



Zoning Board of Adjustment Meeting
Tuesday, September 2, 2014 at 7:00 p.m.
City Hall Council Chambers

MINUTES
Approved 10/6/2014

Chairman Hurd called the meeting to order at 7:00 PM.

I. Roll Call

Present: Michael Hurd (Chair), Daniel Worcester, David Nichols, Jim Hanson, Richard Collins, Carolyn Towle

Absent: Todd Russel

City Staff: Michael McCrory, Interim City Planner, Jane Taylor, City Solicitor

Chairman Hurd appointed Daniel Worcester to sit in for Todd Russel for this meeting.

II. Review Public Meeting Minutes from August 4, 2014:

Motion: To approve the minutes of August 4, 2014

Made by: Mr. Worcester **Second:** Mr. Nichols

Vote: Unanimous in favor

III. Old Business

There was no old business to discuss.

IV. New Business

Chairman Hurd reviewed that the meeting would be a “ZBA Basics” review by City staff. Mrs. Taylor reviewed “ZBA Basics 2014” for the members present:

Zoning Basics

Zoning ordinances are the basic rules for land use within a community (674:16)

A local zoning ordinance reflects what a community wants to develop where (675:17)

Why Do We Need a ZBA?

Because state law requires each community that adopts a zoning ordinance establish a ZBA (RSA 673:1)

Zoning ordinance provides that 1 size fits all, but in reality, one size fits most.

A ZBA provides a “safety valve” for those situations where strict application of the zoning would result in, among other considerations, the unfair inability to use one’s property for the requested purpose.

Organization

Membership

The ZBA has 5 members, each for a 3-year term (RSA 673:3)

No more than 2 appointed each year (unless for vacancy and then for the unexpired term)

May have up to 5 alternates (RSA 673:6)

Alternates sit only to fill a seat that is empty on a temporary basis (RSA 673:11)

Alternates may not participate when there is a full Board present

Alternates do not automatically move up to regular status. (RSA 673:12)

Quorum

Three members present and voting (no abstentions)

Meetings

At the call of the chair (RSA 673:10)

Chair and other officers elected annually (RSA 673:9)

Rules of Procedure to be adopted by the ZBA itself (RSA 676:1)

Nature of the ZBA

“Quasi Judicial” of “court-like” body –ZBA exists solely as an appellate body; it has no legislative function.

What is an “appellate body”?

ZBA hears only “appeals,” requests to “overturn” an ordinance or ruling

It does not have authority to hear any matter where there is no basis for appeal

The ZBA exists:

(a) To provide “procedural due process”

(b) By an impartial tribunal

(c) In an open and transparent manner

(d) Creating a record that permits meaningful judicial review upon appeal

(Paul G. Sanderson, Esq., LGC (The ZBA Decision Making Process))

What does this mean?

ZBA has the authority to overturn the decisions made by others within the community
BUT – in order to do so, it must be seen as NOT taking sides, must hold public and fair hearings and must explain clearly and on the record the basis for its decisions.

So what does this REALLY mean?

As an appellant body, the members must present themselves in a professional, attentive and fair manner and actually BE professional, attentive and fair;

In other words, ZBA members need to both look and act in a similar fashion to judges;
Dress the part – it shows respect to both the process and the applicant;
Avoid conflicts –

Do not communicate regarding an application with an applicant, abutter or others before, during or after the hearing (if it is appealed);

Chair Hurd noted that phone calls from applicants to ZBA members – the ZBA member should refrain from discussing the case to avoid a conflict of interest in the case.

She also commented that e-mail, phone calls, and personal contact between ZBA members should not include discussion about ongoing or pending ZBA cases. If e-mail communications occur among the members where there are three or more involved, then that communication qualifies as an illegal, unnoticed meeting. Discussion among any members outside of a public hearing may unfairly bias the members and need to be avoided.

Do not communicate with another ZBA member regarding a specific application before the public hearing

If there is any conflict or even appearance of a conflict with a person or property involved in an application, step down for that application;

This includes, for example, doing business with, being related to, being an abutter to an applicant, the applicant's business or a member of the applicant's family, and employing or advising an applicant.

A conflict exists when a member has or may be perceived as having a direct personal or financial interest in the outcome that differs from the interest of other citizens.

A conflict exists when a member is “not indifferent” to the outcome; in other words has formed an opinion as to the result *before* the public hearing (Winslow v Holderness)

When in doubt – step out

Participate and ask questions:

Questions should challenge the applicant to prove his or her case;

Questions should not contain the response you are hoping for or lead the person giving testimony;

Questions and their responses are a large part of the legal record of the hearing.

