

ZBA Decision Making Process

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C. Christine Fillmore, Esq.

Gardner Fulton & Waugh PLLC

[Portions based on prior OEP presentations by
Atty Dan Crean and attorneys from NHMA]

Overview

- Foundational legal concepts
- Laying the groundwork
- The hearing
- Deliberation and decision
- After the decision

Foundational Legal Concepts

What is the Purpose of the ZBA?

- Failure to include provision for a ZBA renders a zoning ordinance invalid. RSA 673:1, IV; *Jaffrey v. Heffernan*, 104 N.H. 249 (1962)
- Why? It's the Constitutional "safety valve" to prevent indirect taking of private property for public use without just compensation (inverse condemnation).
 - U.S. Constitution, 5th Amendment; N.H. Constitution, Part 1, Arts 2 & 12
- Mechanism for relief via administrative appeal, special exception, variance and equitable waiver, RSA 674:33

Judicial Function

- ZBA is not legislative (does not create or amend land use ordinances or regulations - although variances allow someone to *work around* them when constitutionally required).
- ZBA is not executive (does not enforce its decisions).
- ZBA is judicial (quasi-judicial) - it *interprets* the ordinance and regulations and applies that interpretation to the application before it.
- Someone's property is at stake, so procedural concerns are elevated.

If You Remember Nothing Else...

- Read and follow statutory requirements.
- Read and follow requirements of your ordinance and rules.
- Be fair and reasonable.

Authority to Act

- Fundamental rule of municipal authority in New Hampshire (*Girard v. Allenstown*, 121 N.H. 268 (1981)):
 - All authority to act comes from the legislature
 - Must find a statute that authorizes the action or necessarily implies it
 - May not rely on the absence of a statute that prohibits it
- Municipality/board may not have an ordinance, rule or procedure that isn't authorized or necessarily implied by a statute.

Relationship to the Public

- Procedural due process: citizens have right to notice and the opportunity to be heard.
 - *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- Municipalities have a constitutional obligation to provide assistance to all citizens with the **process**.
- 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 Meetings

- Meetings “held at the call of the chairperson and at such other times as the board may determine,” RSA 673:10, I.
 - No requirement for a monthly meeting
- A majority of the membership = a quorum necessary to transact business.
- 3 votes needed to reverse administrative/PB decision or decide in favor of an applicant, RSA 674:33, III.
- Chair designates which alternate sits for a member who is absent or who has recused herself.

Laying the Groundwork for a Strong Decision

ZBA as a Quasi-Judicial Board

- In a public meeting/hearing, the ZBA:
 - Collects evidence, hears testimony, receives documents
 - From these, it finds facts (may use member knowledge, too, but within limits)
- Decisions based on the facts, applying the law
 - Presence/absence of opposition does not matter
 - Apply legal tests to reach a decision
 - Approve, deny, modify, or impose conditions

ZBA as a Quasi-Judicial Board

- Burden of proof is on the applicant
- ZBA interprets the ordinance and has the final *local* say on what it means – but a court may review it further
- ZBA develops a record for possible court review

Constitutional Procedural Due Process

- To protect against the unfair loss of a property right, state and federal constitutions require at least:
 - *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. Statutory Due Process

- Notice to affected persons – RSA 676: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 on evidence and facts, RSA 674:33
- A written decision with reasons, RSA 676:3

The Road to Decision

- Application submitted to ZBA
 - Check rules of procedure (RSA 676:1) and RSA 676:7
 - Appropriate notice to parties and public
- Public meetings and public hearings
 - Consider whether any member is disqualified
 - Think about Right to Know Law and site visits
- Hearing and decision that provides procedural due process
 - Clarity and ability to review
 - Rehearing and the correction of errors

Working with Other Boards

- When a proposal requires both ZBA and PB approval
 - Which board hears the case first?
 - Whose conditions prevail?
- Joint Meetings, RSA 676:2
 - Any land use boards may hold joint meetings to decide cases involving jurisdiction of both boards
 - Each board must comply with all legal requirements (notice, minutes, votes)
 - Can be very efficient for everyone (time, money and effort for applicant, abutters, boards and public)

One Bite at the Apple

- May someone apply for the same thing over and over?
 - Generally – no.
 - Second application must be materially different in nature and degree from the original application.
Fisher v. Dover, 120 N.H. 187 (1980); *Kulick's Inc. v. Winchester*, No. 2016-0054 (9/6/2016)
 - What counts?
 - A change in applicable legal standards
 - Application changed to address reasons first was denied

Preparing for Success - Application

- Application can provide a road map for the board
 - Who, where, what, why, when, how are all in there (and if they aren't, you know what to ask about)
 - Description of the proposal and why applicant believes it should be granted
 - Note what they are requesting and the legal standards they must meet to help you make sense of the evidence at the hearing.

Preparing for Success - Notice

- Notice to the public per RSA 91-A is required (24 hours, 2 public places, one of which may be website)
- More notice required under RSA 676:7:
 - Certified/verified mail to all parties at least 5 days before hearing
 - Newspaper publication at least 5 days before hearing
 - You can always provide **more** notice.
 - Failure to notice can be fatal to the process.

The Public Hearing

Timing of the Hearing

- Timing of hearing and decision:
 - ZBA must hold hearing within 30 days of receipt of application, RSA 676:7, II.
 - Applicant is not entitled to the relief they seek merely because the time requirement isn't met.
 - **HOWEVER** – although state law doesn't require the decision within a particular time, federal law may (e.g., telecom facilities).

Right to a Full Board?

- No party is entitled to have a hearing and decision by a full board, *Auger v. Strafford*, 156 N.H. 64 (2007)
 - Board may have a policy of offering to wait until a full board is available – apply the policy evenly!
- Can you substitute someone after the process starts?
- Can a member vote if he/she missed one or more sessions of the hearing?
 - On both: If they can catch up by reviewing the record, yes, but it is better to avoid that situation if possible.

Participation in the Public Hearing

- Board members may ask questions of parties
- Alternates (those not sitting for someone else) may participate in the hearing process if allowed by ZBA's rules, RSA 673:6, V.
- Disqualified members may participate in the hearing as parties (i.e., abutters) or as member of the public.
- Board must hear all parties, and may hear "such other persons as it deems appropriate," RSA 676:7, I(a).

Board's Independent Expert

- All land use boards may hire consultants and experts if there are funds available, RSA 673:13.
- ZBA may also require applicant to reimburse board for cost of third party review, RSA 676:5, V.
- ZBA and Planning Board may not require substantially the same review – applicant pays once
- Applicant is protected by the ability to review invoices and have board assure services were fairly rendered.

Multiple Hearings

- Some cases may require more than one session to hear all parties.
- May continue a hearing to a different day (check notice requirements for subsequent sessions).
 - RSA 676:7, V: state time, date and place of continued session before end of first session and no additional notice is required for continued session.
- Do not allow any parties to contact board members or alternates in the interim days.

Closing the Public Hearing

- Don't close public hearing too soon
 - Has everyone had a meaningful opportunity to be heard?
 - What if board members want to ask additional questions during the deliberations?
 - Fairness to those who may have left after the public hearing closed?

Deliberation and Decision

Deliberation – When?

- Not required to deliberate immediately when the public hearing closes.
- May deliberate some or all cases at the end of the meeting, or on a different day, may continue the deliberation over more than one session if needed.
- No ex-parte contact with board members
- Observe the Right to Know Law:
 - Deliberate only in public, RSA 673:17.
 - Members must not discuss between themselves in person, by phone or e-mail!

Obtaining Legal Advice

- Consultation with legal counsel is not a “meeting”
 - No posting, no notice, no minutes.
 - Attorney must be actively participating
 - **HB 1579 would require boards to keep records. Passed House, Senate committee voted ITL 4/11/18, likely to fail.**
- Review of written or oral legal advice without active participation of attorney is *not* “consultation with legal counsel”
 - Review in public session (thus waiving attorney-client privilege), or
 - Review in nonpublic session (RSA 91-A:3, I(1)).

What to Consider

- Begin with the application (what is being asked for or appealed from?)
- Before making a decision, review everything
 - Relief sought
 - Legal standards
 - How the evidence applies
- Deliberation is only among board members – no comments from parties or public

Weighing the Evidence of 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. 341 (1989).
- 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)

Weighing General Evidence

- Board may rely on personal knowledge of the area.
 - Member should state area of expertise.
 - Bring this fact out during the hearing so all sides have the opportunity for rebuttal.
 - Members should demonstrate their knowledge and experience by intelligent questioning of experts during the hearing.
- Board must have a reason for rejecting expert opinion (what's lacking in their qualifications, methodology, data, conclusions?).
- Minutes and decision should reflect board's reasons for not accepting expert opinion.

