"ARRANGING Your FURNITURE" – Operational Basics For Local Land Use Boards

H. Bernard Waugh, Jr.
Gardner Fulton & Waugh, P.L.L.C
78 Bank St, Lebanon NH 03766-1727
(603) 448-2221
bernie.waugh@gardner-fulton.com
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This is a program on how N.H. planning boards and zoning boards of adjustment are fundamentally organized under State law. It deals with how these boards must "arrange their office furniture" – even before you open up for business; even before making any of the decisions you are authorized to make.

The law is not mathematically exact, and this lecture is only one lawyer's viewpoint. It's no substitute for checking with your town's own legal counsel.

I. The New Hampshire Right-to-Know Law.

The business of planning and zoning boards is ***the public's*** business. The Right-to-Know Law (RSA 91-A) is the bedrock for how ***all*** public bodies operate in New Hampshire. Since its requirements overhang every other topic to be discussed, we'll start with at look at it.

A. PURPOSE.

Part I, Article 8 of the N.H. Constitution reads:

> "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all time accountable to them. Government, therefore, should be open, accessible, accountable

> and responsive. To that end, the public's right of access to governmental ***proceedings*** and ***records*** shall not be unreasonably restricted."

Section 1 of RSA Ch. 91-A reflects this purpose when it says:

> "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."

There may be times when this law seems inefficient, or even contrary to what's good for the community. But the N.H. Constitution and State Law tell us that the benefits of open government outweigh these inconveniences, and that you, as public officials, must operate "in a fishbowl."

B. CONSEQUENCES OF VIOLATING THE LAW.

First, the court has the authority to ***invalidate*** action taken in violation of the Right-to-Know law. Secondly, if a citizen files a lawsuit to enforce the Right-to-Know law, the town or city ***or the official*** who has violated the law can become liable for that citizen's attorney's fees and costs. RSA 91-A:8. ***Hint: it's not worth it.***

> ***NEW 2012 PENALTY:*** Laws of 2012, Ch. 206 adds a new remedy a judge could impose. If the Court finds that a public official has violated the Right-to-Know Law in ***bad faith,*** the Court ***must*** impose a civil fine between $250 and $2000. The official may be required to reimburse the public agency (town) for any attorney's fees it has incurred. A court may also order "remedial training."

In *New Hampshire Challenge, Inc. v. Commissioner, New Hampshire Dept. of Educ.*, (1997), the N.H. Supreme Court said there were only two findings needed in order to grant a request for attorneys fees when a citizen prevails in a lawsuit: ***1st*** the lawsuit was necessary in order to obtain the information and ***2nd*** the governmental body knew or should have known that it was violating the law when it did not provide the information. So ***inadvertence***, confusion, etc. won't cut it!

Also be aware that it's a misdemeanor for anyone to knowingly destroy information with the purpose of preventing that information from being disclosed after a Right-to-Know Request has been made.

RIGHT-TO-KNOW, PART I - PUBLIC MEETINGS

The General Rule: A ***meeting*** of a ***public body*** must have proper ***notice*** and be ***open to the public*****.** Let's take a look at each of these four elements:

A. WHAT IS A "MEETING"?

It is the convening of a ***quorum*** to discuss or act upon any public business. RSA 91A:2, I. ***This includes work sessions and deliberations.*** (Chance meetings on the street are OK, as long as no official business is discussed.)

Question: What is a quorum? ***Answer:*** A ***majority*** of any board or committee constitutes a quorum, unless there is a statute, applicable to some specific board, which says otherwise. (See**:** *First Federal Savings & Loan v. State Board of Trust Co.*, 109 N.H. 467 (1969).) A majority of a quorum is all that is needed to take action, unless there is a statute which says otherwise (e.g. RSA 674:33, which in the case of a ZBA requires a concurring vote of 3 members).

> ***2008 Amendment*** – Expressly prohibits meetings or deliberations among a quorum through sequential E-mails or other electronic means. Therefore a series of E-mails may constitute an illegal "meeting."

Meeting with Attorney: A consultation with the board's legal counsel ***for purposes of receiving legal advice*** is ***excluded*** even from the definition of "meeting." Therefore such a conference needs no minutes, and need not comply with the "nonpublic session" requirements (below). ***But: be very, very careful not to allow such a meeting to drift into deliberations on a pending case!***

> ***2011 Court Case***: In *Ettinger v. Town of Madison Planning Board*, 162 N.H. 785, our NH Supreme Court held that a board ***cannot*** utilize this exemption unless the attorney available for a "contemporaneous exchange of words and ideas." Thus, your attorney must be present, either in person or by speaker phone. You ***cannot*** have a "non-meeting" to discuss written or E-mailed legal opinions (unless they deal with threatened or pending litigation, see below).
>
> ***Careful!*** If you ***do*** discuss the lawyer's written opinions in a ***public*** meeting, the chances are that those opinions will become public records (no longer under the attorney-client privilege). How do you prevent that. Alas, under *Ettinger* there are only two ways: (a) board members read the opinion individually, but don't discuss it as a board; or (b) have a "non-meeting" with your attorney present in person or by speaker-phone.

B. WHAT IS A "PUBLIC BODY"?

"Public bodies" include ***all*** committees, boards, subcommittees, agencies, etc., which perform a governmental function in the community ***including all designated subcommittees or informal advisory committees***. RSA 91-A:1-a. *Bradbury v. Shaw*, 116 N.H. 388 (1976). ***So notice!*** A board cannot escape the public meeting requirement simply by selecting a less-than-quorum group to meet on an issue. Why? Because that group now constitutes a ***subcommittee.***

C. WHAT NOTICE IS REQUIRED?

All meetings must have at least 24-hour notice (not counting Sundays and holidays) prior to the meeting. Notice must be ***either*** published in a newspaper ***or*** posted in 2 prominent public places. RSA 91-A:2, II. Local ordinances can be even stricter about notice. [One of the public places can be a town's official website.]

This 24-hour notice is only a ***minimum*** under the Right-to-Know law. Other statutes can be more strict. For example: (1) Planning board public hearings require 10-day notice under RSA 676:4, I(d); (2) Zoning Board of Adjustment hearings require 5 days' notice under RSA 676:7.

EXCEPTIONS TO NOTICE REQUIREMENTS:

(a) ***Emergencies***. If you have a meeting which is too urgent to give proper notice, the nature of the emergency must be stated in the minutes of the meeting. Notice should still be given to the extent possible (For example, post a notice even if less than 24 hours). RSA 91-A:2.

(b) ***Adjourned (Recessed or Continued) Sessions*** do not require notice, ***as long as*** the time, date and place of the session was announced at a previous, properly noticed, session of the same meeting.

D. WHAT DOES "OPEN TO THE PUBLIC" MEAN?

Anyone (not just local residents) can attend any public meeting. They can take notes, tape record, take pictures, and videotapes. But "open to the public" does ***not*** necessarily mean the right to speak at the meeting. ***Nobody*** has a right to disrupt a meeting or to speak without being invited. Chapter 91-A itself only gives a right to attend, not a right to participate. See ***State v. Dominic***, 117 N.H. 573 (1977) (Selectman convicted of disorderly conduct for disrupting selectman's meeting).

SECRET TAPING: I often get questions about whether citizens are required to inform the board or body that they are taping a meeting. The answer is no. Public meetings are not circumstances where there is an expectation of privacy. Thus secretly taping them does ***not*** constitute illegal wiretapping.

Obviously there may be reasons to allow public input, at specifically-designated portions of the meeting – e.g. when a public hearing is required.

E. MINUTES OF PUBLIC MEETINGS.

Minutes must be kept of ***all*** public meetings and must be available to the public within ***FIVE BUSINESS DAYS*** after the close of the meeting.

> ***Minimum Content of Minutes****:* (a) members present, (b) other people ***participating*** (it's not necessary to list everyone present), (c) a "***brief description***" of subject matter discussed, and (d) any final decisions reached or action taken.

Note: Take that "brief description" wording seriously! You want good records, but you also don't want to waste hours and hours trying to correct a near-verbatim transcription of what happened ("Hey, that isn't what I said!")

Note also: The Right-to-Know law itself has ***no*** "minutes approval" requirement! It is obviously a good idea to approve minutes, to help keep them as accurate as possible. But approval need not occur within the 5-day limit (or indeed at all). [Non-approved minutes should be marked "DRAFT."]

F. NONPUBLIC SESSIONS – EXCEPTIONS TO THE PUBLIC MEETING REQUIREMENT.

(1). ***Nonpublic Sessions*** are meetings which the public does ***not*** have the right to attend. Nonpublic sessions are allowed ***only*** for the exemptions specified in the statute – RSA 91-A:3, II. Since 1991 a public body can no longer exclude the public for ***deliberations;*** all deliberations must be done in a public session unless one of the exemptions applies.

(2) ***Statutory Exemptions*****:** These are listed in RSA 91-A:3, II. The ones that local land use boards might be interested in are:

> **(a)** The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against the employee, unless the employee affected (1) ***has a right to a meeting*** and (2) requests that the meeting be open, ***in which case the request shall be granted.*** (91-A:3, II(a))

(b) The hiring of a public employee (91-A:3, II(b)).

> **2008 Supreme Court Case:** *Lambert v. Belknap County Convention* – The filling of a vacancy in a public office (for example a ZBA) is NOT the "hiring" of a public employee, and CANNOT be discussed in nonpublic session.

(c) Matters which would affect someone's reputation ***other than a member of the body itself*** if made public (if that person requests, the meeting must be public) (91-A:3, II(c)).

(d) Consideration of lawsuits threatened in writing or filed against the body or one of its members (91-A:3, II(e)).

(3). ***How To Go Into Non-Public Session:***

First: The body must have a properly noticed public meeting (need not necessarily be the same day as the non-public session).

Second: A motion to have a nonpublic session must be made and seconded, stating which specific exemption is relied upon.

Third: A roll call vote must be taken, with a majority of those present voting yes. While the statute does not require you to keep minutes of the motion and vote, it is a good idea to do so. ***ONLY the matters specified in the motion can be discussed in the nonpublic session.***

G. MINUTES OF NONPUBLIC SESSIONS

The statute requires that minutes be kept of the proceedings and actions of nonpublic sessions. These minutes must be released to the public within ***72 hours*** (not 144 as with regular meetings), unless 2/3 of the members present in a ***recorded vote*** decide not to release the minutes because of (a) somebody's reputation (other than a board member), or (b) releasing them would make the action taken ineffectual.

Caution*:** Unless you take the 2/3 vote to not release the minutes of a nonpublic session, those minutes are public records and must be released (*Orford Teachers Assn. v. Watson*, 121 N.H. 118 (1981)). In other words ***the fact that the session itself was nonpublic does not automatically make the minutes nonpublic.

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RIGHT-TO-KNOW, PART 2 - PUBLIC RECORDS

A. WHAT IS A PUBLIC RECORD?

Anything with information concerning the town's or city's business is a public record, and must be made available to the public unless there is an exception (below). The following provisions apply, as a general rule:

(1) ***When?*** The records must be available for inspection during regular business hours – unless a record is temporarily unavailable because it's actually being used. However, the Supreme Court has said that when the office is very busy, officials can ask the citizen to ***make an appointment*** to review the records. The maximum time anyone can be required to wait is 5 days. *Brent v. Paquette,* 132 N.H. 415 (1989).

(2) ***Copies.*** Any citizen may make notes, tapes, photos, or photocopies. The municipality should not hand over the records for copying (see RSA 41:61), but should make its photocopy equipment available at ***actual*** cost. Several Superior Court cases have held that towns can include in the "actual cost" computation an amount for staff time needed to make the copies as well as the actual mechanical costs of copying.

(3) ***Form.*** If the information exists in a more convenient ***form***, that must also be made available. (For example in *Menge v. City of Manchester*, 113 N.H. 533 (1973), the court said the city had to make its ***computerized*** tax records available. For the City to offer Menge only photocopies of the paper assessment cards was not enough.) Also in *Hawkins v. N.H. Dept. of Health and Human Services,* 147 N.H. 376 (2001), the Court also said that it is the duty of public bodies to hold records in a ***format*** which makes them ***actually*** available to the public.

(4) The ***motives*** of the person requesting the information are not relevant, and cannot even be asked about. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996).

(5) ***Raw Materials.*** Tapes, rough notes, etc., which are used to compile the official minutes ***are*** public records too. These materials can be destroyed after the official minutes are prepared, but they are public ***until*** destroyed. Note, however, that tapes or notes made by a board member for ***personal*** use are not public records (*Brent v. Paquette*, 132 N.H. 415 (1989), and this exclusion is explicitly (as of 2004) recognized by statute. [Hint: make sure you designate who is taking the official minutes.]

(6) ***Preliminary Drafts.*** As of 2004 the Right-to-Know law exempts preliminary drafts of documents from release under RSA 91-A, ***but*** only to

the extent that such drafts *are never disclosed circulated, or available to a quorum or majority of the public body involved*." Thus if you are a board member working at home on a motion (proposed decision) to present to the board, your preliminary drafts are not public documents, ***but*** once one of those drafts is actually circulated to, or discussed, by a quorum of the board, it ***is*** public (even if it isn't "final").

2008 Amendment – Any document, *INCLUDING E-MAIL*, which eventually reaches a quorum of a public body, is a public record. Hint: NO SINGLE PERSON CAN CONTROL HOW MANY PEOPLE EVENTUALLY GET THEIR E-MAILS!

B. STATUTORY EXEMPTIONS.

The following types of records are ***not*** available to the public (this is not a complete list, but the following may be relevant to local land use boards):

(1) Records pertaining to internal personnel files or practices, including police internal investigation documents (91-A:5, IV). See: *Union Leader Corporation v. Fenniman*, 136 NH 624 (1993). (However, salaries, and lists of employees are ***not*** exempt. *Mans v. Lebanon School Board*, 112 NH 160 (1972).)

(2) Confidential or commercial information, if its release would be an invasion of privacy (91-A:5, IV). (***Note: Balancing Test***: You can't call something "confidential" or "private" just by marking it that way. Instead, with the confidential and privacy exemptions, you must apply a "balancing test" used by the Supreme Court to determine whether or not the record should be released. The test: If "the benefits to the public of disclosure outweigh the privacy benefits of non-disclosure," then the record should be released. The *Brent* and *Union Leader v. Nashua* cases (above) say that the real underlying issue is whether release of the record would aid the citizen to understand any aspect of his/her government.) *Also see Union Leader Corp. v. NH Retirement System***,** 163 N.H. 673 (2011)

(3) Written legal advice. (*SPNHF v. WSPCC*, 115 N.H. 192 (1975).)

Note Applications: Information submitted with local land use applications will in general ***not*** be confidential, because other parties have a Due Process right to respond. If an applicant offers information solely on a "confidential only" basis, you should in general not accept it. An applicant has the burden of proof in all applications, and that means adequate ***non-***confidential information to enable the board to make a decision.

C. PARTIAL RELEASE.

If only ***part*** of a public record is subject to an exemption, the part which isn't should be released. If a case goes to court, the burden of proof will be on the town/city to prove that the material is subject to an exemption. Further, if the information requested is not compiled in convenient form, officials have no duty to compile it, but must allow the citizen to do so if s/he wants to. *Brent v. Paquette*, 132 N.H. 415 (1989).

D. REMOVAL FOR VIOLATION OF CONFIDENTIALITY.

RSA 42:1-a makes it a breach of the oath of office under RSA Chapter 42, for any municipal officer to divulge to the public any information learned by virtue of his/her official position if either (a) the public body has voted to withhold that information from the public by a vote of 2/3 under the Right-to-Know law ***or*** (b) the official knew or reasonably should have known that the information was exempt from disclosure under the Right-to-Know law ***and*** that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body, or would render proposed municipal action ineffective. The method of removing someone under this statute is by petition to the superior court – it is ***not*** an automatic removal.

E. HOW TO DEAL WITH E-MAIL, ETC.

It is so easy these days, using E-mail or chat rooms, to conduct what amounts to a "meeting" without notifying the public. ***The 2008 statute makes it clear that once this discussion reaches a quorum (something no single person has control over) then (a) the E-mails are public records, and (b) you are violating the Right-to-know Law by holding a non-public meeting.***

One approach is to simply adopt a policy prohibiting board members from communicating about any official business by E-mail. My sense is here in the 21st Century such a policy is unrealistic and is bound to be violated.

The alternative is to adopt a policy addressing the issue head-on. Here is one example of a policy that was adopted in one community by the Planning Board (as part of its by-laws, *see* Section III below). Your board should ***not*** simply adopt this lock, stock and barrel. But it may give you some ideas from which to develop your own.

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E-MAIL AND OTHER BETWEEN-MEETING COMMUNICATIONS (Sample Policy).

A. Purpose. The aims of this policy are:

- To ensure compliance with the letter and spirit of the Right-to-Know Law, RSA 91-A, and with the Due Process rights of parties before the Board;
- To clarify Board members' ability, between meetings, to research issues and prepare motions or other potential Board actions, thus promoting efficient use of meeting time, but only to the extent allowed by law; and
- To clarify the role of electronic media such as E-mail in achieving these goals, consistent with the 2008 version of the statute.

