

CHAPTER IV: APPEAL FROM BOARD'S DECISION

REHEARING

[RSA 677:2 Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions](#)

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefore is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed. If the decision complained against is that made by a town meeting, the application for rehearing shall be made to the board of selectmen, and, upon receipt of such application, the board of selectmen shall hold a rehearing within 30 days after receipt of the petition. Following the rehearing, if in the judgment of the selectmen the protest warrants action, the selectmen shall call a special town meeting.

[RSA 677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body](#)

- I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.
- II. Upon the filing of a motion for a rehearing, the board of adjustment, a board of appeals, or the local legislative body shall within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration. Any order of suspension may be upon such terms and conditions as the board of adjustment, a board of appeals, or the local legislative body may prescribe. If the motion for rehearing is against a decision of the local legislative body and if the selectmen, as provided in RSA 677:2, shall have called a special town meeting within 25 days from the receipt of an application for a rehearing, the town shall grant or deny the same or suspend the order or decision complained of pending further consideration; and any order of suspension may be upon such terms and conditions as the town may prescribe.

Within 30 days after the board of adjustment has made an initial decision, any person affected directly by the decision has the right to appeal that decision. The 30-day window within which a motion for rehearing must be submitted is mandatory and strictly enforced. [RSA 677:2](#) was amended in 2005 to correct an anomaly regarding motions for rehearings. Under the old law, motions had to be filed within 30 days after the decision, but the 30 day period was counted beginning with the “date upon which the board voted,” in effect resulting in a 29-day filing window. This anomaly was highlighted in *Pelletier v. City of Manchester*, No. 2003-554 N.H. [March 26, 2004]. The new law provides that the 30-day period will be counted in calendar days beginning with the date *following* the date of the board vote, which is consistent with the general “reckoning of days” statute [RSA 21:35](#) (and with common sense).

Absent a provision in the Rules of Procedure to the contrary, a Motion for Rehearing must be filed during normal business hours in the office of the board. (See [Cardinal Development v. Town of Winchester](#), October 2008.)

However, if it can be shown that the minutes and written decision were not filed within 5 business days of the vote pursuant to [RSA 676:3, II](#), the person applying for the motion for rehearing shall have the right to amend the motion within 30 days after the date on which the written decision was actually filed. Therefore, it is most important for the board to make sure that the minutes and decision of every case are timely filed and made available to the applicant and the public to avoid motions being amended at a later date. A motion for rehearing must describe why it is necessary and why the original decision may be unlawful or unreasonable. The board must decide to grant or deny the rehearing within 30 days.

If the last day for filing an appeal falls on a Saturday, Sunday or legal holiday, they will be deemed timely filed if received by the next business day. See [Steve Trefethen & a. v. Town of Derry](#) Submitted: February 7, 2013, Opinion Issued: April 12, 2013, and [RSA 21:35, II](#) which allows filing at the “next business day” if the deadline falls on a weekend or legal holiday.

The board may reconsider their decisions provided it is done within the statutory 30-day appeal period of the original decision. “...we believe that municipal boards, like courts, have the power to reverse themselves at any time prior to final decision if the interests of justice so require. We hold that belief because the statutory scheme established in RSA chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its own decisions so that the court may have the benefit of the board’s judgment in hearing the appeal.” [74 Cox St., LLC v. City of Nashua](#), [September 21, 2007]. It is recommended that the board include a by-law provision allowing for board-initiated reconsiderations.

In order to submit a motion for rehearing, a person must have “standing;” i.e., the legal right to challenge the board’s decision. Abutters, persons who own property close enough to the land in question to demonstrate that they are affected directly by the board’s action (i.e., a person aggrieved), and the Board of Selectmen all have standing to appeal a ZBA decision. (See [Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment](#), 149 N.H. 63 [2003].) The board should evaluate the potential impact of ZBA action on the person requesting the rehearing to determine if they are aggrieved and have standing to file the motion. The motion should not be granted if the person requesting the rehearing is not impacted differently than the public at large. (See [Weeks Restaurant Corp. v. City of Dover](#), 119 N.H. 541 [1979].)

When a Motion for Rehearing is received, the board must decide to either grant the rehearing or deny it within 30 days. ([RSA 677:3, II](#))

Since this is a board decision, the board must meet to consider the motion and act to grant or deny it. This is a public meeting subject to the minimum posting requirements of the Right to Know Law but is not necessarily a public hearing and no formal notice is required to either the applicant or abutters (or the moving party) unless required by the board’s Rules of Procedure.

If the board decides to grant the rehearing, a new public hearing is scheduled with new notice to everyone and the process moves forward. If the board decides not to grant the rehearing, their work is done. All they must do is inform the petitioner that the rehearing was denied and the petitioner then has 30 days to challenge that decision by appealing to superior court. ([RSA 677:4](#))

Once the board decides to grant a rehearing, they must set the date for the new hearing. It is recommended that the rehearing be held within 30 days of the decision to grant the rehearing provided notice fees and an updated abutters list have been received from the party requesting the rehearing and that the Rules of Procedure outline the rehearing process. (See the draft Rules of Procedure in Appendix A.)