Drafting a Motion

- Don't expect parties to draft a motion for the board.
- Do have someone write it out, and reread the motion again just before the vote.
- May a member draft a motion ahead of time?
- If the motion needs to change, it can be amended; however, someone must keep track.
- Only ONE motion before the board at a time.

Drafting a Motion

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- Be careful before incorporating codes by reference into your motion/decision, because it may incorporate things you don't expect.
 - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)

Drafting a Motion

- Begin with what the applicant has asked for, but you don't have to stick to that.
- Board is not required to grant exactly what the applicant seeks; craft the relief you find appropriate.
- Include conditions in the motion (this may be where the motion gets amended over the course of the deliberations).

Drafting a Motion

- Don't forget that the motion and what happens to it should end up in the minutes.
- Give a written copy to the person taking the minutes.
- If meeting is being audio recorded, be careful to create an adequate record:
 - Read motion out loud, and
 - Require verbal vote from every member

Drafting a Motion

- The motion, once passed, is the essence of the decision.
- It is difficult for the enforcement authority to enforce conditions that are not clear, and if they aren't aware of them!
- Include conditions in the notice of decision.
- Distribute notice of decision to appropriate officials.
- If there are deadlines or milestones, do the appropriate people know about them?

Conditions

- Conditions “precedent”
 - Must be fulfilled before approval can become final
 - Consider placing a time limit on satisfying them
- Conditions “subsequent”
 - Restrict use of the property going forward
 - Example: hours of operation
- May not delegate or assign duties to other boards or agencies, only to the applicant.
 - ZBA approval that was subject to off-site improvements to be completed by the State. Held, special exception was unlawful. *Tidd v. Alton*, 148 N.H. 424 (2002)

Conditions

- Generally, variances run with the land, not the owner.
 - *Batchelder v. Plymouth ZBA*, 160 N.H. 253 (2010)
 - Exception: variances for the disabled, RSA 674:33, V: ZBA may find that variance shall survive only so long as the particular person has a continuing need to use the premises.
- Waiver from building and site requirements for agricultural uses
 - RSA 674:32-c
 - ZBA shall grant waiver to the extent necessary to reasonably permit the agricultural use.

Voting on Motions (Generally)

- ZBA must have at least 3 votes in favor to reverse administrative action or decide in favor of applicant. RSA 674:33, III.
- Failed motion: if you don't get 3 votes in favor of the motion, is that a denial of the appeal or application, or is this a non-decision? Your rules of procedure should answer this question.

Voting on Variances

- Applicant must satisfy all of 5 criteria in RSA 674:33 to obtain a variance, and must receive at least 3 votes in favor.
- If the board votes separately on each of the 5 criteria, it is possible for every factor to have at least 3 votes in favor even if no single member voted that all 5 criteria were met.
- Obviously, board should discuss all 5, but there are varying opinions on whether to vote separately on each one.

Voting on Variances

- **2018 HB 1215**: intended to address this problem.
- Would require ZBA to state in its rules of procedure the method for voting on variances, and to follow it consistently. Changes to the method would apply only prospectively.
 - **House & Senate passed different versions**
 - **Possible committee of conference**
- Even if this bill doesn't become law, it is advisable to choose a method and stick to it.

Written Decision with Reasons

- Required by RSA 676:3.
- Purpose: to document the motion that was passed.
- Include the findings of fact that the board made.
- If the appeal/application is denied, written decision must include the reasons, RSA 676:3, I.
- 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 7(B) of the ordinance to allow a side setback of 10 feet where 20 feet is required..."
 - Refer in decision to the number and date of the plan set you are using.

Written Decision with Reasons

- Include all conditions that were approved, stated clearly so that they are easy to understand by the applicant.
- Helps make a record for future enforcement actions.
- Complete written decision is also necessary for meaningful court review:
 - Communicates what relief was granted or why a request was denied, clarifies how expert opinions were used and relied upon (or rejected).
 - Although a one-line written decision combined with meeting minutes has been found acceptable in the past, NH courts strongly recommend specific findings of fact be stated in written decision to avoid a remand.

