
- When & How to Record a Decision
- When & How to Impose Conditions
- Enforcing Conditions



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Making & Recording a Decision

- ▶ Start with the application – as stated previously.
- ▶ Before acting, review everything.
- ▶ Take the time required.

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The Motion

- ▶ Every decision should be made via a motion.
- ▶ Motions should be made in accordance with rules of procedure.
 - Failed Motion: if motion to approve fails to receive 3 votes in favor, is this a denial, or is this a non-decision?
 - Clarify in the rules of procedure.
- ▶ ZBA is well-advised not to take separate votes on each element of a request, but instead create a motion to grant or deny the entire request.
 - Why? The 3 affirmative vote rule of RSA 674:33,III

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▶ Example: [Thanks to NHMA]

◦ Was This Variance Granted?

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminish Value	All 5 Elements
▶1	▶Y	▶N	▶Y	▶N	▶Y	▶N
▶2	▶Y	▶N	▶N	▶N	▶Y	▶N
▶3	▶Y	▶Y	▶N	▶Y	▶Y	▶N
▶4	▶N	▶Y	▶Y	▶Y	▶N	▶N
▶5	▶N	▶Y	▶Y	▶Y	▶N	▶N
▶# Members Favor this Element	▶3	▶3	▶3	▶3	▶3	▶0



Drafting the motion

- ▶ It is best to have someone actually write out the motion - and reread before voting.
- Don't expect the parties to draft the language of a motion for the board.
- Board is not required to grant what the applicant seeks; Craft the action that the **Board** deems appropriate.
- Be careful before incorporating codes by reference into a decision.
 - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)
 - Incorporated State Fire Code into a decision, leading to fire chief requiring residential sprinklers in a house, which result was neither discussed with nor contemplated by board making the decision.

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Conditions

- Conditions "precedent"
 - Must be met before approval is final
 - Consider putting a time limit to satisfy
- Conditions "subsequent"
 - Restrict use of property going forward
 - Example: hours of operation
- Cannot delegate or assign duties to other boards or agencies, only to the applicant:
 - ▶ ZBA approved subject to off site improvements to be completed by the State. Held, special exception unlawful.
 - ▶ *Tidd v. Alton*, 148 NH 424 (2002)

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Conditions

- Exceptions to some rules
 - **Granting Variances for the Disabled**
 - RSA 674:33, V
 - ZBA may find that the variance shall survive only so long as the particular person has a continuing need to use the premises.
 - **Waiver for Agricultural Uses**
 - RSA 674:32-c
 - ZBA shall grant waiver to extent necessary to reasonably permit the agricultural use.

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Enforcement

- ▶ It is difficult for the enforcement entity (not ZBA) to enforce conditions imposed in a decision if that entity is not aware of condition.
 - Include conditions in notice, don't rely on minutes.
 - Distribute it to appropriate entities/individuals.
 - If timeliness involved, create a "tickler" system.

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Writing the decision

- ▶ Should not be an exercise in "creative writing."
- ▶ Should be documentation of the motion.
- If a denial, reasons must be specified, RSA 676:3, I:
 - Decision and meeting minutes must be on file for public inspection within 5 business days of vote.
 - RSA 676:3, II and Right-to-Know Law compliance.
- Written decision is necessary for review by Court:
 - Communicates what relief was granted, or why a request was denied, clarifies how expert opinions used.
 - Creates a record for future local officials to use in understanding what relief was granted to an applicant.
- Court has strongly recommended specific findings of fact be stated to avoid a remand.

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Writing the decision

- ▶ ZBA relief runs with the land, so be precise.
 - Don't say: "Move to approve a 10 foot variance."
 - Do say: "Move to grant a variance from section xx to allow a side setback of 10 ft. where 20 ft. is required."
 - Refer to the number and date of the plan set revision in the Record
- ▶ Give a written copy to the person taking minutes.
- ▶ If the meeting is being audio recorded, be sure to create an adequate record:
 - Read the motion out loud, and
 - Do not allow votes to be taken by members nodding approval, or other silent expressions of action.

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Rehearings and Appeals

- ▶ **ZBA Appeal process is not the same as PB Appeal**
- RSA 677:2, a motion or request for rehearing must be filed with ZBA within 30 days after any order/decision.
- Period is calculated in calendar days "beginning with the date following the date upon which the board voted to approve or disapprove the application."
- The time is measured from when it is announced, not when it is reduced to **writing**.
- The ZBA may reconsider its decisions **on its own motion** within the 30-day limit to correct error(s).
 - *74 Cox Street, LLC v. City of Nashua, 156 N.H. 228 (2007)*

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Rehearing Procedure

- ZBA must grant or deny motion within 30 days of receipt
 - Not a public **hearing** - but IS a public **meeting**.
 - New notice to abutters **not** required.
 - No testimony or comments from public permitted.
 - Avoid new findings of fact or new reasoning when denying motion for rehearing.
- If new grounds for initial decision have been identified,
 - Better to grant rehearing motion, and hold new hearing to create a more complete record.
 - *MacDonald v. Effingham ZBA, 152 N.H. 171 (2005)*

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Rehearing Procedure

- If granted, case begins from the beginning, not just on the issues originally identified in the motion(s) for rehearing.
- All parties must be notified again, who pays for notices may be an issue.
- Require all parties to present all information again, and create a new decision on the new record.
- Adopt procedural rules to lessen issues.

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If Rehearing denied or afterwards

- **If motion for rehearing is denied**
 - Affected **party** with standing may appeal to Superior Court within 30 days.
- **Be sure to compile and preserve “the record”` as completely as possible.**
 - Requests for information may be made under the Right-to-Know Law.
 - Don't destroy any records in any format before consulting municipal legal counsel.
- **If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.**

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Superior Court Appeal – RSA 677:4

▶ **Any person aggrieved by any order or decision of ZBA may file petition w/ Superior Court within 30 days of date of vote to deny request for rehearing or decision upon rehearing.**

- “Person aggrieved” includes any party entitled to request a rehearing under RSA 677:2.
- Only the governing body may appeal on behalf of the municipality, not other boards.
- *Hooksett Conservation Comm'n v. Hooksett ZBA, 149 N.H. 63 (2003)*

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The Land Use Board “Record”

▶ Everything but the . . .



▶ Keep and compile all correspondence, documents, photos, and other submissions



▶ Leave the editing to the newspaper . . .



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Some Concluding Practical Tips

- ▶ Review Statutes – are procedures current?
- ▶ Find out how participants (including public/applicants/professionals) view your procedures.
- ▶ See how other Land Use Boards do it.

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Land Use Boards and Process

- ▶ Land use board members take an oath of office to abide by the constitution and laws.
 - That doesn't mean they have to be constitutional "scholars" but
 - It does mean that they:
 - Need to have at least a passing acquaintance with applicable laws, ordinances, and rules.
 - Have they been read?
 - Are they available?
 - Need to know when to ask for guidance!

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More practical guidance

- Making an adjudicative decision can be difficult.
- Often impossible to make everyone happy.
- Process is important - Superior Court will be interested in assuring that the decision was reached fairly.
- Good procedural rules may assist in resulting in better decisions and reduced conflict.

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Concluding Note

- ▶ In the words of a noted United States Supreme Court Justice, William Brennan:
- ▶ “If a policeman must know the Constitution, why not a planner?”
 - ▶ Dissenting opinion in
 - ▶ *San Diego Gas & Electric Co. v. the City of San Diego*
 - 450 U.S. 621 (1981)

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Thank You

Questions and Comments

Contact (until June 30, 2016)

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