

**MINUTES of the
BOARD OF ADJUSTMENT TRAINING SESSION
ON THE ZBA DECISION MAKING PROCESS
With Attorney Stephen Buckley, NH Municipal Association and
Jonathan Cowal, Municipal Services Counsel**

**Conference Room A
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

July 25 2023

MEMBERS PRESENT: Chair Phyllis Eldridge; Vice-Chair Beth Margeson; Members David Rheame, Thom Rossi, Jeff Mattson, Jody Record, and ML Geffert

MEMBERS ABSENT: Paul Mannle

ALSO PRESENT: City Attorney Susan Morrell; Jane Ferrini, Senior Assistant City Attorney; Trevor McCourt, Deputy City Attorney; Robert Sullivan, Of Counsel (Part-Time); Stefanie Casella, City Planner

I. Training Session with Attorney Stephen Buckley, *NH Municipal Association* and Jonathan Cowal, *Municipal Services Counsel*, regarding the ZBA Decision Making Process

Chair Eldridge called the meeting to order at 7:04 p.m. Mr. Cowal introduced himself and Attorney Stephen Buckley and said he and Attorney Buckley made up the Legal Services Team at NHMA. He said the presentation would focus on two separate parts: 1) a general overview of the Right-to-Know Law, ethics, conflicts of interest, disqualification, and case studies on conflicts, and 2) the role of the ZBA, ZBA jurisdiction, appeals, procedure, decisions, variance criteria, special exceptions, administrative appeals, motions for rehearing, and appeals.

Mr. Cowal discussed the Right-to-Know law and the four elements necessary to have a public meeting, beginning with Element 1, a quorum. Mr. Rheame asked if allowing a remote presentation should be voted on by the Board. Mr. Cowal said it was a great idea to have remote meeting attendance and wasn't necessarily a legal requirement that the Board had to vote but he thought it was good practice. As an example, he said if a person had a compromised immune system and asked to attend every meeting remotely and the Board announced that it was due to significant health concerns and agreed that they accepted it, it didn't need a vote unless there was a disagreement. Attorney Buckley said the statute required that the reason for the person not to be able to attend had to be stated in the minutes but voting solidified it. Mr. Rheame said therefore there was no threshold in the Statute of what would be an expected reason for being unable to attend and that it could be as simple as being out of town. Mr. Cowal agreed. He said

the Statute used the vague language of ‘not reasonably practicable’ and that it could be left up to interpretation. It was further discussed.

Mr. Cowal then discussed the next three elements: Public Body, Convening, and Discussing or Acting upon something over which the public body has supervision, control, jurisdiction, or advisory power. [Timestamp 23:19]

Mr. Cowal discussed the requirements for a public meeting and said a meeting needed to be publicly noticed in advance in two public places and posted 24 hours in advance of the meeting. Mr. Rossi said there were a few instances in the past year where people had come before the Board and the petition was substantially different than what was published in advance regarding materials about what would be discussed and the request and rationale for it. He asked if it was the Board’s duty or right to postpone a decision until the new materials could be published. Mr. Cowal said Statute 91:A didn’t require the Board to post information about what would be discussed at the meeting, it just required that notice be posed. Attorney Buckley said it was a bit different for the ZBA and that he would address it later.

Mr. Cowal then discussed requirements 2 and 3, making sure the meeting is open to the public and meeting minutes. ([Timestamp 38:22]

City Attorney Morrell asked if the quorum was three out of five people and two people were discussing business related to that public body, they might think since there was only two of them, they could discuss the business without having a meeting. Mr. Cowal said if the people thought they were missing a quorum (Element 1) and didn’t need Elements 2 and 3, they were violating RSA 91:A:II, which is abiding by the spirit of the Statute and limiting discussions of official business to public meetings. He said it could also create conflicts within the Board itself and could be seen as a conflict of interest. [Timestamp 42:00]

Mr. Cowal then discussed Ethics and said it came down to each individual’s understanding of ethics and what it means to be ethical, and that person decides whether they have a conflict and have to recuse themselves. Mr. Rossi asked if it was inadmissible for the Board to hold a vote in which they think an individual member should recuse themselves. Mr. Cowal said the land use boards had a specific Statute that allows for certain quasi-judicial decisions and that the ZBA had a specific mechanism that allowed them to take a vote to determine if they felt someone had a conflict of interest. He said it was non-binding but great evidence down the line if there was an appeal of that decision and the case was heard in Superior Court. It was further discussed.

Mr. Cowal addressed the topics of Disqualification of a Member and what it means to act in a judicial capacity and to act as a juror. [Timestamp 55:03]

Mr. Rheume said the Board members all had some degree of prejudice in terms of understanding their community. Mr. Cowal said the Board’s understanding of the community played a huge role in their decision making process. He said prejudice meant that a person is predisposed to answer in a certain way due to something that’s not legally recognized as a decision making factor, like someone’s race or religion, and that would be a reason to step down from making a decision. He said having feelings about issues related to the community would not be prejudicial.

