

# **New Hampshire Office of Energy and Planning 2016 Annual Planning Conference**

## **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**

# 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 SZA - 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.



# 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)**

# 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.

# 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**

# 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)

# 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.

# 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.**

# 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.**

# 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

# **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**

# 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)*

# 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!**

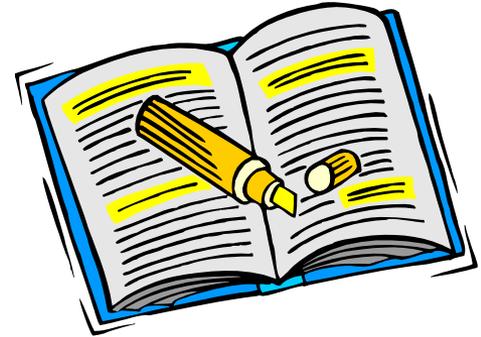
# Working With Other Boards

- **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!**

# 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



# 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.**

# 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!

# 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)**

# 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 . . . .”**

# 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!”



# 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)

# 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?**

# 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.

# Conduct of Hearings

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



# 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**



# 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)

# 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**

# 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.**

# 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).*

# 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.**

# 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)

# 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.**

# 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. *Etinger 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.**

# Making & Recording Decisions

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



# Making & Recording a Decision

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

# 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**

# ▶ 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.

# 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)**

# 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.**

# 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.**

# 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.**

# 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 x.x 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.**

# 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)*

# 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)*

# 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.**

# 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.**

# 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)*

# The Land Use Board “Record”

- ▶ Everything but the . . .
- ▶ Keep and compile all correspondence, documents, photos, and other submissions
- ▶ Leave the editing to the newspaper . . .



**Exhibit #**     



# 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.**

# 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!

# 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.**

# 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)

# Thank You

Questions and Comments

Contact (until June 30, 2016)

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