B. Definitions. In this policy:

- "Communication" means a transfer of information, objective or subjective, from one person to another. It includes face-to-face or phone conversations, letters, memos, E-mails, web sites, or any other medium, regardless of the location or ownership of any device or equipment used.
- Any between-meeting communication involving more than one Board member shall be considered either a "Distribution" or an "Exchange."
- A "Distribution" is a one-way communication, where no between-meeting response (except acknowledgment of receipt) occurs or is expected.
- An "Exchange" is a between-meeting communication, or series of them, which involves a between-meeting response, or expectation of response.
- "Ex Parte communication" is communication, other than at a legally-noticed meeting, between a Board member and a person with an interest in, or affected by, a pending or future case, or other matter within the Board's jurisdiction.

C. Between-Meeting Activities Of Individual Members. Individual Board members may, between meetings, prepare drafts of motions or other potential Board actions. They may also research or investigate general or specific factual issues. However, if the research pertains to a case, the member shall, at the public hearing, report all findings to the Board, and parties to the case shall be given a meaningful opportunity to respond.

D. Distributions. A Distribution may be made to any number of Board members, so long as it does not become an Exchange. Whenever a member makes a Distribution concerning a pending or future case, and it involves a quorum of the Board (counting all senders and recipients):

- A copy shall be forwarded to the Town Planner, who shall determine, under RSA 91-A or other applicable law, whether the Distribution is subject to public disclosure, and shall place the copy in the appropriate file;
- Unless the information is exempt from disclosure under RSA 91-A, the member making the Distribution shall report on it, and its contents, at the public hearing on the case; and
- Parties to the case shall be given a meaningful opportunity to respond to the information in the Distribution.

E. Exchanges. Exchanges involving a quorum or more of the Board, or of any subcommittee as defined below, are prohibited. Such Exchanges shall be considered deliberations, and shall occur only at public meetings noticed in accordance with RSA 91-A. An Exchange pertaining to any activity allowed under paragraph C is permitted if the number of Board or subcommittee members involved is *less* than a quorum; however:

- Each member involved shall be responsible for preventing the number of members involved from reaching a quorum;
- Information discussed in, or generated by, an Exchange shall not be subject to further Distribution; and
- No Exchange shall include any vote or straw vote, or any Ex Parte communication.

F. Ex Parte Communications. Board members shall not initiate Ex Parte communications. If an Ex Parte communication is initiated by another person, the Board member contacted shall:

- Refrain from discussing the substance or merits of a case;
- Inform the person, if necessary, that such a discussion could lead to disqualification;
- Refer the person to the Planning Office or to a Board meeting, as appropriate; and
- Report on the conversation to the Board at a public meeting.

G. Scheduling and Agenda. Notwithstanding paragraphs D, E and F, nothing in this policy prevents any Distributions, Exchanges or Ex Parte communications which pertain solely to:

- Scheduling of meetings or hearings;
- The determination or ordering of agenda items or topics to be taken up at meetings or hearings; or
- General procedural requirements pertaining to such scheduling and agenda matters.

H. Subcommittees. A subcommittee is any group of two or more persons, including at least one Board member, to which the Board has assigned a specific task related to Board business. A subcommittee shall be considered a public body, and all provisions of RSA 91-A and this policy, applicable to a quorum of the Board, shall also apply to a quorum of a subcommittee.

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II. Membership Of Local Land Use Boards (Clothing Ordinary Folks With Power Over Other People's Property!)

A. How Members Are Selected.

PLANNING BOARD:

- 5 or 7 members, as determined by the local legislative body, RSA 673:2 (II), for 3-year staggered terms. (Different in cities or towns with charters.)
- May be elected or appointed RSA 673:2 (II)
- Must be a local resident if either appointed; (RSA 673:2 (II) or elected, RSA 669:6).
- At least one member must be an "ex officio" member of governing body (selectmen). May be different if community has charter. ***"Ex Officio" does NOT mean non-voting.*** The ex-officio member, however, cannot be chair. (3-year term does not apply to the ex-officio member).

ZONING BOARD OF ADJUSTMENT:

- Five regular members; no "ex officio" members; staggered three-year terms. (RSA 673:4).
    - There is no reason a Selectman cannot be a ZBA member (except in a town where the Selectmen make "administrative decisions," in which case that member would have to step down on any appeal of an administrative decision).
- Members are appointed or elected, as determined by local legislative body (town meeting/council).

B. Filling Vacancies:

- ***What is a vacancy?*** A position is vacant when a person resigns, dies, ceases to have domicile in the town or district, is determined by a court to be incompetent, is convicted of certain crimes (felonies), or refuses to take the oath of office.

- For appointed planning board ***or*** ZBA, the "appointing authority" fills vacancies in either regular or alternate positions. [It is also possible for the board's ***Chair*** to "fill a vacancy" in a regular member position by appointing an alternate on a meeting-by-meeting basis.]
- For elected boards, the remaining regular members fill the vacancies until the next regular election, when the vacancy is filled for the remainder of the person's term.
    - Note that the "next regular election" is the next election where the ***beginning of the filing period*** occurs after the vacancy. (If the resignation, death, etc., occurs after the beginning of the filing period, then the appointment lasts another election cycle.)
- For the *ex-officio* planning board member, a vacancy is filled by the governing body being represented.

C. ALTERNATES.

- For ***appointed*** planning boards, RSA 673:6 (I) says that ***local legislative body*** (town meeting) may provide for the appointment (by the same body that appoints the regular members) of not more than 5 alternates, with 3-year staggered terms.
- RSA 673:6 (II) says that an ***elected*** planning board may ***itself*** appoint 5 alternates for 3 years each.
- For ZBA's, you may have up to 5 alternates, ***if*** permitted by vote of the ***local legislative body***. Alternates are appointed by the "appointing authority" (designated locally), for an appointed ZBA. For an elected ZBA, they are appointed by the ZBA itself.
- ***Designation of Alternates:*** During a meeting, the Chairman designates alternates to serve in the place of absent or disqualified regular members (RSA 673:11). Alternates may serve for an individual case or an entire meeting, as necessary.
- Alternates have full board member authority when sitting on case, but ***no*** authority when they are ***not*** sitting.
    - Suggestion: To avoid confusion, when the board is hearing cases (by contrast with, e.g. master plan study sessions), alternates should ***not*** sit with the Board at the head of the room, and should not be asking questions of parties, ***except*** when they will (or may) be ***voting*** on the case.
    - However, alternates should be encouraged to attend and observe both for practice and in case they are needed then or later.

- ***Continuity*** of members hearing a case that is continued to another meeting is not required ***by statute,*** however the best practice is to try to provide for continuity if possible.
    - If you know a case may stretch over many hearings, it may be advisable to have some alternates sit, so that you will be assured of a full board (or quorum) at the time of the final vote.
    - Legislation in 2010 specifically allows participation by alternates in a case where they will not necessarily vote.
    - It is my recommendation, however, that once the hearing is closed and deliberations begin, only those voting should be sitting.
    - Of course no one with a conflict of interest should ever sit with the board, regardless of regular/alternate status.

D. QUORUM.

- ***For Planning Boards,*** a quorum is a simple majority of the Board, and a vote by a majority of a quorum is a legal vote on any measure.

- ***For ZBAs,*** there is a special majority requirement, namely that at least 3 members must vote on any permit or request for relief.
    - If you have only 3 or 4 members present, the applicant's chances are reduced.
    - ***Suggestion:*** Give the applicant a choice to either (a) wait for a meeting when a full board will be present; or (b) to proceed, but with the understanding that a split vote (2-2 or 2-1) will automatically entitle the applicant to a rehearing with a full board.
    - ***Note:*** This is ***only*** a suggestion. It is not (yet) the law. So far there are no NH cases mandating an opportunity for a full 5-member board.

E. MULTIPLE BOARD MEMBERSHIP.

- Under RSA 673:7, multiple board membership is OK, ***except*** that it can never result in ***two*** planning board members (ex-officio or otherwise) serving on the same ***other*** board (if that other board is a land use board, conservation commission or governing body).
    - Although the law is not clear, in my view you should assume this prohibition also includes ***alternates*** – so that you should never have a situation where, for example, a regular and an alternate member of the planning board both serve on the ZBA (even as an alternate ZBA member).

F. DE FACTO BOARD MEMBERS.

- ***Oath of Office.*** All board members, including alternates, must take the oath (RSA 42:1).
- ***When?*** The timing of the annual oath-taking is up to the governing body (RSA 42:3). For elected members, it must be after the time for requesting recounts is over.
- ***What if you don't?*** Sometimes it happens that a board member who is reappointed term after term forgets to be sworn in again. Or the Selectmen forget to sign any new appointment, and this situation can go on for years! Is that person still a legal board member?
    - Don't panic! A member actually holding office (recognized by the Chair and remaining board members as sitting on a case) is considered a ***de facto*** officer, and a decision actually made by that member cannot be collaterally attacked. In practical terms, this means that: (a) you don't need to worry that past actions of the board will be somehow declared invalid; and (b) even for a matter before the board right now, the challenging party's only option would be to file a lawsuit challenging the member's right to sit.
    - The term of a board member in office always extends as long as it takes to choose and qualify a successor (Think of this as a no-gaps-in-office rule).
    - On the other hand, of course, it's best not to let these things slip by!

