



ZBA Decision Making Process

Presented to:
City of Portsmouth

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NHMA's Legal Advisory Services



Open 8:30 a.m. - 4:30 p.m.

- Email: legalinquiries@nhmunicipal.org
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents
- Not drafting individualized ordinances or charters
- Not reviewing specific applications before local boards
- Not settle intra-municipal disputes

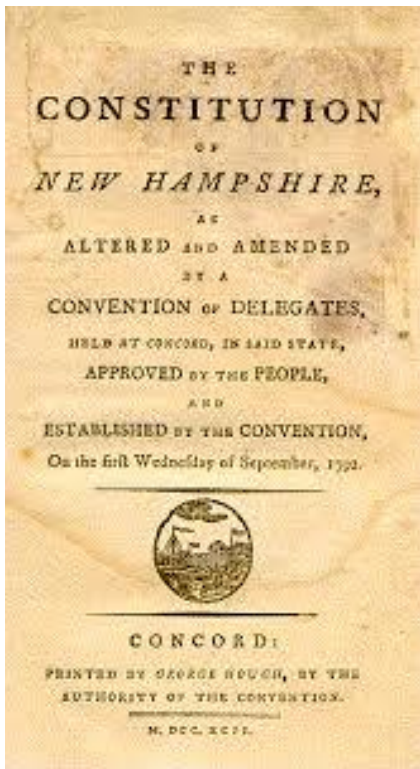
Goal: Response w/in 48 hours

Agenda



- ▶ Right-to-Know Law, Ethics, Conflicts of Interest, Disqualification, Case Studies on Conflicts
- ▶ Role of ZBA, ZBA Jurisdiction, Appeals, Procedure, Decisions, Variance Criteria, Special Exceptions, Administrative Appeals, Motions for Rehearing, Appeal

The Right-to-Know Law RSA Chapter 91-A



PART I, ARTICLE 8 OF THE NH Constitution: Government ... should be open,

SECTION 1 OF RSA 91-A:

The purpose of this chapter is to ensure both the greatest possible public access to the **actions**, **discussions** and **records** of all public bodies, and their accountability to the people.

**What is a
Public
Meeting?
RSA 91-A:2**



Quorum



Public body



Convenes so that they can
communicate contemporaneously



To discuss or act upon a something over
which the public body has supervision,
control, jurisdiction, or advisory power

“Convene”

- ▶ In person gathering
- ▶ Discussions via email, text chains, reply all
- ▶ Emails and text can be considered government records
- ▶ Communications outside of a meeting shall not be used to circumvent the spirit and intent of 91-A
- ▶ All discussions of a public body should take place at a public meeting

Discussing Board Business

- ▶ Chance encounters or social gatherings don't count
- ▶ Must be discussing matters the public body has some form of control over
- ▶ Multiple members of one public body attending a meeting of another public body could get complicated might trigger two public meetings

What are the requirements of a public meeting?



Public notice



Open to the public



Meeting minutes



Conflicts of Interest

It All Begins with “Ethics”

“Ethics” can mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety

Land Use Specific Statute



[RSA 673:14, I](#) Disqualification of Member.

No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member 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 to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

Juror Disqualification 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.