There is no statutory requirement that the petitioner actually attend the rehearing. In the event someone requests a rehearing, then asks that it be delayed or postponed, the board may honor that request at their discretion. However, if the petitioner continually asks for delays and postponements, the board may proceed with the hearing (after proper notice to all) even if the petitioner does not attend. The chair of the ZBA also has the authority to compel witnesses to attend. (See [RSA 673:15 Power to Compel Witness Attendance and Administer Oaths.](#))

If in its review of the motion for rehearing the board feels compelled to add additional reasons for denial beyond those issues raised in the motion, they should grant the motion, hold a new hearing, and include their additional reasons in a new denial decision. This would allow the moving party to file a new motion for rehearing and, if appealed to superior court, bring forth all the reasons the ZBA denied the application. (See [McDonald v. Town of Effingham ZBA](#), 152 N.H. 171 [2005].)

It is recommended that the meeting to consider a Motion for Rehearing not be a *public hearing* and that no testimony is taken. It is a *public meeting* and anyone has the right to attend but all the board is acting on is the motion in front of them (what has been submitted) and should not involve comments by the applicant, petitioner or abutters. If the board believes there are sufficient grounds to reconsider their original decision, the motion should be granted; if not, the motion should be denied.

Standing exists only when relevant factors lead the trier of fact to conclude that the plaintiff has a sufficient interest in the outcome of the proposed zoning decision. Where the only adverse impact that may be felt by the plaintiffs is that of increased competition with their businesses, there is not sufficient harm to entitle plaintiffs' standing to appeal. (See *Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital*, 139 N.H. 450, 656 A.2d 407 [1995].)

If the motion for rehearing cites as a reason for the request the failure of the board to adequately explain its decision, i.e., not address all five criteria for a variance, the board could use the rehearing process to complete its records:

"The... rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts." *Fisher v. Boscawen*, 121 N.H. 438 [1981]

[Colla v. Town of Hanover](#), No. 2005-217, January 27, 2006, examines the issue of what satisfies the requirement of [RSA 677:3, I](#) - with regard to a party's obligation to "set forth fully every ground upon which is claimed that the decision or order complained of is unlawful or unreasonable" when applying to the zoning board of adjustment for rehearing. *Colla* was denied a variance and they motioned for a rehearing stating: 1) the decision was unreasonable; 2) the decision denied them their constitutional rights to due process and equal protection of the laws; 3) the decision was contrary to [Michael Boccia v. City of Portsmouth](#), 151 N.H. 85, 104 [2004]; and 4) the decision was contrary to the ordinance. The ZBA denied the motion and was upheld by the superior court. *Colla* appealed to the supreme court who overruled the lower court ruling stating that the motion "satisfied the spirit and letter of [RSA 677:3.](#)"

A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time.

If the board reverses a decision at a rehearing, a new aggrieved party results and that party then has 30 days in which to appeal for a rehearing on the new decision. *“This triggered the need for plaintiff to apply for a rehearing as a precondition to appeal. This does not mean, as defendants suggest, that boards of adjustment will be forced to consider an endless series of rehearing applications, for it is only when the board reverses itself at a rehearing - thus creating new aggrieved parties - that the statute comes into play.”* 9 v. City of Manchester, 118 N.H. 158 [1978]. (See [Dziana v. City of Portsmouth](#), 140 N.H. 542, 669 A.2d 217 [1995].)

It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.

The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created, but a rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake. Don't reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the board would be final until two hearings had been held. *“The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the court. It is geared to the proposition that the board shall have a first opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed.”* (See *Bourassa v. Keene*, 108 N.H. 261, 234 A.2d 112 [1967].)²⁶

The court stated that the statutes *“...do not serve to limit the board to consideration of the issues that the plaintiff chooses to allow.”* (*Fisher v. Boscawen*, 121 N.H. 438 [1981]). The board may, under this ruling, adopt a different interpretation of the law and base its denial at the rehearing on reasons other than those used at the first hearing. Reconsideration of an application with additional information available could result in reversing the board's original decision.

When a rehearing is held, all legal actions such as public notice (required for the first hearing) must be followed. If possible, the same board members from the original hearing should be present at the rehearing.

After the board of adjustment has acted on a motion for rehearing, it has essentially completed its responsibilities. If the petitioner makes a further appeal to the superior court, the board of adjustment will be required to produce its records and may become a party to the proceedings.

²⁶ Peter J. Loughlin, Esq., 15 New Hampshire Practice: Land Use Planning and Zoning, 3rd Ed., § 21.17.

