

*WE KNOW LOCAL GOVERNMENT*

# *The ZBA Decision Making Process*

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# The Road to Decision

- Application submitted to ZBA
  - Administrative Appeals
  - Variance
  - Special Exception
  - Equitable Waivers from dimensional requirements
  - Plus Other Responsibilities

# The Road to Decision

- Essence of Judicial Decision Making:
  - A process that provides “procedural due process”
  - An open and transparent process in accordance with the “right to know” law
  - An impartial tribunal
  - A record that permits meaningful judicial review upon appeal

# 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
  - Decision by an impartial tribunal
  - Ability to appear and speak through counsel
  - Deliberation based upon evidence and facts
  - A written decision with reasons

# The Road to Decision

- ZBA's Rules of procedure – RSA 676:1
  - ...*shall* adopt rules of procedure concerning the method of conducting its business
  - No specific rules mandated – *Roberts Rules* not required
  - Promotes fair treatment- similar cases treated in similar fashion

# The Right to Know Law

- What is a meeting?
  - The convening of a quorum to discuss or act on any public business. RSA 91-A:2, I
  - Open to the public. Anyone is free to attend, take notes or photos, video or audio tape, as long as it is not disruptive.
  - What is not a meeting? A chance or social encounter not intended to discuss official business

# Public Meetings

- Minimum required notice.
  - 24 hours' notice posted in two prominent places or published in newspaper. RSA 91-A:2, II
- Emergency exception
  - use whatever means are available to inform the public.
- Recessed meeting. Recessed sessions do not require notice if the date, time and place are announced at the previous session.
- RSA 676:7 imposes additional notice requirements
  - 5 days before date of public hearing (see RSA 21:35 for counting of days)

# Communication Outside Meetings

- RSA 91-A:2-a (*NEW*)
  - Public bodies may only deliberate in properly held meetings (except for things that are not “meetings”)
  - May not use communications outside meeting to circumvent spirit and purpose of law (sequential or otherwise)
  - Distribution by email (1-way communication) okay, but soliciting or receiving responses improper

# Public Hearing

- Applicant, abutters, holders of easements etc, nonabutters who can demonstrate personally affected, and others as Board may deem appropriate. RSA 676:7, I (a).
- Chair maintains order and makes procedural rulings.
- Rules of procedure set order of presentation: e.g., applicant, others in favor, those opposed, rebuttal.
- All questions through chair; no cross examination
- Time limits are permissible.
- Site visits: be careful to treat as part of public hearing if quorum of the board attends.
- BUT WAIT! First there's . . .

# Disqualification

- Under RSA 673:14, a member is prohibited from sitting on a case “if that person has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause as a juror upon the trial of the same matter in any action at law.”

# Disqualification

Typically disqualification arises in six situations:

- Prejudgment
- Abutters
- Financial interest in the outcome
- Employment
- Family relations
- Other relations i.e.- business

# Disqualification

- Under RSA 673:14, any member on the board may ask for an advisory vote on whether a member should step down in a case, but the decision is for the member to make.
- An interested party has a right to object to a member's participation on grounds of disqualification.
- In fact, if the party knows the facts, the party must make a timely objection, or the issue is waived. *Bayson Props. v. Lebanon*, 150 N.H. 167 (2003).
- Advice: disclose the facts and explain decision to step down or not to step down. Be cautious, not intimidated.

# Members Hearing the Case

- The 5 regular members shall sit unless disqualified, or absent.
- An alternate member, selected by the Chairperson, may sit for each *disqualified* or *absent* member, RSA 673:11.
- An alternate may not fill a seat that is *vacant*, i.e.. death or resignation.

# Members Hearing the Case

- ZBA member missed some hearings on complex case, and voted. Abutters failed to object before vote: Held: member not disqualified. *Fox v. Town of Greenland*, 151 NH 600 (2004)
- PB member missed meetings and voted on subdivision. Held: Constitution does not require all members of a board to participate, nor is a participating member required to attend every hearing. *Auger v. Town of Strafford*, August 23, 2007

# Members Hearing the Case

- The concurring vote of 3 members of the board needed to decide in favor of an applicant or petitioner. RSA 674:33, III.
  - Does an applicant have a due process right to be heard by a full board of 5?
  - Is a decision by less than 5 members a reason for a rehearing?
  - Provide opportunity to object to any member before proceedings commenced

# Closing the Public Hearing

- Chairperson closes the public hearing - receipt of information is complete.
  - Don't ask questions of parties during deliberation.
  - Don't allow others to pose questions to the board
- If the board chooses to reopen the hearing:
  - Be sure to allow all parties an opportunity to be heard on the additional information
  - Re-notification necessary

# Closing the Public Hearing

- Once closed deliberations may begin – but may be done at some other time
- Deliberations in public – but no public comment accepted
- Voting members only – no alternates or disqualified members participate

# Multiple Hearings at Meeting

- An issue for the Board under its procedural rules
  - Not required to deliberate at the close of the public hearing.
  - May deliberate some or all cases at the end of the meeting.
  - May deliberate some or all cases on a different day.
  - May continue a hearing until a different day.

# The Decision



Where the Rubber Meets the Road

# Deliberations

- If deliberating at a different time:
  - Observe the right to know law and deliberate to decision in public, RSA 673:17.
  - Do not allow ex-parte contact with board members in the interim days.
  - Members should not discuss the case between themselves in person, by phone, or by e-mail, unless it is to receive legal advice from counsel for the ZBA.

## Deliberations: Obtaining Legal Advice

- Consultation with counsel is not a “meeting”.
  - Need not be posted.
  - No minutes are required.
- What if the board meets to review a letter from counsel? Is this “consultation”?
  - Advice from counsel is privileged, not a public record subject to disclosure.
  - But, if the advice or letter is disclosed in public, the privilege may be waived.