Written Decision with Reasons

- Written decision and meeting minutes must be on file for public inspection within 5 business days after the vote, RSA 676:3, II and Right to Know Law.
- If they are not, it is not only a violation of the Right to Know Law, it creates a longer period within which someone who appeals the decision to superior court can amend their appeal (see more below).
- Does your board mail or e-mail a copy to the applicant? Be consistent.

After the Decision

Rehearing and Appeals

- Motion for rehearing must be filed with ZBA w/in 30 days after order or decision. RSA 677:2
 - Count calendar days from the date on which the board took the vote (not when written decision was issued).
 - If it is filed late, deny the motion on that basis.
- Who can file? Select board, any party, or any “person directly affected” by the decision or order.
- Even if no one files a motion, ZBA may reconsider its decision within that 30 day period to correct error(s).
 - *74 Cox Street, LLC v. Nashua*, 156 N.H. 228 (2007)

Motion for Rehearing

- Motion must state every reason the decision was unlawful or unreasonable. RSA 677:3.
 - Anything not raised in the motion for rehearing can't be raised later if the case goes to court.
- ZBA must grant or deny motion within 30 days
- To do this, hold a public **meeting** (not a hearing) to decide whether or not to rehear the case.
 - Don't take testimony or comments from the public on this – it's just a discussion and vote by the board.

Motion for Rehearing

- Avoid new findings of fact or new reasoning when denying a motion for rehearing (just say “denied”).
- If new grounds for initial decision have been identified, better to grant the motion to rehear and hold a new hearing to create a more complete record.
 - *MacDonald v. Effingham ZBA*, 152 N.H. 171 (2005)
- New evidence submitted with motion for rehearing:
 - If it could have been presented during original hearing, Board doesn't **have** to consider it, but **may**.

Rehearing

- If motion for rehearing is granted, the case begins again from the beginning.
- Rehearing is not limited to the issues originally identified in the motion for rehearing.
 - Notify all parties again. Who pays for this?
 - Require all parties to present all information again; create a new decision based on this new record.
 - Adopt procedural rules to reduce confusion and dispute.

When do Motions for Rehearing Stop?

- If a motion to rehear is denied, can someone move to rehear the denial?
 - No. That would create an endless loop. The only place to go from a denial of rehearing is up to court.
- If a motion to rehear is granted, automatic next step is to schedule rehearing, send notices, hold the rehearing, and create a new decision.
 - If ZBA reaches same result for same reasons, unclear if another motion to rehear is needed – if filed, ZBA usually simply denies it.
 - If ZBA reaches different decision, or the same decision for different reasons, parties may move for a rehearing on that.

Appeals to Superior Court

- If motion for rehearing is denied:
 - Any person aggrieved may file a petition for appeal with the superior court within 30 days of the date of the board's vote. RSA 677:4.
 - “Person aggrieved” includes any party entitled to request a rehearing under RSA 677:2.
 - Only the governing body may appeal on behalf of the town/city, not any other board.
 - *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003)

Appeals to Superior Court

- If an appeal is filed, ZBA usually works with the local governing body to manage the litigation with town counsel (except if governing body made the decision being appealed from or filed the appeal – then ZBA needs separate counsel).
- You may receive 91-A requests, treat them the same way you always do, and do NOT destroy records in any format before consulting town counsel.
- Compile and preserve “the record” as completely as possible because it **is** the record for court review.

Appeals to Superior Court

- The certified record includes everything the ZBA has on the case.
 - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, notices, certified mail receipts.....
 - Court will set a date by which the “Certified Record” must be submitted
 - Work with town counsel to assemble it.
 - Counsel will determine if anything is privileged or doesn’t belong; best course is to send counsel everything.

Concluding Suggestions

- Stay up to date on changes in the law – are your procedures current?
- Find out how applicants, the public, and professionals view your procedures.
- Stay in touch with enforcement officials and Planning Board – are you helping or hindering one another?
- See how other boards in your municipality and in other municipalities do things.

Concluding Suggestions

- These decisions can be difficult and it is often impossible to make everyone happy.
- Encourage all ZBA members and staff to become informed about laws, ordinances, and rules.
- Legal advice – everyone should know when to ask for it and how to find it.
- **The process is important** – because people's property is at stake, the courts are interested in assuring the decision was reached fairly.

THANK YOU!

C. Christine Fillmore

Gardner Fulton & Waugh, PLLC

78 Bank Street, Lebanon NH 03766

603-448-2221

cfillmore@townandcitylaw.com