Difference Between Legislative vs. Quasi-Judicial



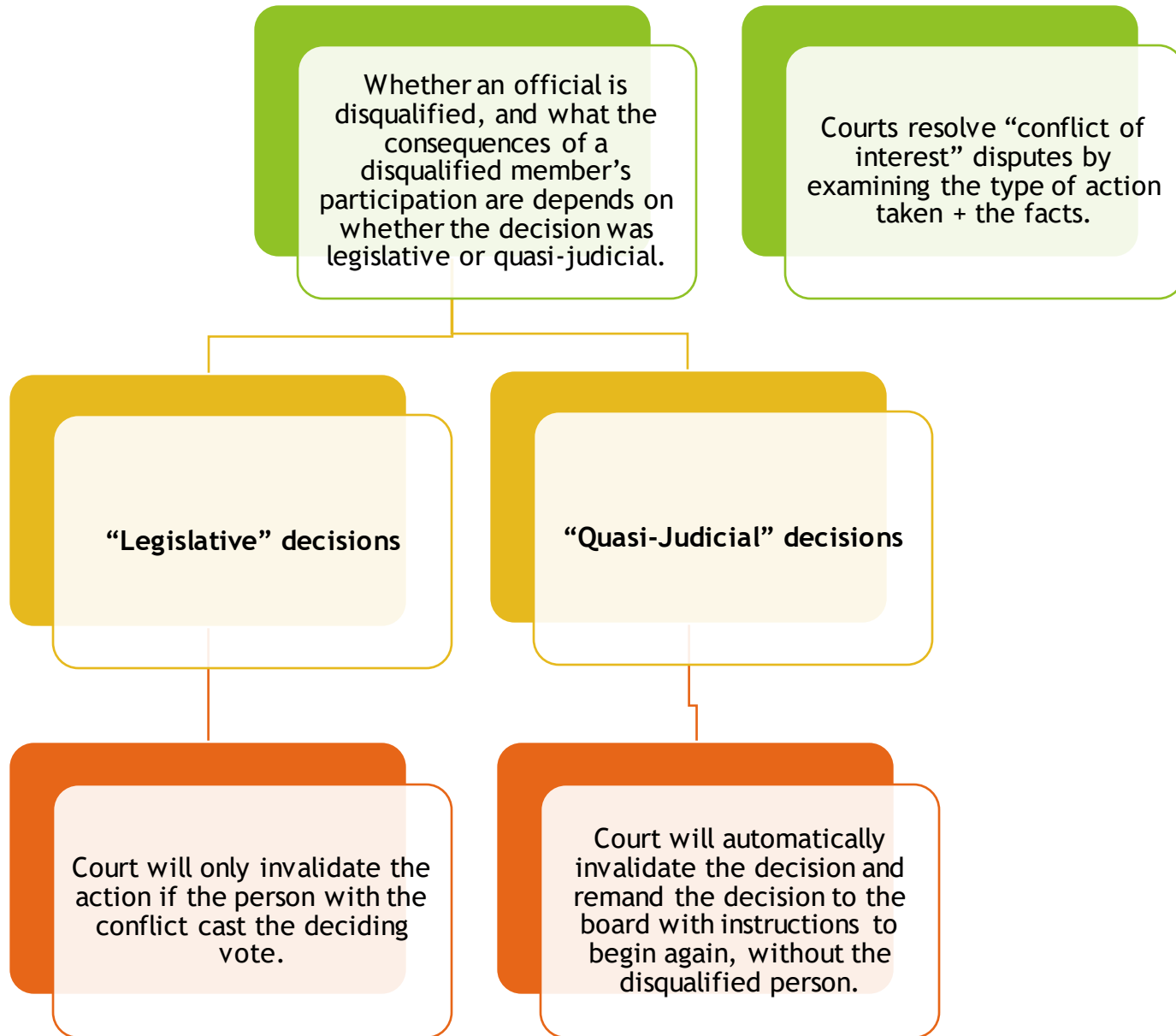
Legislative

- ▶ Widely felt
- ▶ Policy decisions
- ▶ Must act in public's interest, but don't need to be "indifferent"

Quasi-Judicial

- ▶ Affect rights of specific petitioner
- ▶ Notify & hear parties
- ▶ Weigh evidence
- ▶ Must be indifferent

What if the Official Participates Anyway?



Recusal vs. Abstaining

Recuse:
Immediately remove
from discussion and
voting

Abstain: does not
vote

Recusing is the
remedy for avoiding
conflict, not
abstaining

Avoiding Conflicts

- ▶ Advisory Vote - RSA 673:14, II.
- ▶ Recuse (yes) vs. Abstain (no)
- ▶ Avoid Social Media Opinions on Pending Matters
- ▶ Disclose and Remove Yourself
- ▶ Err on the Side of Caution!