III. Rules of Procedure (By-laws).

"***Every*** *local land use board* ***shall*** *adopt rules of procedure concerning the method of conducting its business. Rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with city, town, village district clerk or clerk for the county commissioners for public inspection.*" (RSA 676:1)

- ***Keep them simple.*** Think about how you want your meetings conducted, then craft the bylaws to suit that desire. Include statutory requirements, such as notice and filing deadlines (bylaws are easy to change). For an example for the ZBA, see the OEP ZBA Handbook.
- ***You DON'T need Roberts' Rules.*** Parliamentary procedure for land use boards follows the general principle that the Chair is always right,

unless overruled by a majority of the board. So these rules need not be in the By-laws. ***Remember, sometimes falling back on parliamentary procedure can be the only way to move beyond an impasse.*** Thus, if informal deliberations aren't getting anywhere, the Chair should never hesitate to fall back on formal procedures – i.e. having a motion on the floor, etc.

- ***Follow your own rules****…or else*!…or else you risk otherwise valid actions being declared invalid (*Appeal of Barbara Nolan*, 134 N.H. 723, (1991)) ***Note:*** If you want to retain the authority to ***waive*** the rules (example: time for ZBA administrative appeal), you should include a waiver provision in the rules themselves – *see Greene v. Town of Deering*, 151 N.H. 795 (2005).

- ***Officers.*** The board itself determines who its officers are (a chairman is required, and others as the board deems fit). Don't make it a popularity contest – think about who will do the best job. Appropriate officers are Chairman, Vice Chairman, and Secretary/Clerk. Officers' terms are for 1 year (673:9).
    - ***May the Chair Vote?*** Yes, yes, yes! The chairman is not like the President of the Senate, who only votes to break ties.

- ***Reconsideration.*** Include a by-law provision for reconsideration of your decisions ***on the Board's own motion.*** (This has specifically been upheld by the NH Supreme Court in the case of ***74 Cox St., LLC v. City of Nashua*, (Sept 21, '07) –** the court holding that a ZBA (and the logic also applies to planning boards) has "inherent authority" to reconsider a decision at any time ***before the appeals period elapses and the decision becomes final.***) Thus boards (by motion of a member in the majority) should clearly have the ability to move to correct their mistakes – for example you discover that a decision was made on the basis of applicant fraud. There may be time limits beyond which no reconsideration is allowed (for example vested rights have attached). But this would depend on all the circumstances of a case.

- ***Other critical points to include in rules of procedure.***
    - ***ZBA:*** *Time limit for filing administrative appeals* (RSA 676:5 "Such appeal shall be taken within a reasonable time, as provided by the rules of the board"). ***Recommendation****: 30 days, BUT… with a provision allowing the Board to waive the time period if the person appealing demonstrates to the Board's satisfaction that he or she did not know, and could not reasonably have known, that the decision had been made* (*see*

Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998); see also *Greene v. Town of Deering*, 151 N.H. 795 (March 2005)).

- o ***ZBA:*** *Question: Should you have in your bylaws a time limit for making a decision after the hearing? Recommendation: at least 30 days (or no limit at all).* If you do insert a limit you should allow for an extension at the request or permission of the applicant. (Note that the planning board's time limits are set by statute, RSA 676:4-a – basically a 65-day clock following acceptance of the final application as complete).

- o ***PB and ZBA: Joint Hearings.*** Procedures for joint hearings with other boards are ***required*** if requested by an applicant (for cases where both boards' approval is needed). *But each board should mind its own business!* In other words, each board participating in the joint hearing must make its own decision on its own subject matter (and must deliberate separately). If the planning board is involved, the chair of that board runs the joint meeting. (RSA 676:2).

- o ***Format*** for hearings. For pure quasi-judicial hearings (e.g. a variance application), I recommend 4 stages: (a) Presentation by applicant and those in favor; (b) Presentation by any opposed; (c) Rebuttal by those in favor; (d) Rebuttal by those opposed.

IV. Money Issues.

- ***Staff and Expenses.*** A land use board is authorized to have staff and make expenditures, but there must be an approved budget for it. (673:16, I.) If the Board of Selectmen retains control of the purse strings (almost always true, unless the town meeting pass an article saying otherwise), then the Selectmen also control your ability to spend – for example retaining legal counsel and hiring other staff.

  - o ***Whose lawyer is it, anyway****?* If the Selectmen control the legal budget and only hire a certain attorney – then that person ***is*** your lawyer. On the other hand, if the attorney is representing the board, legal strategy, etc., should be determined in consultation with the board, not some other body (analogy with a rich uncle hiring a lawyer to defend his nephew – the nephew still calls the shots on legal strategy).

- ***Costs of Public Notices and Abutter Notification.*** An applicant should be responsible for bearing this financial burden. But it is the ***board's*** obligation to ensure that this happens. The board can collect from the applicant the costs of newspaper notification and certified mailings to abutters and others as required by statute. These expenditures ***do not*** have to be approved by the local legislative body. (RSA 673:16, II; 676:7, IV)
- ***Expert Review of Applications?*** RSA 673:16, II speaks generally of the board's ability to collect fees coving "*the expense of notice, the expense of consultant services or investigative studies under RSA 676:4, I(g) or the implementation of conditions lawfully imposed…*"
    - For the ***ZBA*** there is (as of 2010) a similar statute (*see* RSA 676:5, V). However, for a project requiring both ZBA and planning board review, the ZBA study or peer review requirement ***cannot duplicate*** a requirement already imposed by the planning board.
    - In my opinion, however, ***either*** board can charge such costs to an applicant ***if and only if*** the information you need from the "expert" is crucial enough to give you the information you need to make a decision, such that if an applicant ***refuses*** to pay, you could deny the application for failure to satisfy the burden of proof (and have that denial upheld in court). [In fact, that's a general rule you can probably use as a "check" for ***any*** condition of approval.]
    - For both boards, the law gives the applicant the right to ***detailed invoices*** from the entity providing the services.

V. Conflicts of Interest and Disqualification.

Citizens with a beef against a decision often try to attack, not the substance of the decision, but ***who made it***. The popular name for this type of charge is "conflict of interest."

A. CONFLICTS DISTINGUISHED FROM INCOMPATIBILITY.

The "conflict of interest" issue (whether an official is disqualified to make a particular decision) is often confused with the issue of whether a person is disqualified from holding office at all. For example, someone might say, "I

don't think it's proper for a real estate broker to be on the planning board." If a realtor represents a developer, he obviously can't vote on that developer's application. But she certainly is ***not*** ineligible to be on the board at all. The ***conflict*** question focuses on specific decisions, whereas the ***incompatibility*** question focuses on the office a person holds. The only incompatibility rules applying to land use boards are the multiple membership rules (see above).

B. LEGISLATIVE VERSUS JUDICIAL FUNCTIONS

Not all decisions made by land use board members are subject to challenge because of a conflict of interest. Courts from many states have said that even blatant bias or prejudice does not constitute grounds for disqualification when an official is acting in a ***legislative*** capacity (e.g. a planning board member recommending zoning amendments. In those states, for example, a city council member would not be disqualified from voting on an ordinance which affected an entire city, even if he himself had a direct financial interest.

New Hampshire Law. N.H. cases have not gone quite so far. But they have recognized a difference between legislative and quasi-judicial decisions. In *Michael v. City of Rochester*, 119 N.H. 734 (l979) the N.H. Supreme Court refused to invalidate a city council decision despite one member's conflict of interest because "no judicial function was involved." And in *Appeal of Cheney*, 130 N.H. 589, 594 (1988), Justice Souter said that the rule for legislative functions is that a conflict invalidates a vote "*only if the vote improperly cast determined the outcome,*" i.e. if it's the deciding vote. See also *Merrimack v. McCray*, 150 N.H. 811 (2004).

The Quinlan Case - Legislators Can Prejudge: In *Quinlan v. City of Dover*, 136 N.H. 226 (1992), the Court held that in a ***legislative*** context, the mere fact that a city councilor has spoken out on one side of an issue in advance ("prejudgment") does ***not*** disqualify him/her from voting on that issue ***at all***. The Court repeated its statement from the ***Michael*** case, however, that a ***financial*** conflict-of-interest would void the vote if it determined the outcome.