Discussion about information given by the applicant: if the plans are inaccurate or should be revised the ZBA should require the applicant to make the plans legible and accurate. Requiring a continuance of the case until the information is more consistent with requirements is a good practice.

Procedural Requirements

Each application, regardless of the category must follow 6 basic steps:

Application
Notification
Public Hearing
Findings of Fact
Decision/Statement of Reasons
Notice of Decision

Following these steps closely will reduce further the number of appeals to Superior Court as the first focus of any attorney on appeal will be whether or not the procedures were followed, as it is much easier to win on procedural issues than on the actual merits.

Mrs. Towle noted that site visits are a good option for the ZBA to better understand the circumstances of a case. Individual members can visit the site before the hearing, but the ZBA needs to formally notice a site visit and there are specific rules about how a site visit is conducted.

A. Application

Claremont follows the New Hampshire Office of Energy and Planning template, which incorporates the criteria set forth by both state law and the NH Supreme Court.

1. The application must be complete.
2. There must be a drawing of the property describing the relief sought.
3. There must be a complete listing of abutters. It is the applicant's responsibility to submit a complete and correct list.
4. Fees must be paid.

Without the 4 above items, the application should be rejected.

If someone other than the property owner is signing the application, authorization for the applicant's actions should be submitted in writing at the time of the application.

B. Notification

Notice of public hearing must be given by certified mail to the applicant and all abutters and all holders of conservation, preservation or agricultural preservation restrictions;

Notice must be no fewer than 5 days prior to the hearing;

Notice must be published in the newspaper no fewer than 5 days before the hearing;

Notice must be posted in at least 2 public places in the City;

Notice must state the time and place of the hearing;

Notice must describe the application, including the name of the applicant, the location of the property and what the applicant wants to do.

C. Public Hearing (RSA 676:7)

Must be held within 30 days of receipt of the application, may be waived by the applicant;
Procedures determined by local ZBA rules;
The applicant has the “burden of proof,” i.e., must show by a *preponderance of the evidence* that the relief sought meets the required criteria for the type of application;
Applicant has the “burden of production,” i.e., must place evidence in the record to support a finding of fact *on each element* for the type of application;
Applicant and those “directly affected” have right to be heard, others at ZBA discretion.

D. Findings of Fact (Deliberative Proceeding)

It is impossible to determine if the ZBA has made a “reasonable and lawful” decision unless there is a record for the basis of its decision.

Time for the ZBA to talk amongst itself –

Not the time to ask further questions of the parties or to take further questions
If do so, effectively re-opens the hearing and ALL then have the right to be heard.

ZBA should discuss the essential facts presented against each of the required criteria.

Remember – It is the Zoning Board of Adjustment, not the Zoning Board of Approval!

Did the applicant meet the burden of proof?
Did the applicant meet the burden of production?

E. Statement of Reasons/Decision

Just because it seems to be a good idea doesn’t mean you can vote in favor of it!

All applications must have at least 3 votes in favor of granting the application for it to be approved (RSA 674:33, III)

(Practice pointer – if fewer than 5 members in attendance, applicant should be given the option of postponing the hearing until a 5 member board can be assembled – See variances)

Each required criteria should be discussed separately prior to a vote on the motion to approve or deny the application, with members giving factual reasons for their positions.

Simply restating that the member thinks the application meets or does not meet the criterion is not adequate. The member must state WHY!

If a member finds that the applicant has not met any one criterion, then that member must vote against the application as a whole. *It is an all or nothing finding.*

Members voting against a specific criterion *must* state the reason(s) for his or her vote.

Remember – It’s a good idea is not an adequate reason unless supported by specifics!

Conditions as Part of Decision - There is no statutory authorization for the ZBA to grant conditions; however the NH Supreme Court has held on several occasions that it is within the ZBA's powers "to attach reasonable conditions where they are necessary to preserve the spirit of the ordinance." (*Robinson v. Town of Hudson* , 154 N.H. 563, 914 A.2d 239, 2006)**154 N.H. 563, 914 A.2d 239 (N.H. 2006)**

Mr. Worcester asked if he disagreed with certain conditions of approval, could he change them or would they stay that way in the motion. The best option for this scenario would be clear communication among ZBA members during the public hearing so any issues are cleared and any pending conditions of approval are acceptable to all prior to the formal motion.

