



WE KNOW LOCAL GOVERNMENT



**The ZBA:  
Decision Making Process**

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OEP Spring Planning & Zoning Conference  
June 11, 2011

You Don't Create, Implement or Enforce the Ordinance

**JUDICIAL DECISION MAKING**

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**The ZBA is a Quasi-Judicial Body**

- At a public meeting, (Right to Know Law, RSA 91-A) the ZBA determines if relief from the ordinance should be granted.
  - Collects evidence,
  - Finds the facts,
  - Applies legal tests from statute,
  - Has the final say on the meaning of the language as it affirms, overrules or modifies decisions of administrative officials.

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**Adjudication**

- The Right to Know Law applies:
  - Deliberations must occur in public.
  - No Secret Ballots permitted.
- Decisions based solely on the evidence, not on the presence or absence of opposition
  - A minimum of 3 “Yes” votes required to act, rather than a majority, See RSA 674:33, III.
  - The burden of proof is upon the applicant.

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## Rules of Procedure

- Required of all land use boards by RSA 676:1.
  - Must be adopted at a public meeting and filed with municipal clerk.
  - Define Internal Organization and Quorum
  - Specify the Order of Business at a Meeting
  - Adopt forms for applications, how abutters to be identified and notified, may specify fees
- Adherence to the rules will assure fairness in conduct of a difficult hearing.

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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.
- Property rights include both ownership interests, and usage rights.
- The ZBA is the “Safety Valve” that keeps the process of land use control constitutional.

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## N.H. Statute & 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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## Relationship to Other Boards

- Applicant may request the ZBA to hold joint meetings with any other land use board
  - RSA 676:2
- May notify the Planning Board of ordinance language that is unclear or difficult to apply
  - RSA 675:3, public hearings on ordinance changes.
- Relationship with the “Administrative Officials”
  - Do not attempt to give “advice”, since that will bias any future appeal on the issue

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## Duty to the Public

- Constitutional obligation to provide assistance to all citizens.
  - Richmond Co. v. City of Concord, 149 NH 312 (2003)
- A “reasonable” obligation, not a duty to educate or inform beyond notices legally required.
  - Kelsey v. Town of Hanover, 956 A.2d 297 (NH 2008)

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## Relationship to the Parties

- Duties to Applicants and Abutters:
  - Procedural due process, notice and the opportunity to be heard
  - Decide the matter on the evidence
- Developing a Record for Court review:
  - Take care to follow procedural requirements
  - Make detailed written findings of fact and rulings on legal questions, RSA 676:3

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When Board Members Should Not Sit in Decision

## **CONFLICT OF INTEREST AND DISQUALIFICATION**

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## Types of Decisions

- Judicial or Quasi-judicial Capacity
  - ZBA almost always act in judicial capacity
  - Acting on applications before it
  - Public hearings – hearing the parties and considering evidence
- Legislative or Administrative
  - Preparing rules of procedures
  - Considering zoning amendments

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## Juror Standard: RSA 500-A:12

- A member should recuse if he/she:
  - 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 in the matter;
  - Is employed by or employs any party in case;
  - Is prejudiced to any degree; or
  - Employs any of the counsel appearing in the case

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## Conflict of Interest

- No official may vote if conflict of interest exists
  - A direct personal or pecuniary (financial) interest in the outcome.
  - 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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## Disqualifying Conditions?

- Knowledge gained in performance of duties
  - Surveyor, realtor, engineer, lawyer in the community who has represented one or more of the parties
- Dual role of certain land use board members
  - Dual membership, e.g. ZBA and Selectman
  - Case involving administrative appeal from the building inspector who is your direct employee

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## Disqualification Procedure

- Disqualification as a tactical weapon
  - By interested party
  - Advisory Vote - RSA 673:14, II, board votes for member to step down?
  - Importance of timeliness
- Local conflict of interest ordinances?
- Seating of an alternate for the matter.

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How to come to your determination.

## DECISION MAKING PROCESS

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## Multiple Hearings at Meeting

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

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## Deliberations

- If deliberating at a different time:
  - Observe the Right to Know Law; deliberate to decision in public, RSA 673:17.
  - Do not allow *ex-parte contact* with board members in the interim period.
  - Members should not discuss the case between themselves or with anyone else
    - In person, by phone, or by e-mail, unless
    - To receive legal advice from counsel for the ZBA.