Case Study: Winslow v. Holderness Planning Board (1984)



- ▶ Abutter appeal of a PB subdivision approval (with waivers granted)
- ▶ Resident (at the time) spoke in favor of the application and subsequently became a member of the board who voted in favor of the proposal (6-1 vote)
- ▶ Superior Court reversed PB decision & applicant appealed
- ▶ Supreme Court affirmed the lower court:
 - Proper to disqualify PB member as evidence showed he was not indifferent
 - Mere participation by a single DQ'd member can invalidate a board's decision
- ▶ Quasi-judicial vs. administrative / legislative discussion

Case Study: W. Robert Foley, Trustee v. Enfield (2017)



- ▶ ZBA chair e-mailed a list serv asking, "Should the board members consider precedents when deciding their position on a case?" The chair received replies from municipal employees and zoning board members in other communities.
- ▶ The ZBA denied the rehearing request the day after the chair's e-mail on grounds unrelated to the issue of precedents - whether the variance would violate the spirit of the ordinance by promoting overcrowding.
- ▶ Applicant learned of email after he appealed to superior court and argued that the list serv posting was an *ex parte* communication that violated his right to a fair hearing, and he might have asked for a recusal.
- ▶ The Court noted that plaintiff failed to appropriately preserve the issue for appeal and concluded that the plaintiff failed to demonstrate prejudice as a result of the communications.

Case Study: Z-1 Express v. Manchester (2019)



- ▶ CUP application before planning board.
- ▶ After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ One of the members who voiced opposition on social media was asked to recuse himself, he refused and he later voted to deny the application.
- ▶ Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind "threaten[ed] the integrity of the deliberative process" undermining public trust in the overall function of the planning board.

What is the Role of the ZBA?

Safety valve

Quasi-Judicial

No enforcement authority

Obligation to assist public
(reasonable)

Rules of procedure

No requirement for monthly meeting

What is the ZBA's Jurisdiction?



- RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled, RSA 674:33, V
- RSA 236:115: Certificates of approval, junkyards
- Often serves as building code board of appeals

Appeals to the ZBA RSA 676:5

- ▶ ZBA hears appeals, per RSA 674:33
- ▶ Heard within reasonable time, per ZBA rules
- ▶ ZBA may impose reasonable fees
- ▶ ZBA may require applicant to reimburse for third party review & consultation



What Decisions can be appealed to the ZBA?



- ▶ Appeals to the board of adjustment concerning any matter within the powers set forth in RSA 674:33 may be made “by any person aggrieved, or by any officer, department, board or bureau of the municipality affected by any decision of an administrative officer.”
- ▶ “Administrative officer” has been defined to mean any municipal official or board responsible for issuing permits or for enforcing the ordinance. It includes the building inspector, or other official or board with such responsibility.
- ▶ The term decision of the administrative officer includes any decision involving construction, interpretation, or application of the terms of the ordinance. It does not include discretionary decisions to enforce an ordinance but does include any construction or interpretation of the ordinance being enforced. *15 Land Use Planning and Zoning § 21.10 (2021)*

Effect of Appeal to ZBA



- ▶ An appeal of the issuance of any permit or certificate has the effect of suspending that permit or certificate and no construction, alteration or change of use which is contingent upon it shall be commenced.
- ▶ Likewise, an appeal of any order or other enforcement action stays all proceedings under the action appealed from unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such officer, that by reason of the facts stated in the certificate, a stay would, in the officer's opinion, cause eminent peril to life, health, safety, property or the environment. 15 *Land Use Planning and Zoning* § 21.12 (2021)