F. Notice of Decision (RSA 676:3)

A written decision must be given to the applicant within 5 business days of the vote; if denied, the express reasons for the denial must be included, although it is recommended to also give the reasons for approval.

A few words generally - - -

Creation of a Record - There are many attorneys who are eager to go to court. Therefore, it is critical to create a strong record:

1. Ask questions
2. Be specific if you have any concerns
3. In establishing findings of fact on each criterion, a "yes" or "no" is not good enough. Each member should indicate the "why" related to the application meeting or not meeting the specific criteria.

REMEMBER – the fact that the applicant wants to “differ” from surrounding properties cannot be used to justify denial of an application – you need to clearly state the fact WHY the difference is significant.

Appeals to ZBA

Variances (RSA 674:33, I(b))

Variance standard effective 1/01/2010 by amendment of RSA 674:33, I(b):

Eliminates distinction between use and area variances

ZBA may authorize variance from the zoning ordinance so long as:

- Not contrary to the public interest.
- The spirit of the ordinance is observed.
- Substantial justice is done.
- The value of surrounding properties is not diminished.

Literal enforcement of the ordinance would result in unnecessary hardship to the owner.

In Layman's terms – A variance is a decision by the ZBA to exempt a specific structure or use from the zoning requirements.

Review Criteria to Grant Variance:

Review of the first 3 criteria should center on such factors as whether the variance would:

- *Alter the essential character of the locality*
- *Threaten public health, safety or welfare*

Additionally, it may ask and determine if a variance is even required (*Bartlett v. City of Manchester*, 164 N.H. 634 (2013))

I. *Not contrary to the public interest* – Applicant must show that there will be no harm to the public interest if granted; generally an application is only contrary to the public interest if it seriously violates the basic objectives of the zoning ordinance.

Mere conflict with terms of the ordinance is not sufficient to deny on this prong. The key issue is if it violates the ordinance's zoning objectives. (*Harborside Associates LP v. Parade Residence Hotel LLC*, 162 N.H. 508 (2011))

Considerations include

1. Whether the variance would alter the essential character of the neighborhood; and
2. Whether the variance would threaten public health, safety or welfare. (*Harborside*)

II. *Must Not be Contrary to the Spirit of the Ordinance*

Effect of granting the variance must not interfere with the underlying purpose of the restriction in the context of the health, safety or general welfare of the community.

Factors to consider may include traffic, public streets and sidewalks, fire safety, quality of air and light, etc.

III. *Granting the Variance Must Result In Substantial Justice*

Is the loss to the applicant outweighed by the public interest?

IV. *Not diminish value of surrounding property* – (new to statute in 2010 – previously case law only) Any loss to the individual that is not outweighed by a gain to the general public is an injustice.

V. *Would Not Result in Unnecessary Hardship*

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

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

Special conditions are found in the property itself and not in the individual plight of the applicant (Harrington v. Town of Warner, 152 NH 74, 81 (2005); Garrison v. Town of Henniker, 154 NH 26, 30 (2006); Rancourt v. City of Manchester, 149 N.H. 51 (2003))

i.e. Special condition of the land that distinguishes it from other land in some meaningful way in the same district with respect to suitability for use for which it is zoned that results in it being burdened more severely by the zoning restriction.

(i) *Because of the special conditions of the property.* No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) *The proposed use is a reasonable one.*

Presumption that the use is reasonable if is allowed in the district;

If not allowed in the district, ZBA determines reasonableness, but must have evidentiary basis for decision and make clear findings of fact to support its determination.

Key is how would affect the surrounding areas.

Just because the proposal is reasonable, it is not enough to meet the conditions for a variance – it must also meet all other criteria (Garrison v. Town of Henniker, 154 NH 26 (2006))

However –if the applicant cannot meet the above standard by demonstrating that the zoning ordinance precludes any reasonable use of the land THEN

(B) 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.

Standard from Governor’s Island Club v. Gilford, 124 NH 126 (1983) – stated that applicant must demonstrate that zoning ordinance prevented ANY reasonable use of the property.

Mr. Worcester asked if a certain case could create a precedent for future cases. Mrs. Taylor responded that generally, a decision does not make a precedent. If the same request occurs multiple times, then there is likely need to revise the Ordinance.

This standard for unnecessary hardship applies regardless of whether variance is sought from restriction on use, dimensional requirement or any other limitation set forth in the ordinance.

Disability Variances

All criteria apply EXCEPT requirement for unnecessary hardship.