C. HOW TO TELL THE DIFFERENCE.

Whether a decision is legislative or judicial depends, not on who makes the decision, but rather on its subject matter. The Court has said that a municipal body is acting judicially when it decides matters which affect the rights of a specific petitioner with respect to a specific parcel of land. *Ehrenberg v. City of Concord*, 120 N.H. 656 (1980). Also:

> "If (the municipal officials) are bound to notify, and hear the parties, and can only decide after weighing and considering such

evidence and arguments as the parties choose to lay before them, their action is judicial." *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984). See also *In Re Bethlehem*, 154 N.H. 314 (2006).

D. N.H. CASES INVOLVING QUASI-JUDICIAL DECISIONS.

The Standard Of Impartiality Part I Article 35 of the N.H. Constitution says that "*it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit*." The courts have applied this rule to all judicial or quasi-judicial decisions. ***This includes all land use board decisions on specific applications.***

1. Prejudgment.

(a) A man who had voted in favor of a project as a member of the planning board was ***not disqualified*** from voting on the same project as a member of the city council. His participation as a planning board member "does not prove that he had an interest in the project other than that of any other citizen." *Atherton v. Concord*, (supra). Thus a ZBA member, say, who voted on a variance request would ***not*** be disqualified from acting on a motion for rehearing. That's just process, not bias.

(b) A man who had spoken in favor of a project at a public hearing before the planning board ***was disqualified*** from voting on the same project when he later became a board member because he had "prejudged the ***facts*** of the case before joining the board." *Winslow*, (supra).

(c) A board chairman who had testified before the N.H. Bank Commission in favor of a bank in his town was ***not disqualified*** from sitting on an application for a variance which was necessary to build a bank building. The Court said the issue of the desirability of a bank in town was different from the issue of a variance to put the bank on a particular location.

2. Abutters. Anyone owning land abutting a piece of property which is the subject of some type of application is ***disqualified*** from acting on that application. *Totty v. Grantham Planning Board*, 120 N.H. 390 (1980).

3. Financial interest in the outcome. A public officer is disqualified if he has "a direct personal and pecuniary interest" *Preston v. Gillam*, 104 N.H. 261. However 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*, (supra).

4. Employment. An employment relationship with an interested party ***might*** be grounds for disqualification, but the following cases indicate that the rule has exceptions, and that it is possible for an employment relationship to be so remote that the employee in reality has no interest different from that of the general public.

(a) An attorney who had formerly been employed by the Concord Housing Authority, but who had been paid for those services, was no longer employed, and who stated, without anyone giving contradicting evidence, that he had no bias, was ***not disqualified*** from voting on an application by the Housing Authority. *Atherton*, (supra).

(b) An employee of a Rockingham County food surplus program was ***not disqualified*** from sitting on the Board of Adjustment in a case in which the County was applicant for a nursing home expansion. He had testified that he was free of bias, and the court found he had no pecuniary interest in the outcome. *Sherman v. Town of Brentwood*, 112 N.H. 122 (1972).

(c) A county commissioner, deciding on the necessity of taking land for an airport purposes was ***disqualified*** when it was discovered that his law partner had represented a party to the dispute in question. *Appeal of City of Keene*, 141 N.H. 797 (1996). The court held the entire decision void, because it was impossible to estimate the influence of the disqualified person.

(d) A ZBA member who was a former employee of one of the parties in a case was held ***not disqualified*** in the absence of any evidence that she was anything other than personally indifferent to the outcome. *Taylor v. Wakefield*, 158 N.H. 35 (2008).

5. Family relationships. There are no New Hampshire court cases on the extent to which a family relationship can constitute a conflict of interest on municipal boards. In other states this factor can be disqualifying, depending (once again) on the facts, and the degree of relationship. A person almost always has a direct interest in his or her spouse's affairs (See *Sokolinski v. Municipal Council of Township of Woodbridge*, 469 A.2d 96 (New Jersey 1983).

In *City of Rochester v. Blaisdell*, (May, 1992), a taxpayer was in a dispute with the City. It turned out that one of the partners in the City's law firm (who hadn't actually participated in the case at all) was an uncle of the judge hearing the case, although they hadn't seen each other in 20 years. The Supreme Court held, based on the N.H Code of Judicial Conduct, that the judge at least had a duty to inform the parties, so that they could request him to step down.

In *Webster v. Candia*, 146 N.H. 430 (2001), where a board member's wife was one of the leading opponents of a project, the trial court was upheld in finding, based on the evidence, that the husband was biased. (***Hmm…Interesting marriage!***)

E. LAND USE BOARDS - THE STATUTE.

Since 1988 all local land use boards have been subject to RSA 673:14 which prevents a member from sitting on a case:

> "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."

Note that under RSA 500-A:12, a juror ***may*** be disqualified for any of the following reasons, namely that he or she:

(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court. ...'.

Equally important in RSA 673:14 is the ***procedure*** it sets up. Any person on the board (but ***not*** people in the audience) can ask for a vote on whether s/he herself ***or any other member*** is disqualified in a case. The vote must be taken prior to the public hearing in the case. The statute says the vote is non-binding. But I'd hate to have to go to court with a case where the board voted that someone was disqualified, but s/he refused to step down.

- In *Bayson Props., Inc. v. City of Lebanon*, 150 N.H. 167 (2003) it was held that, even though only board members can ask for a ***vote*** on disqualification under RSA 673:14, nevertheless ***any*** party can ***object*** to a particular member, based on a conflict of interest.

- ***IMPORTANT:*** In fact, not only ***may*** a party object – the party ***must*** object at the earliest possible opportunity; otherwise the right to object is lost. (In *Bayson*, the planning board gave parties an explicit opportunity to object at the beginning of the hearing. Only 4 months and 11 hours' worth of hearings later did the applicant object (based on facts they'd known all along). The Court said that was too late.

- See also *Fox v. Town of Greenland*, 151 N.H. 600 (2004) – the issue was whether a ZBA member who'd missed 2 out of 4 hearing was disqualified from voting. The Court said the objection was raised too

late: "*Had the petitioners raised their objections to Wilbur's participation at either of these meetings, the board could have corrected the problem by disqualifying Wilbur from voting* ***or taking steps to ensure that he had familiarized himself with the record.***"

F. RECOMMENDATIONS ON DISQUALIFICATION.

Officials exercising judicial or quasi-judicial authority, such as planning and zoning boards, must be impartial. Yet, though the above cases provide some guidance, there are very few black-and-white rules. What should you do when the answer is unclear?

- ***Reveal the potential conflict to the parties***. That at least gets the issue out on the table, so nobody can claim surprise. Under *Bayson*, if nobody objects at that time, the parties have waived their right to object later.
- ***When in doubt (especially if challenged), step down***. Under the rule of the *Winslow* case, a court will overturn a board's decision if a disqualified person participated, whether or not he influenced the outcome. It's silly for a board to risk being overturned because of a conflict of interest.
- Furthermore you ***can*** step down if you don't feel right about sitting on the case, ***even if*** your "conflict" doesn't fit any of the court-created rules. (Hint: You don't have to "fess up" to any actual conflict – it's perfectly fine to say "I don't think I have a conflict, but I'll step down to prevent it from being raised as an issue.")

* * *

VI. Public Hearings.

A. WHEN ARE PUBLIC HEARINGS REQUIRED?

- ***ZBA*** – a hearing is required on every application to the Board, RSA 676:7.
- ***Planning Board*** – hearing is required for all applications unless excepted under RSA 676:4, I(e).
    - ***Exceptions*** include "minor lot line adjustments" ***which do not create buildable lots***. However, normal notices must be sent, and a hearing may be requested by any party.

- Disapprovals based on failure to provide information required in your regulations' application checklist ***Note:*** Such a decision, even though no hearing is held, ***can*** be appealed to court, *see Town of Hinsdale v. Emerson*, 122 N.H. 931 (1982) (appeal of preliminary decision by planning board not to waive an item on its checklist); *also see DHB, Inc. v. Town of Pembroke* (2005).
- "Minor subdivisions" creating not more than 3 lots (RSA 676:4, III. However this requires full notice, and an opportunity for a hearing if parties request it. And indeed, a hearing can be skipped ***only if*** your ***local*** subdivision regulations specifically allow that. [*Recommendation:* It isn't worth it. First, you have to send all "normal" notices anyway, and secondly you have to have a "meeting" in order to make a decision. Why not make that meeting a "hearing"?]

  [***ASIDE:*** I would argue there's really no such thing as a "minor subdivision." ***All*** development is ***cumulative*** in its impact, and whether it's one major subdivision, or numerous minor ones, the impact that must be examined under your regulations is the ***cumulative*** impact, see *Bacon v. Town of Enfield*, 150 N.H. 468 (2004). If you aren't looking at cumulative impact, you aren't truly being ***impartial.*** If you're truly being impartial, the relevant question is ***not*** "Who really gets hurt if this one person is allowed to do this." (That's "situation ethics.") Instead the morally-relevant and public-policy-relevant question is: *"What if **everybody** in similar circumstances were allowed to do this?"*]

- ***Question:*** Does the RSA 676:4 procedure apply to Excavation hearings? ***Answer:*** No. RSA 155-E:7 applies. Look at it carefully, because there are some differences (e.g. notice is required in ***three*** public places, rather than normal two!)