“One Bite of the Apple” *Fisher v. Dover*

- ▶ Subsequent applications by unsuccessful petitioners are limited.
- ▶ Second application must be materially different in nature and degree from the original application. *Fisher v. Dover*, 120 N.H. 187 (1980)
- ▶ A change in applicable legal standards may be such a change. *Brandt v. Somersworth*, 162 N.H. 553 (2011)
- ▶ If the applicant has addressed/changed things that were reason for denial in original application—could be a material difference





Appeal to the board within a reasonable time (in your rules, RSA 676:5)



Hearing within 45 days of appeal receipt- RSA 676:7, II



Approval or Disapproval Decision within 90 days - 674:33, VIII



Notice to affected persons, RSA 676:7



Opportunity to be heard, RSA 676:7



Decision based on facts and evidence, RSA 674:33, 91-A



Decision by impartial tribunal, RSA 673:14



Written decision with reasons and findings of fact supporting decision, RSA 676:3

Continuing Public Hearing



- ▶ *If the board of adjustment finds that it cannot conclude the public hearing within the time available, it may vote to continue the hearing to a specified time and place with no additional notice required.*

RSA 676:7, V

- This manner of continuing an application requires the board to have commenced the public hearing process
- When the public hearing does not conclude within the time available then the board can vote to continue to a specified time and place
- In such circumstances additional abutter and newspaper notification is not required
- Ordinary notice required by the Right-to-Know Law would still be necessary

Who must be heard at the ZBA Hearing? RSA 676:7, I (a)



- ▶ The applicant shall be heard
- ▶ The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony
- ▶ The board shall hear all non-abutters who can demonstrate that they are affected directly by the proposal under consideration
- ▶ The board may hear such other persons as it deems appropriate.
- ▶ Any party may appear in person or by the party's agent or attorney at the hearing of an appeal.

Non-abutters - Affected Directly - Standing



- ▶ Standing to appeal does not apply to all persons in the community.
- ▶ Standing is a factual determination in each case, considering factors such as:
 - The proximity of the plaintiff's property to the site for which approval is sought
 - The type of change proposed
 - The immediacy of the injury claimed
 - Plaintiff's participation in the administrative hearings.

*15 *Land Use Planning and Zoning* § 25.01 (2022)

The Evidence

What does the board do during the hearing?

- Collect evidence and determine the facts
- Apply legal tests (e.g., the variance criteria)
- Develop a record for court review

Board has considerable discretion to choose between competing expert opinions:

- General studies and articles may not be enough to contradict specific expert opinion
- Board may question expert's qualifications, methodology, etc.
- Board may rely on personal knowledge of the area
- BUT uncontradicted expert testimony overcomes general member knowledge

The Decision

RSA 674:33 & 676:3



- ▶ 3 members must concur
- ▶ Must use one consistent voting method, RSA 674:33, I(c)
- ▶ Any change in the board's voting method shall not take effect until 60 days after adoption and shall apply only prospectively
- ▶ Decision must be in writing
 - ▶ (State reasons for approval/ disapproval)
- ▶ Conditions of approval?
- ▶ Issue decision w/in 5 business days

New Law - Findings of Fact - RSA 676:3, I



- ▶ The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant.
- ▶ *The decision shall include specific written findings of fact that support the decision.*
- ▶ *Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal*, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.
- ▶ If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

New Law - Time for Decision - RSA 674:33, VIII

- ▶ The ZBA shall begin formal consideration and shall approve or disapprove applications within 90 days of the date of receipt
- ▶ The applicant may waive this requirement and consent to a mutually agreeable extension
- ▶ If the ZBA determines it lacks sufficient information to make a final decision on an application, and the applicant does not consent to an extension, the board may deny the application without prejudice
- ▶ If an application is denied without prejudice the applicant may submit a new application for the same or substantially similar request for relief

How to Make the Decision



- ▶ ZBA need not mindlessly accept the conclusions of experts with knowledge of the project.
 - ▶ ZBA entitled to question and reject the methodology or conclusions of the expert's studies of the proposed development.
- ▶ Although the ZBA may not disregard an expert opinion based upon vague and unsupported concerns of town residents, it may rely upon residents' statements of objective facts in its determination of how much weight to give an expert opinion.
- ▶ *Three Ponds Resort v. Town of Milton is illustrative*
 - ▶ Applicant commissioned a traffic study.
 - ▶ Traffic study concluded no additional impact.
 - ▶ ZBA considered Three Ponds' traffic study in detail and identified at least three significant concerns (all of which were supported by the record), before rejecting the expert's conclusions.



