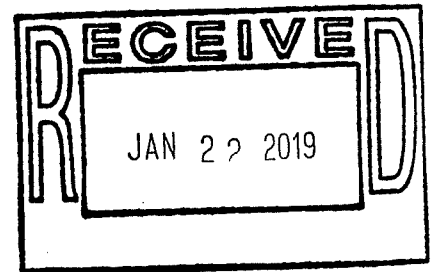


**AGENDA
PLANNING BOARD
FEBRUARY 19, 2019**

**AGENDA ITEM #5
OTHR BUSINESS**

**DISCUSSION OF LETTER
FROM JEREMY KATZ**

Jeremy Katz
PO Box 1325
Lebanon, NH 03766



Zoning Board of Adjustment
City of Lebanon
51 North Park Street
Lebanon, NH 03766

January 22, 2019

To the Board:

I am writing regarding the January 22, 2019 ZBA meeting agenda item #6(A) "Amendment to Zoning Board of Adjustment Bylaws – Second Reading."

Specifically, I want to bring to the Board's attention my concerns that these rules appear to conflict with the best practices for zoning boards in New Hampshire as published by the NH Office of Strategic Initiatives, could violate state laws, and could diminish the perception of fairness in proceedings before the Board that the public is entitled to.

If any of these adverse results came out, they would diminish the extremely hard work that the City Planning and Zoning Office as well as this Board invests in serving the City. By having conflicting rules, the enforceability of any decisions could be called into doubt, which could create a substantial litigation burden on the City down the road as disgruntled applicants could have new means and reasons to litigate ZBA decisions that they do not like – a result that would negatively affect the landowners and taxpayers within the City who will have to ultimately provide the budget for those expenses.

It could also frustrate the extremely thoughtful work of the City Planning, Zoning and Codes departments, who invest a lot of work to get things right the first time around. By adopting bad rules, the City runs the risk of its correct decisions being overturned by courts on the basis of bad process.

I have indicated with particularity the sections of concern, and also produced citations to and abstracted page copies of the December 2017 edition of the NH Office of Strategic Initiatives publication "The Board of Adjustment in New Hampshire – A Handbook for Local Officials."

Issue #1 Rule E(b)

An application that has been submitted to the Board to appeal an administrative decision and/or in order to resolve an existing violation of the Zoning Ordinance shall be heard or reheard so long as a quorum is present.

This rule appears to create a different standard for hearing appeals from administrative action than for other actions such as variances and special exceptions. However, this is in conflict with OSI best practice guidance as found on page A-2 at 2(d) and 2(e) which state as follows (underlined emphasis added):

d. If there are less than five members (including alternates) present, the chair shall give the option to proceed or not to the applicant.

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e. If the applicant opts to postpone due to less than a full board present, the board shall announce the time, date, and location of the continued hearing.

Here, the best practice guidance obligates the board to provide the applicant the option to postpone.

This makes sense, because it is the City's obligation to field a board of 5 members who can hear these cases. It is not an applicant's fault if the full board is not available. A reasonable applicant might feel that they are unable to receive a fair result without a full 5 member board.

After all, with a 3 member board the applicant must get a unanimous vote. With a 4 member board, the applicant must only get 75% of the board to vote in its favor. With a 5 member board, the hurdle is reduced to a simple majority.

Issue #2 Rule E(C)

The failure of the Board to reach any result by 3 concurring votes constitutes a *de facto* denial unless a subsequent motion is made at the same meeting that garners the required 3 votes. If less than 5 members are present and the board fails to reach any result by 3 concurring votes, the Chair may continue deliberation to the next regularly scheduled meeting, if the Chair determines using his or her reasonable discretion that there is a likelihood that a full 5 member Board will be present.

Rule E(D)

The failure of any motion to receive at least 3 votes at the rehearing shall *not* automatically constitute grounds for any additional rehearing.

This rule conflicts with OSI best practice guidance found at A-4 (6) "Voting" which requires:

Should a motion result in a tie vote or not receive the necessary 3 votes to decide in favor of the applicant, the opposite of the failed motion does not automatically prevail. The board must put forth a new motion to affirmatively set forth a decision.

In other words, if a motion to grant a variance fails by a 2 in favor, 3 opposed margin, that does not mean that the variance is automatically disapproved.

This is especially important when there are fewer than 5 board members present since motions could result in a tie. Alternate motions should be put forward but if the board truly cannot find something at least 3 members can agree on, the meeting should be continued until a fifth member can be present.

If a motion to approve does not receive three votes, the application is not automatically denied. A further motion, with reasons for the denial, should be offered and another vote taken. The applicant and others should be able to understand the reasons for the decision even though they may not agree with it.

Here, again, the best practice obligates the board to produce a decision that is affirmatively voted by a 3 person majority and sets forth reasons for approval or denial that can be understood. To the contrary,

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the proposed rules put forward a standard that allows board non-action and/or non-approval to deny relief to appellants without the statement of any reasons whatsoever. While that might reduce the burden on the Board, it will substantially increase the burden on the City over time.

According to the City website, the current Zoning Board of Adjustment has 4 members, with one full member position vacant. The City also has zero alternates, with all 3 alternate positions vacant. I would imagine that these rules are an attempt to problem solve how to operate the Board when the City has not been able to reliably produce a full complement of 5 members and 3 alternates. If anything, this underscores the extraordinary amount of dedication and time commitment invested by the four sitting members of the board – if among more than eight thousand adult residents we are unable to find four more volunteers to make similar investments.

However, despite what I would anticipate to be good intentions, I believe the medicine is more damaging than the ailment. A better practice would be to redouble the City's efforts to field a full board that can reliably attend and produce written approvals and denials, not to diminish the rights of landowners to fair hearings by a fully populated board.

Thank you again for your service and for your consideration of my comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Katz', with a long, sweeping horizontal stroke above the letters.

Jeremy Katz

- D. All those in opposition to the appeal shall be allowed to speak.
- E. The applicant and those in favor shall be allowed to speak in rebuttal. Those in opposition to the appeal may, with the permission of the Chair, be allowed to speak in rebuttal. *(amended 3/6/06)*
- F. Any speaker who desires to ask a question of an applicant or another speaker shall do so through the Chair. *(amended 3/6/06)*
- G. When the Board is satisfied that all relevant information has been presented, the hearing on the appeal shall be declared closed pending a decision, and the next case called up.
- H. Members of the Board may ask questions at any point during testimony.
- I. Any board member who desires the reappearance of any party to the case and/or additional documentation and information from an applicant, shall make a motion to that effect which must be seconded, and receive a majority vote of the board in attendance. *(amended 3/6/06)*
- J. Each person who appears shall be required by the Chairperson to state his name and address and indicate whether he is a party to the case or any agent or counsel of a party to the case.
- K. Any party to the case who desires to ask a question of another party to the case must do so through the Chairperson.
- L. Any person who desires the Board to compel the attendance of a witness shall present his request in writing to the Chairperson not later than 3 days prior to the public hearing.

8. APPEALS/APPLICATIONS:

- 1A. Each appeal to the ZBA shall be made on an ~~approved form~~ approved by the Board and shall come through the Zoning Administrator or the City Manager. The person filing the appeal shall present to the Zoning Administrator a list of all property owners directly abutting this property in accordance with State law. A filing fee, as set by the Lebanon City Council shall be collected at the time of filing. The Zoning Administrator together with the Chairperson of the board, shall determine the date of all appeal hearings as near as possible in accordance with Lebanon Zoning Regulations and New Hampshire State law.
- 2B. The Zoning Administrator shall notify the appellant or appellants and all abutters by Certified Mail, stating the time and place of the hearing, and such notice shall be given not less than five days before the date fixed for the hearing of the appeal. In addition, the board shall also send such a notice to the Planning Board and the City Council, and either board shall be a proper

party to appear and to be heard upon any such appeal. The cost of all such mailing shall be payable by the appellant or appellants prior to the required public hearing. At each duly advertised meeting of the ZBA, the Zoning Administrator shall present to the Chairperson all applications scheduled for that meeting.

3C. An appeal to the board on any administrative decision or requirement shall be taken within 30 days of the date of such decision or requirement because the person making the appeal believes himself aggrieved by an officer, department, board or bureau of the municipality. Also, if the appeal is on a certain piece of property, the person filing the appeal shall present to the Zoning Administrator a list of all property owners directly abutting this property in accordance with State law. (*amended 03/16/15*)

4D. The board shall attempt to decide all cases within 30 days of the closing of the public hearing. Notification of the decision shall be made on a form provided by the board and shall be sent to the applicant, the City Clerk and then filed in the records of the board as kept by the Zoning Administrator.

~~5. The failure of the board to reach any result by 3 concurring votes constitutes a *de facto* denial unless a subsequent motion is made at the same meeting that garners the required 3 votes.~~

6E. a. If there are fewer than 5 members present or able to sit on an appeal, the applicant, if requesting a Special Exception or Variance, may choose to continue the hearing or rehearing until a full board is present, except as set forth in subsection b. (*amended 2/6/17*)

b. An application that has been submitted to the Board to appeal an administrative decision and/or in order to resolve an existing violation of the Zoning Ordinance shall be heard or reheard so long as a quorum is present (*amended*)~~If appealing an administrative decision, or if requesting a Special Exception or Variance in order to address a violation of the Zoning Ordinance, the application shall be heard provided a quorum is present and able to sit, except that if and when such an application is reheard, the applicant may choose to continue the rehearing until at least 4 members are present and able to sit. (*amended 2/6/17*)~~

c. The failure of the Board to reach any result by 3 concurring votes constitutes a *de facto* denial unless a subsequent motion is made at the same meeting that garners the required 3 votes. If less than 5 members are present and the Board fails to reach any result by 3 concurring votes, the Chair may continue deliberation to the next regularly scheduled meeting, if the Chair determines using his or her reasonable discretion that there is a likelihood that a full 5 member Board will be present.

ed. In all cases where the applicant is heard by less than a full 5 member Board, the failure of any motion to receive at least 3 votes will automatically

constitute grounds for a rehearing. The failure of any motion to receive at least 3 votes at the rehearing shall not automatically constitute grounds for any additional hearings. (amended 2/6/17)

9. FORMS:

All forms and revisions thereof shall be adopted by resolution and shall become a part of the by-laws.

10. PUBLIC NOTICE:

~~1A.~~ Public notice of public hearings on each appeal shall be published in the local newspaper not less than five days prior to said hearing. Such notice shall include the name of the applicant, action desired by the applicant, provision of the Zoning Ordinance concerned, the type of appeal being made, and the time and place of the hearing in accordance with RSA 676:7 Public Hearing; Notice.

2B. Notice shall be given not less than five days prior to the hearing to the Chairperson of the Planning Board, the City Clerk and any other parties deemed by the board to have a special interest in the appeal in addition to the abutting property owners.

11. AMENDMENT:

The by-laws may be adopted by majority vote if read at two successive meetings of the board, and may be amended in like manner.

Adopted: October 18, 1976
Amended: February 19, 1980
Amended: February 21, 1990
Amended: March 6, 2006
Amended: October 1, 2007 (Section 1 Officers)
Amended: January 7, 2008 (Section 1 Officers)
Amended: March 16, 2015 (Section 1 Officers; Appeals)
Amended: January 5, 2016 (Appeals)
Amended: February 6, 2017 (Order of Business & Appeals)
Amended: April 3, 2017 (Meetings)
Amended: _____

The Board of Adjustment In New Hampshire

A Handbook for Local Officials

December 2017

NH Office of Strategic Initiatives

Johnson Hall
107 Pleasant Street
Concord, NH 03301

Phone: 603-271-2155
Fax: 603-271-2615
Website: www.nh.gov/osi



the chairperson as soon as possible. Members, including the chairperson and all officers, shall participate in the decision-making process and vote to approve or disapprove all motions under consideration.