- ***Planning Board –*** hearings on legislative matters:
  - Recommendations to legislative body of zoning/building code amendments (RSA 676:5).
  - Adoption of subdivision or site plan regulations, historic district regulations, or master plan (RSA 675:6) (Notice is required to be both published and posted in 2 public places 10 clear days prior to the hearing).
  - Although RSA 155-E is silent on procedure for excavation regulations, I also recommend using 676:6 procedure for that.

- ***Revocation –*** Under RSA 676:4-a (revocation of ***recorded*** approval), the board meets and votes to revoke, specifying the reasons, and ***only then*** sends out notice, giving any party a right to request a hearing. The

request must be submitted within 30 days, or the revocation can be recorded.

- ***Question:*** Can a ***non***-recorded approval be revoked? What about a ZBA approval? ***Answer:*** There's no firm case law, but the general rule is that ***any*** type of permit can be revoked if the permit-holder materially violates it. *See City of Laconia v. Becraft*, 116 N.H. 786 (1976). Also the way RSA 676:4-a is drafted: It says a recorded approval can be revoked ***only*** for certain reasons. The implication is that other types of approval can also be revoked. Obviously this should be done only rarely and for good and sufficient reasons.

B. CONDUCT OF A MEETING/HEARING.

- ***Procedure.*** Except where covered by your by-laws (above), the general rule is that a hearing is conducted by the Chair, which means that the Chair's procedural rulings prevail, unless overturned by a majority of the board members present.

- ***When in Doubt,*** or at an impasse, ask for a motion, second, and a vote. On the other hand, if the Chair is not in doubt, no vote may be required – (for example "Hearing no other corrections I declare the minutes of August 18 approved.") [***Hint for Chairs***: It's best to start formal, and modify from there. It's very difficult to increase formality after informality starts.]

- ***Who MUST be heard?*** The applicant (appellant), abutters, holders of interests such as conservation easements, "and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration." (RSA 676:7, I(a) and 676:4, I(d)). *Weeks Restaurant* Test – the interest must be materially different from that of ordinary citizen in the community. [This is also the test for when a person has standing to appeal – either to the ZBA or to court.]

- ***Who MAY be heard?*** Anyone, at the board's discretion (Id.)

- ***Can The Chair Limit Time?*** Yes, yes, yes. You are ***not*** at the mercy of applicants or other parties. *Recommendation*: Set some parameters in advance – ask applicants how much time they reasonably need and hold them to it. Limit others to a certain time limit (e.g. 3-5 minutes maximum). ***Note:*** It is common for parties to assume they have an absolute right to read a 10-page single-spaced letter "into the record." Wrong! Explain to them, that the letter will be (or perhaps already has

been) read by board members, and is already part of the record. Give them 2-3 minutes to hit the high points.

- ***Fairness vs. time constraints.*** This ability to keep things moving, without people feeling they're being railroaded or pressured, is *the most important* aspect of being a board chair. Meetings cannot go on forever, and members get burned out with all the applications unless there is efficiency in the process.

- ***Impartiality.*** The important thing, from a perception-of-fairness perspective, is not that all parties be allowed to ramble on indefinitely, but rather that whatever timing limits you set be applied ***even-handedly.*** (Be aware, however, that if it is a very emotional case, board hearings can sometimes serve a cathartic function over and above the information actually being given to the Board.)

- ***Introduction.*** The Chair should develop a standard introduction for the public – it sets the tone for your meeting, and helps guide participants. (This may contain or summarize some portion of your procedural by-laws.) ***Problem:*** If you're hearing several applications, inevitably some parties don't show up until later. You may have to repeat parts of the introduction, or print it up for those who come late.

- ***All Input Is Through The Chair.*** All persons speaking should address only the Board. Do not permit cross-witness arguments, or "cross-examination." This is not a trial. Questions may be raised (e.g. abutter question to an applicant), but the questioner should address the Chair, and the Chair should repeat the question (at the proper time) in a manner which is impartial and seeks the type of information the ***board*** needs to make its decision. ***Get a gavel and use it!*** [All of this may be harder with lawyers present – the chair should go over procedures with town counsel, to whatever extent you need for the confidence to look any attorney in the eye and say "no."]

- ***Be Of Assistance.*** It goes without saying that being an official does not make you better than anyone else. Board members have a ***constitutional*** duty, not only to act in good faith, but to assist parties. *Carbonneau v. Rye*, 120 N.H. 96 (1980). The process should not amount to a test of wills or a shell game, especially over questions of ***procedure***. Take this point seriously, because it gets the heart of the meaning of "government by the people." It is the function of towns "to provide assistance to their citizens, and that the 'measure of assistance certainly includes informing applicants not only whether their applications are substantively

acceptable but also whether they are technically in order.'" *Richmond Comp. v. Concord*, (2003) (quoting *Savage v. Town of Rye*, (1980)).

C. ADVISORY OPINIONS.

- ***ZBA – Don't Do It!*** The duty to provide assistance does ***not*** mean giving an advisory opinion to citizens – either as an individual board member (remember discussion of *ex parte* communications) ***or as a board.*** The "assistance" in such a case would be to let the citizen know the ***process*** for how a decision gets made (e.g. refer them to the zoning administrative official). A ZBA makes decisions ***only on appeal*** (which includes requests for variances and special exceptions).

- ***Planning Board – Only As "Preapplication Review."*** In the case of planning boards, the statutes specifically allow meetings for "conceptual consulation phase" and "design review phase" which are supposed to be non-binding, *see* RSA 676:4, II. *Recommendation:* The Board should emphasize the non-binding nature of these pre-application procedures by ***not*** taking any formal votes.

    - ***For subdivisions and site plans*** the local legislative body (requires town meeting vote in towns) can now authorize the planning board to ***require*** preliminary subdivision or site paln review. If the town meeting votes to authorize this:
        - You must amend your subdivision or site plan regulations.
        - The law saying that the applicant can "elect to forego" preapplication review no longer applies.
        - It also appears that the 65-day time limits otherwise applicable to planning board decisions no longer apply.
    - ***2006 Change In The Law***: Previously, a planning board application has been exempt from new changes in ordinances and regulations if the ***final*** application has been accepted as complete prior to the first posting of the public notice on the proposed change in the regulation. As of 2006 it is no longer the final application, but ***any*** application (including preliminary or "design review" application), if the notice to abutters and the public has been sent. [There is a caveat, namely that if preliminary approval is granted, and no final application is submitted within a year, the exemption from new changes is lost. ***2008 Change:*** The Board may now inform an applicant when "Preliminary" or "Design Review" is over, thus triggering the 12 months within which a final application must be submitted, or any exemption is lost.]

D. DEVELOPMENTS OF REGIONAL IMPACT.

All local land use boards are ***required*** to determine whether an application before it is a "developments of regional impact." (RSA 36:54 et seq.) In such cases, hearing notification to neighboring town and to the regional planning commission must be made (*14 days in advance*, not 5 days like everyone else), and they have the right to testify (but not the right to appeal!). Doubt concerning the potential for regional impact is required to be resolved in favor of finding such potential.

- ***Criteria for regional impact*** (RSA 36:55) include, but are not limited to, the following:
    - The relative size and number of dwelling units involved (if a subdivision);
    - The proximity of the development to a municipal boundary;
    - Impact upon transportation networks;
    - Anticipated emissions;
    - Proximity to regional aquifers or surface waters; and
    - Shared facilities.
- ***The problem of timing.*** Decisions on the potential for regional impact are formal actions of the board. Given that a ZBA typically starts looking at an application for appeal on the same night that it holds the public hearing, there's no time to notify the neighboring municipality and the relevant regional planning commission. If this is the case, you can open the public hearing, take testimony from the applicant an anyone else with an interest in the application, then continue the application until the next month, then provide notice to the other municipality and the RPC regarding the continued hearing (other parties must be allowed input on any new matter). *Another approach would be to delegate to your clerk or staff person the authority to go ahead and notify RPC's etc., if the development looks like it might be regional impact. But the Board itself would still have to vote on that (at a later time).*

E. SITE VISITS.

- ***No Trespassing***. Despite what the statutes may say, you have no right to trespass without permission (constitutionally, since you represent the government, it might violate Due Process, and give rise to a civil rights action against you personally!) ***Always get permission.*** At the hearing, simply say "You don't mind if board members visit the property, do you?"

- If permission is refused, you normally would deny an application for failure of the applicant to allow the board to get sufficient information. There is no true substitute for actually seeing the property.