ZBA Authority to Rule Zoning Relief is Unnecessary

- ▶ Contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance.
- ▶ That the mere filing of a variance application does not limit the ZBA's ability to determine whether the applicant's proposed use of property requires a variance in the first place.

Bartlett v. City of Manchester, 164 N.H. 634, 635 (2013)

New Case - Avanru Development v. Swanzey



- ▶ Appeal of denial of 76-unit multi-family dwelling special exception request
- ▶ Among the reasons why the zoning ordinance permitted the granting of a special exception for a multi-dwelling use in the business district was whether such an approval would not reduce the value of any property within the district, nor be injurious, obnoxious, or offensive to the neighborhood.
- ▶ The Superior Court concluded that the ZBA erroneously relied upon public comments opposing the project improperly basing its decision on aesthetics, and by judging the application solely on its popularity.
- ▶ Because it was undisputed that the exact same structure could be built by right if the use were a hotel or nursing home, the ZBA erred by not analyzing the implications of the use on the business district, but instead focused on aesthetic issues.

Administrative Appeals

- ▶ The board rules on whether the building inspector/code enforcement officer correctly applied regulations when denying a permit
- ▶ When interpreting the ordinance in an administrative appeal, the board must confine its review to the language of the ordinance when that language is plain and unambiguous
- ▶ The ZBA can substitute its judgment for that of the administrative official and is not required to give deference to the rulings of the administrative official.
- ▶ The ZBA' s jurisdiction is appellate not original - meaning the board cannot render an advisory opinion on the meaning of the zoning ordinance in the absence of an appeal by an aggrieved property owner.

Special Exceptions

- Permission to do something zoning ordinance permits under specific circumstances
- Must be in zoning ordinance!

Variances

- Permission to do something not permitted by zoning ordinance
- Five criteria, RSA 674:33, I



Variance Criteria 1 & 2

The variance will not be contrary to the public interest

Examine whether the variance would

- (a) alter the essential character of the locality or
- (b) threaten public health, safety or welfare.

The spirit of the ordinance is observed

Examine the effect of the variance in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.

Variance Criteria 3

Substantial justice is done.

- ▶ Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.
- ▶ The injustice must be capable of relief by the granting of a variance that meets the other qualifications.
- ▶ Courts will also look at whether proposed development is consistent with the area's present use.



Variance Criteria 4

The values of surrounding properties are not diminished.

- ▶ In considering whether an application will diminish surrounding property values, consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood.
- ▶ Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria.
- ▶ But be cautious in relying solely on personal experience/knowledge if it contravenes the evidence of professional experts.
- ▶ Nevertheless it is the board's job to weigh competing evidence.

Variance Criteria 5

Literal enforcement of the zoning ordinance would result in an *unnecessary hardship*.

1. “UNNECESSARY HARDSHIP” MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

- ✓ NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY;
- ✓ THE PROPOSED USE IS A REASONABLE ONE.