Mr. Cowal compared the difference between legislative vs. quasi-judicial and the difference between recusing and abstaining, and he discussed how to avoid conflicts. Mr. Rheame clarified that there was no requirement that a Board member disclose their reason for recusal if they chose to recuse. Mr. Cowal agreed and said the member could simply say that they had a conflict and had to recuse.

Mr. Cowal reviewed a few case studies as examples of how a court would treat certain situations: Winslow v. Holderness Planning Board 1984 and W. Robert Foley, Trustee vs. Enfield 2018, and Z-1 Express vs. Manchester 2019. [Timestamp 1:07:48]

Attorney Stephen Buckley then discussed the role of the ZBA and the ZBA's jurisdiction, and what decisions could be appealed to the ZBA and its effects. He discussed the Fisher vs. Dover case. He discussed all the things that insured that the ZBA provides due process and how to continue a public hearing. [Timestamp 1:14:02]

Mr. Rheame said he thought the Board wasn't making people re-notice and that they were just asking for a postponement. Ms. Casella said it was read into the record and the reason for a request for postponement was stated and postponed to another date and time. Attorney Buckley said he read the Statute strictly according to the way it was worded, which is that the Board had to have the public hearing opened and wasn't able to complete the public hearing within the allotted time. He said it was problematic to say the Board never opened the public hearing and now they're going to grant a rehearing without new notice being provided because it wasn't open and they didn't discontinue it due to the lack of time to complete it that night. He said the Board had to go by the words of the Statute and it didn't say they could just postpone without opening the public hearing and not providing new notice. He noted that there was a need to apply discipline to the applicants and the process. It was further discussed. [Timestamp 1:33:15]

Attorney Buckley addressed who must be heard at a public hearing, non-abutters and their standing, what the Board does during a hearing, that the Board has discretion to choose between competing expert opinions, who must be heard at a public hearing, and the Board's decision. [Timestamp 1:37:28]

Mr. Rheame said there was a court case a few years ago that reduced some of that discretion regarding expert opinions and stated that the Board needed to listen to expert opinions. Attorney Buckley brought up that particular case and it was further discussed. [Timestamp 1:43:43]

Attorney Buckley discussed the topic Decision by the Board and said the Statute stated that three members must concur, although for the ZBA it was four members. He said it had to be a consistent voting method, that any change in the Board voting method would not take effect until 60 days after adoption, that the decision had to be in writing, that there had to be conditions of approval, and the decision had to be issued within five business days.

Chair Eldridge said the Board didn't have in writing how they closed the public hearing and asked for discussion and that it had been suggested that the Board shouldn't discuss the motions on the floor but they did and then they voted. She said that not all the Board members mentioned the criteria, and if they changed that procedure, it would need 60 days. Attorney Buckley agreed and said the Board would write it up and adopt it as a new rule of procedure. He said it did not

need a public hearing and would not go into effect for 60 days. It was further discussed.
[Timestamp 1:49:14]

Attorney Buckley then reviewed the new Statute RSA 676:3 for Findings of Fact and the new Statute 674:33 for Time for Decision and how to make the decision. He said the ZBA had the authority to rule that zoning relief was unnecessary. Mr. Rossi said the Board had debates about preexisting nonconforming uses and there was a lot of confusion about specific cases, which included one for replacing a trailer in a trailer park that was a nonconforming preexisting use. Attorney Buckley said it was allowed to continue and that it could expand as long as it was not unreasonable. It was further discussed.[Timestamp 2:01:38]

Attorney Buckley reviewed a new case, *Avanru Development vs. Swanzey*, which was an appeal of a denial of a 76-unit multi-family dwelling special exception request. He reviewed administrative appeals, special exceptions and variances, and the five variance criteria.

Mr. Mattson asked if the Board had to stick to the special conditions that distinguish it from other properties criteria in terms of it being unique from other properties as opposed to some other justification for hardship. He referenced the *Walker vs. Manchester* case where the application was similar to other properties in the area that already had the variance and this property didn't, so it wasn't distinguished from other properties. Attorney Buckley said the judge pointed out that there were not special conditions that distinguished it from others, that they were all the same, and he would oppose the granting of the variance. He said his dissent pointed out that something unique about the property itself was needed to said there were special conditions. He discussed it further. [Timestamp 2:13:40]

Attorney Buckley then reviewed special exceptions, the cumulative impact of the *Foley vs. Enfield* case, the time for exercising variances and special exceptions, rehearings, and the action on a motion for rehearing and beyond the rehearing. He concluded that the ZBA Handbook was a good resource and was available for digital download and that the NH Municipal Association was there to give the Board assistance and answer their questions.

The meeting adjourned at 9:25 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary