
The ZBA Decision Making Process

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ZBA Basic Organization

- Quorum. Majority of membership. RSA 673:10, III
 - Chairperson and other officers. Elected for one year term. RSA 673:8, 9
 - Meetings. At the call of the chair and as board determines. RSA 673:10, I.
 - Rules of procedure. RSA 676:1 requires the board to adopt rules of procedure “concerning the method of conducting its business.”
 - Simple rules can deal with regular and special meetings, order of business, procedure at public hearings, etc.
 - E.g. at OEP website
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The Right To Know Law, RSA 91-A

Public Meetings: New Definition

- What is a meeting? The convening of a quorum, “whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously” 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
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Public Meetings: Notice

- Minimum required notice. Meetings must have 24 hours' notice posted in two prominent places (1 of which may be internet website) or published in newspaper. RSA 91-A:2, II
 - Emergency exception: “a situation where immediate undelayed action is deemed to be imperative by the chairman. . .” who shall post a notice asap and use whatever other 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.
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Public Meetings: Minutes

- Minutes must be kept of every meeting.
 - Two deadlines: Must be made available to public (1) not more than 5 business days after the meeting, RSA 91-A:2, II; and (2) within 144 hours. RSA 676:3, II.
 - Note that review and approval of the board is not required by RTK law and is usually not possible within the deadline.
 - Minimum contents of minutes: (1) names of members present; (2) other people participating; (3) brief summary of subject discussed; and (4) any final decisions made.
 - Minutes must be more detailed for purposes of certified record for appeals to superior court.
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Records: New Definition

- “Governmental records”: “any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum thereof, or any public agency in furtherance of its official function . . . whether in paper, electronic, or other physical form”
 - “Public agency”: “any agency, authority, department, or office . . .” of the municipality.
 - RSA 91-A:1-a, III and V
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Records, Availability

- Ordinarily, public records must be available for inspection and copying during regular business hours.
 - If record not immediately available, within 5 business days agency must (1) produce it for inspection, (2) deny request in writing with reasons, (3) state in writing time necessary to make a decision.
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Public Disclosure, Exemptions

- Categories are listed in RSA 91-A:5, but most do not apply to land use files. (E.g., “invasion of privacy”)
 - Notes made for personal use that do not have an official purpose, including notes made during meetings. RSA 91-A:5, VIII.
 - Preliminary drafts, notes, memos, etc. not in final form and not disclosed, circulated or available to a quorum. RSA 91-A:5, IX.
 - Written legal advice from counsel. *Soc’y for Protection of N.H. Forests v. WSPCC*, 115 N.H. 192 (1975)
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New: RSA 91-A Electronic Communications Amendments

- Meetings. If quorum is physically present, absent members may participate by conference call if impractical to attend. Roll call votes required. RSA 91-A:2, III
 - Meetings. Distribution of material by email (one-way communication) okay, but soliciting or receiving responses from quorum is improper. RSA 91-A:2-a
 - Records. Email related to board business circulated among quorum is public record, no matter whose computer is used. Must be available to public inspection .
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Public Hearing Procedures

- Applicant, abutters, others “affected directly” and others as permitted by board may testify in person or writing. 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 . . .
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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.”
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Juror Standard, RSA 500-A:12

- A juror is disqualified if the juror is “not indifferent” because he or she:
 - Expects to gain or lose upon the disposition of the case;
 - Is related to either party;
 - Has advised or assisted either party;
 - Has directly or indirectly given his opinion or has formed an opinion;
 - Is employed by or employs any party in the case;
 - Is prejudiced to any degree regarding the case; or
 - Employs any of the counsel appearing in the case in any action then pending in the court.
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Judicial Decisions on Disqualification

- Typically disqualification arises in six situations:
 - Prejudgment
 - Abutters
 - Financial interest in the outcome
 - Employment
 - Family relations
 - Other relations
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Prejudgment

- *Winslow v. Holderness*, 125 N.H. 262 (1984). A member was disqualified where, prior to joining the planning board, he had spoken, in his private capacity, in favor of the project at a public hearing on the subdivision application.
 - However, in *State v. Aubert*, 118 N.H. 739 (1978), a judge in a probation violation case was not necessarily disqualified merely because he had formed an opinion prior to trial, so long as he was able to “set aside” his opinions and “decide the case on the evidence.”-- important principle.
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Prejudgment, continued

- *City of Dover v. Kimball*, 136 N.H. 441 (1992). A board member who predicted to applicants that their application would not be accepted was held not to have impermissibly prejudged the application because the member was responding to questions from the applicants, and his comments were reasonable and accurate.
 - “Ex parte” contacts should be avoided. They create issues of due process since a member learns information that other parties are unaware of.
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Abutters

- Owners of property abutting the applicant's property are disqualified from sitting on the application. *Totty v. Grantham*, 120 N.H. 390 (1980).
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Financial Interest in the Outcome

- A public officer is disqualified if he or she has “a direct personal and pecuniary interest” in the decision. The interest must be “immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it.” *Atherton v. Concord*, 109 N.H. 264 (1968).
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Employment

- *Sherman v. Brentwood*, 112 N.H. 122 (1972). A ZBA member employed by Rockingham County in a food surplus program was not disqualified from hearing a case where the county was an applicant for a nursing home expansion.
 - *Appeal of City of Keene*, 141 N.H. 797 (1996). A county commissioner deciding on the public necessity for eminent domain for airport purposes was disqualified because his partner had represented a party to the case.
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Family Relations

- *Webster v. Candia*, 146 N.H. 430 (2001). A planning board member was not disqualified when his spouse was a leading opponent of the project in an earlier phase.
 - *Blaisdell v. Rochester*, 135 N.H. 589 (1992). A judge could be asked to recuse himself when his uncle, whom he hadn't seen in 20 years, was a partner of a lawyer in the case.
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Business Relationship

- *McLaughlin v. Union-Leader Corp.*, 99 N.H. 492 (1955).
A person who had regularly run an ad in the Union-Leader was not disqualified from sitting as a juror on a case in which the newspaper was a party.
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Disqualification Procedure

- 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.
 - Any 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.
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Alternates

- When a member is disqualified or otherwise absent the chair shall select an alternate to sit on the case. RSA 673:11. (Curiously, statute does not apply to vacancies.)
 - One view: Alternates should not sit with the board and participate in questioning and discussion unless they are actually sitting for a regular member on the case. Risk of unnecessary error creating issue for appeal.
 - Other view: Alternates should gain experience and maintain interest by participating in cases even when they are not voting.
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The Problem of Lengthy Hearings

- If a public hearing extends for several meetings and a board member misses an evening, the member may still participate in deliberations and vote if the member has studied the record well enough to be familiar with the evidence. *Auger v. Strafford*, 156 N.H. 64 (2007).
 - Member can review minutes, recordings and exhibits.
 - Personal attendance is necessary only when the issue of witness credibility is critical; rare in the case of expert testimony, which can be evaluated from written record. *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708 (1984)
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Deliberation

- Board should be certain it has all available necessary information before closing public hearing; reopening requires new public notice.
 - Board may wish to deliberate and vote at later meeting. After public hearing is closed, a draft proposed decision is permitted. *Webster v. Candia*, 146 N.H. 430 (2001)
 - Avoid ex parte contacts with parties or deliberation among members outside meeting.
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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).
 - In any case, strong written decision is important where factual issues must be resolved, especially where expert opinions are involved.
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Decision: Is It Fair to Vote with Fewer than 5 members?

- The concurring vote of 3 members is needed to decide in favor of an applicant. RSA 674:33, III
 - Does applicant have due process right to 5?
 - Does applicant have right to continuance?
 - Open questions in NH; in other states courts have found no right to a full board under similar statutes.
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Decision: Motion

- Suggest not take separate vote on each element of a request for variance.
 - Could yield 3 votes for each criterion separately when no single member favors variance.
 - Instead: one clearly stated motion either to approve or deny for stated reasons, with stated conditions of approval, if applicable.
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Tie Vote Now What?

- OEP Handbook (p.43) says continue until fifth member available.
 - Some ZBAs say 2- 2 is denial.
 - No NH court decision; other states divided.
 - Rules should clarify, so parties will know in advance
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Decision: Findings of Fact

- Detailed findings of fact can aid court review.
 - Lack of findings not, itself, reversible error.
Thomas v. Hooksett, 153 N.H. 717 (2006).
 - However, court can remand case if the decision is “unclear.” *Kalil v. Dummer*, 155 N.H. 307 (2007).
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Decision: Written Notice

- Written decision is required, and written reasons in event of disapproval. RSA 676:3, I
 - Decision and meeting minutes must be on file for public inspection within 144 hours of vote. RSA 676:3, II.
 - Important to communicate exactly what was granted or denied and why.
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Conditional Approval

- Representations by applicant are not binding unless clearly made a condition of approval. *N. Country Env'tl. Servs. v. Bethlehem*, 146 N.H. 348 (2001).
 - Conditions must reasonably relate to ensuring compliance with relevant criteria. *Nestor v. Meredith*, 138 N.H. 632 (1994).
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Not Over Until It's Over

- Decision subject to request for rehearing for 30 days by applicant, abutter, other person “directly affected” or governing body. RSA 677:2.
 - ZBA itself can reconsider within 30 days. 74 *Cox St. LLC v. Nashua*, 156 N.H. 228 (2007).
 - ZBA to grant or deny rehearing within 30 days. RSA 677:3.
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Rehearing Request: Procedure

- ZBA to consider at meeting; no public hearing or abutter notice required.
 - Rehearing not to be granted lightly; opportunity to correct errors.
 - ZBA should not just amend decision to add new reasons or findings; if error detected, rehearing is remedy. *McDonald v. Effingham*, 152 N.H. 171 (2005).
 - Rehearing starts procedure from beginning.
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Detailed Information

- State of New Hampshire Office of Energy and Planning has many helpful publications on planning and zoning issues at its website: www.nh.gov.oep.
 - The annual Municipal Law Lecture Series sponsored by the New Hampshire Local Government Center in the fall of every year typically concentrates on land use legal issues.
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