# Findings of Fact

- Make findings which disclose basis for decision
- Essential facts that testimony & evidence has established
- Court has strongly recommended specific findings be stated
- Necessary for meaningful review by Court
- Case may be remanded

# Deliberations: Evidence Issues

- The burden of production and the burden of proof lies with the applicant.
  - Production: There must be evidence in the record to support a finding of fact on each element.
  - Proof: “preponderance of the evidence”
- Formal “rules of evidence” for a court do not apply.
- In the absence of evidence in the record, a decision is likely to be reversed on appeal.

# Weighing the Evidence

- Board may rely on personal knowledge of the area, but not in the face of uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989).
- Board has considerable discretion to choose between competing expert opinions. *Richmond Co. v. Concord*, 149 N.H. 312 (2003).

# Weighing the Evidence

- Doubt about reliance on general studies, articles, etc. to contradict expert opinion:
  - Yes: articles and reports about hazards of shooting ranges. *Star Vector Corp. v. Windham*, 146 N.H. 490 (2001)
  - No: Audubon fact sheet re: vernal pools. *Continental Paving, Inc. v. Litchfield* (No. 2008-370, April 9, 2009)
- In any case, strong written decision is important where factual issues must be resolved, especially where expert opinions are involved.

# Motions

- Motions should be made in accordance with your rules of procedure.
- We suggest that ZBA's do not 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: Was This Variance Granted?

Member	Public Interest	Hardship	Spirit & Intent	Substantia l 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	<b>0</b>

# Failed Motions?

- Issues for your rules of procedure:
  - Proceeding with an even number of members, effect of a tie vote? Does not pass the motion to approve, since there are not 3 affirmative.
  - Is a failed motion to approve a denial, or just an opportunity for a new motion?
  - Are members allowed to abstain, and does an abstention destroy a quorum?
  - Effect of a failed motion to deny?

# Drafting a Motion For Approval

- ZBA relief runs with the land, so take care and be precise.
  - Don't say: "Move to approve a 10 foot variance..."
  - Do say: "Move to grant a variance from section \_\_\_ to allow a side setback of 10 ft where 20 ft is required..."
- Not required to grant what the applicant seeks; craft the relief you feel is appropriate

# Conditions

- ZBA may attach conditions
  - Must relate to land – not to person (but see exception)
  - Must serve legal purpose under the ordinance
    - Improper: Variance granted if house to be built costs at least \$500,000.
    - Proper: Variance is granted – condition that house not exceed a certain height. Legal purpose of zoning in setting minimum lot sizes: ensure that abutters are not deprived of light and air.

# Conditions

- Exception to the rule
  - 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

# Conditions

Cannot be delegated duties to others

When considering a special exception, a ZBA approved the relief subject to off site improvements to be completed by the State. Held, this was the same as waiving or varying the terms of the zoning ordinance, and special exception unlawful. *Tidd v. Alton*, 148 NH 424 (2002)

## Conditions Can Send Applicant to Other Boards

- When a proposal requires both ZBA relief and Planning Board subdivision or site review approval:
  - Who hears the case first? Usually the ZBA, since without their relief, the proposal fails.
  - Whose conditions prevail? The ZBA usually defers most to the Planning Board.
  - These are the cases where joint meetings (RSA 676:2) are most helpful

# The Decision

- Written decision is required.
- If a denial, the reasons must be specified.
  - RSA 676:3, I
- The written decision is an opportunity
  - To communicate exactly what relief was granted, or why a request was denied.
  - To create a record for future local officials to use in understanding what relief was granted to an applicant.

# The Decision

- Written decision, together with meeting minutes - within 144 hours of the vote (6 days) RSA 676:3, I
- Note: RSA 91-A:2 requires meeting minutes not more than 5 business days after public meeting.
- If no regular office hours – place on file with Town Clerk

# Motion for Rehearing

- Filed within 30 days of ZBA decision – calendar days beginning with the date following the date of decision RSA 677:2
- Must set forth fully every ground upon which it is complained decision or order is unlawful or unreasonable
- Application for rehearing required prior to appeal to Superior Court
- Court review limited to grounds in motion for rehearing, absent good cause shown

# Motion for Rehearing

- ZBA grant or deny motion within 30 days
- Requires standing i.e.: legal right to challenge board's decision
- Selectmen, any party to the action or proceedings, or any person directly affected
- ZBA has inherent authority to reconsider for any reason during 30 day appeal period. *74 Cox St., LLC v. City of Nashua*, 156 NH 228 (2007)

# Motion for Rehearing

- Decision to grant or deny motion not a public *hearing* – but IS public **meeting**
- Opportunity for board to correct errors
- No new notices to abutters required
- No testimony or comments from public
- Yes or No
- If motion granted – hold another Public Hearing
- If motion denied – ZBA is done
- Appeal to Superior Court within 30 days

# Motion for Rehearing

- Avoid rendering new findings or adding new reasons when denying motion for rehearing
- If new grounds for initial decision have been identified – better to grant rehearing motion without adding new grounds for denying the original decision. *See MacDonald v. Effingham ZBA*, 152 N.H. 171 (2005)

# Rehearing

- The 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 this is often a disputed issue.
- Require all parties to present all information again, a new record is created.
- Base the new decision on the new record.

# Conclusion

- Making an adjudicative decision is 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 will result in better decisions, and reduced conflict.

# Thank you!

- For more information – please contact us:
  - Call LGC Staff Attorneys at:  
1-800-852-3358 ext. 384
  - E-mail LGC at: **legalinquiries@nhlgc.org**

Helpful Websites:

[www.nhlgc.org](http://www.nhlgc.org)

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