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## 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?
  - 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.
  - Probably not a legal non-public session.

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## The Public Hearing

- Don't close public hearing too soon
- Once closed, deliberations may begin
- Deliberations must be in public – but no public comment accepted
- Voting members & alternates *deliberate* (if allowed by rules)
  - NO disqualified members *participate*
  - *Alternates do not vote unless they are sitting on the matter.*

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## Board's Independent Expert

- All land use boards may hire consultants, experts, RSA 673:16, if funds available.
- New law: effective Sept. 11, 2010
  - RSA 676:5
  - ZBA may require applicant to reimburse Board for cost of 3rd party review
  - Planning Board and ZBA can't require review of substantially same topics – applicants pays once

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## Weighing the Evidence

- Board need not accept conclusions of experts
- 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).

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## 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*, 158 N.H. 570 (2009)

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## Weighing the Evidence

- Use of member's knowledge and experience
  - Should state area of expertise, training
    - Announce during public hearing so all sides have opportunity for rebuttal
  - Demonstrate knowledge and experience by questioning of witnesses during public hearing
    - Test the witness, don't become the witness
  - Analysis of the evidence during deliberations

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## Motions

- Motions should be made in accordance with your rules of procedure.
- We suggest that ZBA's not take separate votes on each element of a request
  - 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: 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

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## Failed Motions?

- Issues for your rules of procedure:
- With an even number of members:
  - A tie vote does not pass the motion, since there are not 3 affirmative.
  - Is a failed motion treated as a denial, or just an opportunity for a new motion?
    - Some ZBAs say 2-2 is denial.
    - No NH court decision; other states divided.
- OEP Handbook says continue until fifth member available.

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## 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

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## Conditions

- ZBA may attach conditions
  - Must relate to land – not to person except in the disability variance, RSA 674:33, V
  - Must serve legal purpose under the ordinance
    - Improper: Variance granted only if house to be built costs at least \$500,000.
    - Proper: Variance is granted – condition that house not exceed a certain height (ensures that abutters are not deprived of light and air).

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## Conditions

- Conditions "precedent"
  - Must be filled before approval is final
  - Ex: submitting revised drainage plan in response to information in a technical study
  - Consider putting a time limit to satisfy
- Conditions "subsequent"
  - Restrict use of property going forward
  - Ex: hours of operation

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## Conditions

- Cannot delegate duties to other boards, agencies, etc, only to the applicant.
- Special exception case, a ZBA approved 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)

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## 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?
  - Whose conditions prevail?
  - Joint meetings (RSA 676:2)?
- New RSA 676:4, I(b), planning board cannot wait until all other permits/approvals in hand, but can condition approval upon receipt.

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## The Decision

- Written decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II
- Written decision is required; if a denial, the reasons must be specified, RSA 676:3, I
- Opportunity to communicate exactly what relief was granted, or why a request was denied.

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## Findings of Fact

- In the record and decision, make findings which describe the essential facts established by testimony & evidence
- Court has strongly recommended specific findings be stated
  - Case may be remanded if findings are deemed inadequate.
  - Kalil v. Town of Dummer, 155 N.H. 307 (2007)

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Dealing with the Motion for Rehearing, and a New Hearing if the Motion is Granted

## **REHEARINGS**

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## It's Not Over 'Till It's Over

- Motions for Rehearing must be 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

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## Motion for Rehearing

- Decision to grant or deny motion not a public hearing – but IS a public meeting
  - Opportunity for board to correct errors
  - No new notices to abutters required
  - No testimony or comments from public
  - Yes or No
- Multiple motions may be received, granting any of them will restart the process

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## 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)

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## 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.
  - MacDonald v. Effingham ZBA, 152 N.H. 171 (2005)

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## Rehearing

- 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 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.

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## Rehearing Denied, What Happens Now?

- The unhappy party may appeal to Superior Court within 30 days of the decision.
- Be sure to compile and preserve “the record” as completely as possible.
  - Requests for information may be made both under the Right to Know Law, and under Superior Court discovery rules.
  - Don’t destroy information before consulting town counsel!

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## 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.

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## Thank you!

- For more information – please contact us:
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