NOTE: Revision to definition of "setback" in revisions to zoning ordinance excludes handicap accessible ramps from being subject to setback requirements of the ordinance.

Key Issues on Voting on Variance

1. Must have 3 affirmative votes to pass
2. Tie vote is a denial
3. If variance is denied, it may not be re-filed unless the application is substantially different from the one denied (Fisher v Dover – Res Judicata).

Appeal from Administrative Decision (RSA 674:33,I(a))

ZBA determines whether or not an administrative officer has made the correct decision, including where administrative official is alleged to have made error in the enforcement of any zoning ordinance regarding transfer of lots in unapproved subdivisions. (RSA 674:33, I(a)).

Plays role of a referee in determining the correct interpretation of rule or ordinance.

Example – denial of building permit because lot has 20ft frontage on public right of way where 50ft required

ZBA's role is to strictly construe the ordinance. (Trottier v City of Lebanon)

Does it require 50' frontage on a public way?

If so, how much does the lot have?

If less than 50', then uphold the administrative decision

Property owner's remedy may be to request a variance

Includes review of Planning Board decisions that are based on the construction, interpretation of application of the zoning ordinance (RSA 676:5(III))

Note: 2013 changes in law

ZBA may limit time applicant has to undertake approved variance and/or special exception to 2 years from date of final approval. (RSA 674:33, I-a & IV)

Appeal from Planning Board decision must come first, before any appeal to Superior Court pursuant to RSA 677:15.

Practice Pointer: An appeal of an administrative decision stays the action being appealed, unless the administrative officer certifies that a stay would cause "imminent peril to life, health, safety, property or the environment." (RSA 676:6)

Special Exceptions (RSA 674:33,IV)

ZBA may, where appropriate and "subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance."

Special exceptions are those uses permitted by the ordinance subject to specific conditions that are set forth in the ordinance (Sec. 22-63, and individual conditions in particular zoning districts - Claremont Code)

If ALL conditions are met, ZBA must grant the special exception.

If ALL conditions are not met, ZBA must deny the special exception (Shell Oil v Manchester; Tidd v Town of Alton)

ZBA may add conditions to its approval (Nestor v Meredith ZBA)

Equitable Waiver of Dimensional Requirements (RSA 674:33-a)

Most recent of ZBA responsibilities – added to help deal with the honest mistake, discovered after the fact.

Only applies to physical layout or dimensional requirement – NOT to use restrictions

Requirements

1. Discovered after structure substantially completed or after lot conveyed to bona fide purchaser;
2. Violation not result of ignorance, failure to inquire, obfuscation, misrepresentation or bad faith;
3. Violation result of good faith error,
4. Physical violation does not constitute a nuisance, diminish value of other property or affect the permissible future use of the property;
5. Due to the degree of construction or investment, cost of correction outweighs public benefit

If violation has existed for at least 10 years, owner does not have to prove lack of discovery or honest mistake, but must still prove no loss in value of surrounding property and that cost of correction outweighs the public benefit of correction.

Expansion of Non-conforming Use (RSA 674:19)

While non-conforming uses are permitted through the concept of vested rights, zoning ordinances, non-conforming uses are any alterations of a building for use for a purpose or in a manner that is not closely related to the use of the property had prior to the alteration or expansion of the use of the property. (*New London Land Use Assn. v. New London ZBA, 130 N.H. 510 (1988)*)

- Non-conforming uses may be expanded only if it is a "natural activity" of the use.
- A change of non-conforming use is not acceptable, even if less offensive to the ordinance;
- Non-conforming uses run with the land.

Changes to Section 22-113 of the Claremont zoning ordinance have attempted to clarify the issue of non-conforming lots and structures.

An expansion to or change of a non-conforming use would be obtained by use of a variance, understanding that the purpose of the zoning ordinance is to bring a non-conforming use into conformity with zoning as quickly as possible (*Granite State Minerals v Portsmouth*)

Rehearings & Appeals

For another day.....

V. Correspondence

There was no correspondence.

VI. Other

Motion: retain the ZBA officers as they presently stand until January 2015.

Made by: Chairman Hurd **Second:** Mr. Hanson **Vote:** Unanimous in favor.

VII. Adjournment

Motion: to adjourn the meeting.

Made by: Mr. Worcester **Second:** Mr. Nichols **Vote:** Unanimous in favor.

The meeting adjourned at 8:40 PM.

Respectfully submitted,
Michael McCrory
Interim City Planner