- Individual board members may visit a site (with permission), and as long as there is no quorum of the board, the Right-to-Know law doesn't apply.

- On the other hand if you visit individually, it may be difficult to avoid "*ex parte*" communications, where every board member gets a potentially different story from the owner (who may live at the site).

- ***If a quorum*** attends a site visit, ***that is a "meeting"!*** Notice is required, as well as minutes.

- Since it's a "meeting, a site visit must also provide for the public to attend and observe.

- If the applicant refuses access to the non-board public, that also may be a basis for denial (without prejudice).

- Take minutes, take photographs, ask questions, and ***stick together*** (often hard to do, but otherwise you get unrecorded "side-conversations" going on which may be the basis for later challenges**.**

F. OTHER ISSUES ON HEARINGS AND MEETINGS.

- ***Minimize the Number of Meetings***. Avoid member burnout.

- ***Continued hearings:*** If a hearing must be continued from time to time, always make a specific announcement of the date, time, and place. Otherwise new notice to public and abutters will be required.

  - If the continuance is to allow an applicant to submit required information, and it is not reasonably provided within the time set forth, you can deny the application. The burden of providing sufficient information on all criteria in your ordinance or regulations is on the applicant.

  - There is no reason to permit an applicant to bring an entire new set of documents and distribute them to the board, with no time to review them. Make sure your rules in essence will require a continuance unless all materials are provided a specifically- set reasonable time beforehand.

- ***Effect of Appeal to the ZBA:*** When an appeal is made of an administrative decision (e.g. the issuance of a building permit), RSA 676:6 says that the effect is to ***preserve the status quo***. The appeal "*shall be deemed to suspend such permit or certificate, and no construction, alteration, or change of use which is contingent upon it shall be commenced*." There is a narrow exception in cases where there is imminent peril to life, health, safety, property, or the environment. ***Note***, there is no similar "suspension" for subsequent appeals to superior court, except by specific court order.

- ***Contents of the Abutter/Public Notice:*** Public notices must accurately state what will be heard and decided by the board, to allow other parties to adequately evaluate whether they need to attend and offer testimony. (Thus if someone has applied for a variance and the ZBA figures out that she needs a special exception, deny the variance and ask her to file a new application – don't fudge it!)

- ***Planning Board – Regulation Waivers:*** State law explicitly authorizes planning boards to insert waiver provisions into its subdivision and site plan regulations. The statute has standards which are the equivalent of a variance.
    - Just as a variance is the "constitutional safety-valve" of zoning, I have long believed that planning boards not only can, but ***must*** grant waivers, if variance-like standards are met.
    - Most planning boards have long granted waivers. With this relatively new state law, ***if you want less stringent standards*** than those applicable to a variance, you ***should*** put those standards into your regulations; otherwise in my view the stringent variance standards will be presumed to apply.

- ***Planning Board –*** 2010 statute prohibits a board from delaying its decision due to outstanding permit requests with other agencies (such as NH DES or the Army Corps of Engineers). The planning board ***can***, however, make any approval ***conditional*** on the approval of those other agencies. ***Opinion:*** It is my opinion that this 2010 statute does ***not*** prohibit the common practice, whereby planning boards have in their regulations that any required ZBA approval (e.g. a special exception) must be obtained prior to applying to the planning board.

VII. The (Written) Decision.

- RSA 676:3 requires written decisions for all local land use board applications. (It only requires "written reasons" in the case of a denial, but it is ***highly recommended*** that you ***always*** draft written reasons.) The written decision must be made available within 144 hours of the actual vote (or else the appeals period is extended). The record of the written decision may be included as part of the board's written minutes.

> ***Note: 2010 law:*** For subdivisions (and site plans, if they are recorded in the Registry of Deeds), any ***conditions of approval*** are now also required to be recorded. Therefore either the conditions should be written right on the recorded plan (can be difficult if the conditions are complex ones) ***or*** the decision document itself ('Notice of Decision') should be recorded at the Registry together with the plan.

- ***Close the Hearing*** before you begin deliberating, and be ***very strict*** about prohibiting further input (from the applicant or anyone else) while the board is deliberating. Use that gavel if necessary!
    - If you truly find a need to reopen the hearing, give ***all*** parties an opportunity to comment on the subject under consideration.

- ***Recommendations On The Timing The Writing Of The Decision And Vote:***
    - Some applicants think they have a right to a decision the same night as the hearing. ***This legally untrue, and is NOT an expectation you should try to meet.***
    - Why? Well, you obviously can't write the decision ***before*** the hearing, since that would be pre-judging the outcome without hearing the evidence.
    - Likewise, you can't get a good quality write-up if you try to do all of your wordsmithing at the meeting itself (the proverbial elephant being a horse designed by a committee).
    - That leaves 2 choices. Either you vote-first-write-it-later; or you delay at least a week ***after*** the hearing, to allow someone to draft a comprehensive proposed written decision, which is then presented in its entirety as a ***motion*** to the full board.
    - ***The second procedure is very strongly recommended!*** It is remarkable how this "keeps you honest" – how often you find that your initial "gut reaction" can later be seen as impossible to justify in a comprehensive write-up.
    - The board may do some preliminary discussion right after the hearing is closed – even an informal "straw poll" – but you

should not take a final vote until the written motion is prepared, deliberated, edited, cut, slashed, or added to in your deliberations, and is put into a form that a majority is comfortable with.

- If this procedure is followed, it also gives your ***attorney*** a chance to work with the person assigned to do the draft, to make it as strong and defensible as possible (in those cases you think may be appealed).

> ***2012 Decision:*** In *Bosonetto v. Town of Richmond*, 163 N.H. 736 the ZBA had voted one week to deny the requested exception, then voted again 2 weeks later to adopt a written decision. The Court held that the 30-day appeals period started at the time of the ***first*** vote! ***Recommendation:*** Citizens deserve to know when a decision is intended to be final. If your board intends to draft a written decision, ***don't take the vote until the written decision is in front of you***. Any votes taken prior to that time should be carefully identified as "preliminary" and "not final" for purposes of appeals or motions for rehearing.

- ***Recommended elements of the Write-up (motion):***
  - ***Findings of Fact*** – This is ***not*** just a long regurgitation of the testimony. Instead it should hone in on those facts the board itself believes are decisive; as well as resolving the factual issues where there is conflicting testimony.
  - ***Reasoning –*** This is in essence a "rulings of law" section where your fact findings get tied into the applicable regulatory standards (e.g. the 5 variance standards, or the decisional criteria in the site plan regulations) to reach a conclusion on each relevant standard.
  - ***Action Taken –*** This section includes a final denial or granting of the application, plus any and all ***conditions*** you wish to attach.
    - Divide the list of conditions into "Conditions precedent" which must be met before the approval becomes final, and "Conditions subsequent" (which will govern the actual construction phase, and later). *See Simpson Devel. Corp. v. City of Lebanon*, (May 2006).
  - ***Recommendation: Always*** state as Condition Number One that the project will be constructed/implemented substantially in accord with the plans on file and the testimony. This converts all of those details into conditions, and assures that things won't change, without further hearing.

- ***Denials:*** Granted, the law is that if ***even one*** of the legal standards isn't met, the board should deny the application, and further, that if ***even one*** of the board's reasons is upheld, then the court will uphold it.

Nevertheless in most cases it is highly recommended that you address ***all*** the criteria. Reason: to give the Court as many different reasons as possible why the board should be upheld. (In *Chester Rod & Gun Club v. Town of Chester* (Sept. 2, 2005), the Court said that if the board is overturned on one issue, and hasn't addressed the other criteria, the court is supposed to ***remand*** the case to the Board. But don't tempt fate – it's better to address ***all*** the criteria.)

- ***Personal Knowledge.*** Board members ***may*** base their decisions on personal knowledge of the circumstances; e.g., traffic safety ("…that stretch of road always ices up.") or the lay of the land ("Well, the rainwater flows off that hill straight into Fred's basement…").
    - But be careful not to take this to an extreme. The board may not rely on ***factually unsupported*** conclusions in the face of contrary expert testimony. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989)
    - If your conclusion is based on facts known to the Board, but not included in the testimony, be sure to ***include those facts in your "findings of fact" –*** even those obvious things that "everybody in town knows." Otherwise a Court ***won't*** know about them. (Remember court appeals are usually ***on the record***, and anything that doesn't make it into the minutes or the written decision probably won't get considered.)
    - Generic publications you may get off of the internet, but which don't address the specifics of an application, are usually not going to be legally sufficient to support a decision (*see Continental Paving, Inc. v. Town of Litchfield*, 158 N.H. 570 (2009)). This does ***not***, however, mean that an expert's testimony, if unopposed, must always carry the day.