OR If #1 not satisfied:

2. AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

Special Conditions Self Created Hardship



- ▶ Special conditions can be determined based upon the proposed use itself having “special conditions.” Is the subject property itself unique in its environment. *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508, 518 (2011).
- ▶ Self-created hardship should be only one factor to be considered when assessing hardship. It should not in and of itself justify denial of a variance. A denial based exclusively on self-created hardship, without more, is not conclusive on the issue of undue hardship. *Kwader v. Town of Chesterfield*, No. 2010-0151, 2011 N.H. LEXIS 45, at *9 (Mar. 21, 2011)

Status of Variances



- ▶ A variance runs with the land and passes with the land to a subsequent purchaser.
- ▶ By definition, a variance is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner.
- ▶ Once granted, a variance can be enjoyed by both present and subsequent owners of the land. 15 *Land Use Planning and Zoning* § 24.05 (2021)

Special Exceptions



- ▶ The review standards for variances does not apply to special exceptions.
- ▶ A special exception is a use permitted upon certain conditions as set forth in a town's zoning ordinance.
- ▶ If the conditions for granting a special exception are met, the zoning board must grant it, and by so doing, no exception to the application of the ordinance is truly made.
- ▶ A special exception is not the equivalent of a nonconforming use. Uses that are permitted as special exceptions are deemed to be permitted so long as they satisfy the special exception provisions in the ordinance.

Variances from the Terms of a Special Exception?



- ▶ When a ZBA is considering whether to grant a special exception, it may not vary or waive any of the requirements set forth in the zoning ordinance.
- ▶ While a ZBA may grant a special exception, it cannot decide to waive any of the requirements for a special exception spelled out in the zoning ordinance.
- ▶ If a landowner cannot meet the conditions required for granting of a special exception, it may still be possible to obtain similar relief through the granting of a variance
- ▶ 15 *Land Use Planning and Zoning* § 23.02, § 23.06 (2021)

Status of Special Exception

- ▶ A special exception is not personal to the applicant, and it cannot be limited to the use only of the applicant.
- ▶ A special exception runs with the land and not a particular owner, hence a condition restricting the use to the particular owner would be inappropriate. 15 *Land Use Planning and Zoning* § 23.05 (2021)

Is Cumulative Impact a Permissible Consideration?



- ▶ Perreault v. Town of New Hampton, 171 N.H. 183 (2018).
- ▶ Applicant sought variance to construct a shed within the 20-foot side yard set back, that was denied by the ZBA.
- ▶ There was evidence of sixteen other properties, all located on the same road as the applicants' property, with storage buildings in locations that the applicants asserted were in violation of the setback requirements.
- ▶ According to the applicants, this evidence demonstrated that their proposed shed would not alter the essential character of the neighborhood or threaten the public health, safety, or welfare.
- ▶ The ZBA's denial was based upon the conclusion that allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.
- ▶ The Court assumed without deciding, that cumulative impact is a proper consideration in the variance context.

Cumulative Impact - *Foley v. Enfield*



- ▶ The applicant sought to construct two-story house and an attached, two-car garage within the 30-foot setback from Rollins Point Road, eight to ten feet from his lot line. He argued that the ZBA erred in finding that the variance would violate the spirit of the ordinance by promoting overcrowding of the land.
- ▶ The ZBA chair noted that while the plaintiff's proposed construction of a larger house on his property may not have a "great effect" on Rollins Point, the cumulative effect of granting similar variance requests in the future could be "large and irreversible."
- ▶ During deliberations, the majority of the ZBA observed that the plaintiff's proposed construction "would crowd the land of Rollins Point and might encourage further such crowding and thereby would degrade the natural environment of the point."
- ▶ Court concluded that, in evaluating the plaintiff's variance request, the ZBA acted properly in considering the cumulative impact of granting similar variances in the future on Rollins Point. See *id.*

Time for Exercising Variances and Special Exceptions



2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause,...