Before appealing to superior court, parties must exhaust their administrative remedies first, meaning that they must pursue an appeal to the ZBA first and a motion for rehearing in order to allow the local board an opportunity to correct its mistakes or reach a new decision based on new information from the petitioner. This does not apply when the ZBA does not have jurisdictional authority over the appeal such as the question of an equitable estoppel claim. Because the ZBA does not have the authority to adjudicate an equitable estoppel claim, administrative remedies need not be exhausted before bringing suit.

(See [Daryl Dembiec & a. v. Town of Holderness](#), November 13, 2014, and a summary of the case on the OEP website <http://www.nh.gov/oep/resource-library/laws-rules-cases/index.htm> Selected Supreme Court Decisions 2015.)

APPEAL TO SUPERIOR COURT

[RSA 677:4 Appeal from Decision on Motion for Rehearing](#)

Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable. For purposes of this section, "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2.

[RSA 677:5 Priority](#)

Any hearing by the superior court upon an appeal under RSA 677:4 shall be given priority on the court calendar.

From the petitioner's point of view, it is important to go through the established procedures in moving forward with the appeal process. All administrative remedies, including the request for a rehearing by the board of adjustment, must be exhausted before an appeal can be taken to superior court. In New Hampshire, a person must argue his case in court on the same grounds set forth in the petition for a rehearing unless the court makes a specific exception for good cause.

[RSA 677:6 Burden of Proof](#)

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

In reviewing a case, the court, in general, will consider only errors of law and not matters of judgment. The court is expert in law, not in zoning or local conditions. Rather than substitute its judgment for that of the board of adjustment, the court will assume that the board has more complete knowledge of the situation. Only if the board has not satisfied legal requirements, or is shown to have acted arbitrarily or in obvious disregard of the evidence, will the court set aside the board's decision.

RSA 677:9 Restraining Order

The filing of an appeal shall not stay any enforcement proceedings upon the decision appealed from, and shall not have the effect of suspending the decision of the zoning board of adjustment or local legislative body. However, the court, on application and notice, for good cause shown, may grant a restraining order.

If a decision is appealed to superior court, this action does not prevent the applicant from utilizing the approval unless the person appealing obtains an order from the court restraining or preventing the applicant from using the approval. An applicant who proceeds to use the approval when an appeal has been filed is doing so at his own risk because the appeal may ultimately be granted and the decision reversed requiring the applicant to undo anything done under the approval.

RSA 677:10 Evidence; How Considered

All evidence transferred by the zoning board of adjustment or the local legislative body shall be, and all additional evidence received may be, considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of an action at law.

The superior court will not reopen the question of facts pertaining to the case unless the records of the board are too meager to show the basis for the decision. However, the supreme court has stated, *"This court has consistently held that upon review the trial court may hear any and all additional evidence presented that will assist in evaluating the reasonableness of a zoning board decision."* *Shaw v. City of Manchester*, 120 N.H. 529 [1980]

The necessity for a board to maintain complete records and to make its decision on the basis of recorded evidence is clear. A board whose decisions are frequently overturned by a court may soon become a center of controversy and weaken the entire structure of zoning administration.

The court re-emphasized this point in *Olszak v. Town of New Hampton*, 139 N.H. 723, 661 A.2d 968 [1995] and cited the *Merriam* case in holding that "Plaintiff's burden of proof in zoning appeals is sustained by evidence that the decision of the board could not be reached by reasonable men." Evidence of the thought process of members of the ZBA is irrelevant to this issue. *"Furthermore, since the board members were acting in a judicial capacity they may not be required to answer inquiries into the mental processes by which their decisions were reached."* *Merriam v. Town of Salem*, 112 N.H. 267, 268 [1972]

"The key to a defensible record is a clear and complete record. When faced with a land use appeal, as a preliminary matter, the court orders submittal of the 'record.'"

Just what is the record?

***"It is the summary of all the evidence taken in, considered, and used in reaching the decision. Normally, court appeals center on the reasonableness of the result reached based on the evidence considered. Normally, inquiring into the member's legal interpretations, or the mental process used in reaching a decision, is not permitted."* Merriam v. Salem, 112 NH 267 (1972)**

Conduct of a Public Meeting, Including Compliance with RSA 91-A, Conflicts of Interest and Preservation of a Defensible Record, Bernard H. Campbell, Esq., New Hampshire Municipal Association
Municipal Law Lecture Series, Lecture #1, Fall 1992, pg. 11.

APPEAL OF PLANNING BOARD DECISION

[RSA 677:15](#) was amended in 2013 (SB49, Ch. Law 179:1, 2013) to clarify that any portion of a planning board decision that is appealable to the ZBA must go to the ZBA first and that any appeal of a planning board decision in superior court is stayed until such time as the matters appealable to the ZBA have concluded. In addition, if a planning board decision is appealed to the superior court and it is later discovered that matters of the decision should have been appealed to the ZBA, the court can stay the proceedings to allow an opportunity for the petitioner to appeal to the ZBA.

677:15 Court Review

I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