- ***Expert Opinion***: There is no ***automatic*** reason to trust "experts." (Often an applicant will have them, and other parties won't). It simply is not true that expert testimony can only be trumped by other expert testimony. (Common example: impact on neighboring property values).
    - Remember, the "expert" is probably being paid. Take his/her testimony with a "grain of salt" and ask tough questions until you are convinced. ("Because I'm an expert and I say so" is never good enough.)
    - ***But*** use common sense – if you choose to believe a non-expert (or your own knowledge) over an expert, the board should explain the ***reasons*** (in its write-up) why the non-expert testimony is more persuasive (In the *Condos East* case (above) the Board

decided to follow its own opinion, without any explanation even though ***both*** the applicant's expert and the town's own hired peer reviewer said the road was adequate. The Court said that was "unreasonable.")

- ***Vote.*** This may seem obvious, but the manner of voting is important. ***The final vote should be up or down on the complete write-up.*** For example in a special exception, either the proposal meets the criteria established by the zoning ordinance, or it doesn't. Yet board approaches to voting are often muddled. The problem is that many boards think that they have to vote on the individual criteria for variances. Wrong! Consider the following ZBA variance scenario:

  > Imagine a case where A, B, and C vote for "no diminution of property values", and D and E vote against. Then B, C, and D vote for "in the public interest", and A and E vote against. Then C, D, and E vote for "unnecessary hardship", and A and B vote against. By the time you're done, the Board as a whole has found each of the five criteria to be satisfied by a 3-2 vote, yet every member of the Board believes that two of the criteria are NOT satisfied. In a straight vote to approve or disapprove the variance, it would have to be defeated 5-0!

  Although many boards use worksheets to help members through the complexities of the variance criteria, such a worksheet should not be treated as ballots, ***or as a substitute for a joint written decision!***.

- ***Votes contrary to the motion.*** What happens if a motion is made to approve an appeal, and the vote is 2 in favor, 3 against; is this a denial? No. This is only a failed motion, not a positive action of a majority of the board. Following such a failed motion, one of the three who voted against it should be obliged to move for denial, with a vote ensuing (***plus a written decision justifying that denial!***)

- ***Are Land Use Boards Bound By Precedent?***
  - Legally, almost never. If the board truly believes a past decision was a mistake, you are not legally doomed to repeat that same error.
  - However, the demands of ***impartiality*** require consistency, unless there is a specific reason to be otherwise. (You can be darn sure either the past or present applicant is going to be darn angry.)
  - There is one way past decisions ***can*** be binding, namely if an ordinance enacted by the legislative body (e.g. zoning ordinance): (a) is ambiguous, and (b) has been ***regularly*** interpreted one way in the past (many times, not just once), the ***ZBA*** may be powerless to change the interpretation (the Court assumes that if the legislative body were dissatisfied, it would

have amended the ordinance. This is the "***administrative gloss***" doctrine. *Tessier v. Town of Hudson*, 135 N.H. 168 (1991).

- ***Re-Submission Of Previously Denied Applications.*** The earlier denial of an application that is materially the same as a new one precludes the Board from reaching the merits of the new application. In order to be heard on the merits, the applicant must show either (a) changed circumstances affecting the merits of the application, or (b) that the application is materially different. *Fisher v. Dover*, 120 N.H. 187 (1980). (While the *Fisher* case involves variances, its logic arises out of the law of finality; hence in my view it applies to ***all types*** of local land use board decisions.
  - ***Due Process:*** If the application is even slightly different from a previous one, in my view you should hold a ***public hearing*** on the issue of whether it is "materially different." That is an issue the parties have a right to be heard on.
  - ***Response to prior decision.*** The need for a hearing is particularly acute if the applicant claims that the changes were made in direct response to the reasons why the prior application was denied. *Morgenstern v. Town of Rye*, 147 N.H. 552 (2002).
  - ***Keep the two decisions separate.*** Even if you find that the new application is "materially different," that doesn't bind you to vote in favor of it. It simply means you address it on the merits. An application can be "materially different" yet still fail to meet the applicable standards.

VII. Relationship Between And Among Boards.

- ***There's No Such Thing As "The Answer."*** What do I mean? When a landowner asks "Will I be allowed to do X?", the ***procedural*** answer is just as important as the substantive one. It is crucial that all officials have a sense of ***who decides which questions***. (This is true in most governmental fields of law – the procedure is a key part of the answer.)

- In general, if the question involves the ***zoning ordinance***, the final local authority (prior to any court appeals) is the ZBA. If it is a ***subdivision or site plan*** issue, it's clearly the planning board.

- ***What about projects where both boards' approval is required – who goes first?***
    - This may hinge on your own regulations. (E.g. in some towns, the planning board regulations prevent an application from being accepted as complete if a special exception or variance is required.)
    - The planning board ***cannot*** grant ***final*** approval to any project which violates the zoning ordinance (or would do so without ZBA approval).
    - However in the absence of a governing regulation, there is no reason such approval could not be ***conditionally*** approved, contingent on the other board's approval
    - This is ***not*** a good idea in the case of variances, since a variance is supposed to be hard to get.
    - Developers often choose to go to the ZBA first because they assume the expense will be less. ***This may or may not be true.*** A ZBA has the authority to require as much information as it needs to make a decision, and sometimes this is not much less than a planning board. [A ZBA should plainly avoid "conceptual" approval, with no specifics.]

- ***When does the ZBA hear a Planning Board appeal?***
    - Under RSA 676:5, III, a planning board's interpretation or application of ***terms of the zoning ordinance*** is appealable *de novo* to the ZBA. But the ZBA ***cannot*** hear any ***other*** aspect of the planning board's decision.
    - This means some planning board decisions are appealable ***both*** to the ZBA and court at the same time – a party must appeal zoning issue to the ZBA and the "planning" issues to court. Case law makes clear the party cannot wait until the ZBA acts before going to court on the non-zoning-ordinance issues.
    - The ***exception*** to ZBA jurisdiction is where the zoning ordinance contains an "innovative technique" under RSA 674:21, which grants discretionary permit authority (e.g. a "conditional use permit") to the planning board. Planning board decisions made in those cases are ***not*** appealable to the ZBA, but only directly to court.

- ***Historic District Commission – Complete Review by ZBA.*** Appeals of HDC decisions present the ZBA with a significant fact-finding challenge. Unlike other administrative appeals, when hearing an appeal to an HDC decision the ZBA is considering the historic district

ordinance, not the zoning ordinance, and this is conducted as a *de novo* review. It is as if the HDC did not make a decision, and the ZBA must hear the entire case from its beginning to its end. (RSA 677:17)

- ***ZBA Rehearings.***
  - Planning boards do not hold rehearings (except perhaps rarely on their own motion – *see* "Reconsideration" under III above – or perhaps in response to post-approval violations for purposes of revocations under RSA 676:4-a).
  - For ZBA's on the other hand, no party can appeal without first filing a motion for rehearing, and even then, cannot raise any issue in court which was not first raised in a motion for rehearing.
  - ***Purpose of a Rehearing*:** It allows the Board to correct its errors before the case goes to court, and for new information or lines of argument to be introduced.
  - ***Timing.*** Motion for Rehearing must be filed within 30 days of the time the ZBA's decision is made (but if the minutes to the meeting are not available within 144 hours after the meeting, the petition may amend the motion for rehearing after the 30 day limit has passed. (RSA 677:2)

- ***ZBA Action on the Motion for Rehearing.***
  - ***Another 30 days.*** Grant or deny the motion within 30 days of it being filed with the board.
  - ***Don't hold a hearing, to decide whether to have a rehearing!*** It is recommended that the decision whether to hold a rehearing should be made based solely on the written motion, with no testimony (otherwise you're ***holding*** a rehearing!) But there is no legal prohibition to asking questions of some party.

- ***Reasons to grant the motion.*** Grant a rehearing if:
  - There is new evidence that was previously unavailable
  - If you are convinced that the ZBA committed an error
  - If you think the case will be appealed, and your attorney tells you your write-up (or the record) is too sketchy and is likely to be overturned.
  - If that last one sounds a little facetious, my point is simply that no court has ever overturned a decision to hold a rehearing. On the other hand, for the parties' sake (and the board's) it should not be done lightly.

- The party moving for the rehearing should pay for new public notice publication and abutter notification.
- ***Scope of Rehearing.*** The ZBA is not limited to the scope specified in the motion. The ZBA may expand the rehearing of its own accord.
- ***Don't alter your decision WITHOUT a rehearing.***
- ***Level of detail in motion for rehearing:*** A Court is highly unlikely to criticize a motion for rehearing because of lack of specificity. *See Colla v. Town of Hanover (January '06).* So you shouldn't deny such a motion because it isn't specific enough *per se***.** You ***can***, of course deny it because it does not contain any persuasive reason to grant a rehearing.

* * * End * * *