2018 amendment allows for termination of variances granted prior to 8/19/13 by zoning amendment

Rehearings, RSA 677:2

- Motion must be filed within 30 days
- ZBA may even consider its own decision within time period
- Hold meeting to determine whether to grant rehearing
- Grant rehearing when board committed technical error or there is new evidence that was not available at the time of the first hearing
- If rehearing is granted, may consider certain issue(s) or rehear entire case

Action on Motion for Rehearing

- ▶ The N.H. Supreme Court has made it clear that in furtherance of the finality of decisions by zoning boards, rehearings should not be lightly granted.
- ▶ Rehearings should only be granted if the petitioner can demonstrate that the board committed technical error or that there is new evidence that was not available at the time of the first hearing.
- ▶ Such new evidence should reflect a change in conditions which occurred subsequent to the original hearing or which was unavailable at the time of the original hearing. 15 *Land Use Planning and Zoning* § 21.18 (2021)

Beyond the Rehearing

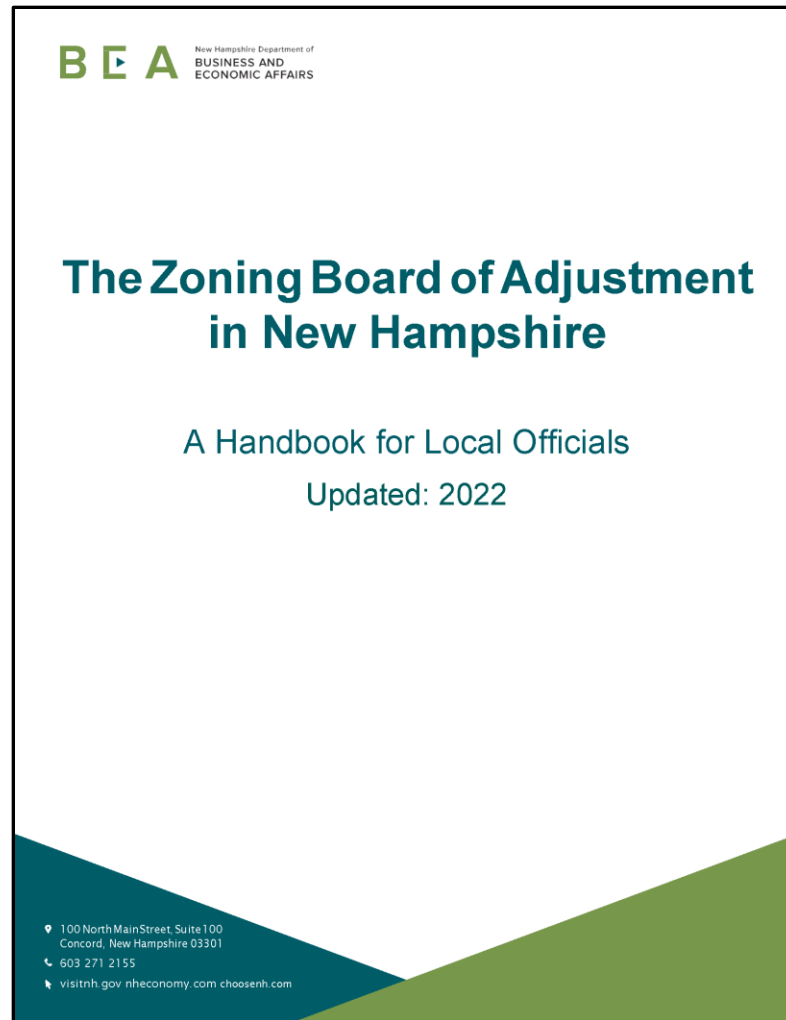
- ▶ Affected party with standing may appeal to Superior Court within 30 days, RSA 677:4, or, if the application involves housing and housing development, to the Housing Appeals Board.
- ▶ Be sure to compile and preserve “the record” as completely as possible.
- ▶ If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.



Good Resource: ZBA Handbook



- ▶ Downloadable
- ▶ Free digitally
- ▶ Searchable
- ▶ Linked TOC



https://www.nheconomy.com/getmedia/283fd8ed-ac1b-4536-8243-fd124b369e67/2022-ZBA-Handbook-Print-Version_1.pdf



*for inviting
NHMA to
Portsmouth!*



NHMA'S MISSION



Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.

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