Meetings

1. **Regular meetings** shall be held at (place), at (time) on the (day) of each month. Other meetings may be held on the call of the chairperson provided public notice and notice to each member is given in accordance with RSA 91-A:2, II.
2. **Quorum:** A quorum for all meetings of the board shall be three members, including alternates sitting in place of members.
 - a. The chairperson shall make every effort to ensure that all five members, and one or two alternates, are present for the consideration of any appeal or application.
 - b. If any regular board member is absent from any meeting or hearing, or disqualifies himself from sitting on a particular case, the chairperson shall designate one of the alternate members to sit in place of the absent or disqualified member, and such alternate shall be in all respects a full member of the board while so sitting.
 - c. Alternates shall be activated on a rotating basis from those present at a particular meeting. When an alternate is needed, the chair shall select the alternate who has not been activated for the longest time and if there are two or more alternates who meet that criteria, the alternate who has served the longest shall be activated. If two or more alternates still both meet that criteria, the selection shall be made by the flip of a coin.
 - d. If there are less than five members (including alternates) present, the chair shall give the option to proceed or not to the applicant. Should the applicant choose to proceed with less than five members present, that shall not solely constitute grounds for a rehearing should the application fail.
 - e. If the applicant opts to postpone due to less than a full board present, the board shall announce the time, date, and location of the continued hearing. If the board cannot determine the time, date, and location of the continued hearing, the board shall provide new notice to all parties pursuant to RSA 676:7.
3. **Disqualification:** If any member finds it necessary to disqualify himself from sitting in a particular case, as provided in RSA 673:14, he shall notify the chairperson as soon as possible so that an alternate may be requested to sit in his place. When there is uncertainty as to whether a member should be disqualified to act on a particular application, that member or another member of the board may request the board to vote on the question of disqualification. Any such request shall be made before the public hearing gets underway. The vote shall be advisory and non-binding.

Determining the threshold of disqualification can be difficult. To assist a member in determining whether or not they should step down (recuse themselves) board members should review the questions which are asked of potential jurors to determine qualification (RSA 500-A:12). A potential juror may be asked whether 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 an opinion or formed an opinion;
- e. Is employed by or employs any party in the case;

- c. The applicant shall pay for all required notice costs in advance.

4. Public Hearing

The conduct of public hearings shall be governed by the following rules:

- a. The chairperson shall call the hearing in session and ask for the clerk's report on the first case.
 - b. The clerk shall read the application and report on how public notice and personal notice were given.
 - c. Members of the board may ask questions at any point during testimony.
 - d. Each person who appears shall be required to state his name and address and indicate whether he is a party to the case or an agent or counsel of a party to the case.
 - e. Any member of the board, through the chairperson, may request any party to the case to speak a second time.
 - f. Any party to the case who wants to ask a question of another party to the case must do so through the chairperson.
 - g. The applicant shall be called to present his appeal.
 - h. Those appearing in favor of the appeal shall be allowed to speak.
 - i. Those in opposition to the appeal shall be allowed to speak.
 - j. The applicant and those in favor shall be allowed to speak in rebuttal.
 - k. Those in opposition to the appeal shall be allowed to speak in rebuttal.
 - l. Any person who wants the board to compel the attendance of a witness shall present his request in writing to the chairperson not later than 3 days prior to the public hearing.
 - m. The board of adjustment will hear with interest any evidence that pertains to the facts of the case or how the facts relate to the provisions of the zoning ordinance and state zoning law.
 - n. The chairperson shall present a summary setting forth the facts of the case and the claims made for each side (see Findings of Facts form in Appendix C). Opportunity shall be given for correction from the floor.
 - o. The hearing on the appeal shall be declared closed and the next case called up.
5. **Decisions:** The board shall decide all cases within ____ days (30 recommended) of the close of the public hearing and shall approve, approve with conditions, or deny the appeal. Notice of the decision will be made available for public inspection within 5 business days, as required by RSA 676:3, and will be sent to the applicant by certified mail. If the appeal is denied, the notice shall include the reasons therefore. The notice shall also be given to the planning board, the board of selectmen, town clerk, property tax assessor and other town officials as determined by the board. Notice shall be published in the (insert name of local newspaper) and shall be posted in two locations at (insert both locations - should be the same places as the hearing notices).
6. **Voting:** The chairperson may assign the task of drafting a motion to a board member who shall bring a draft motion to the board at the continuation of the deliberative portion of the meeting for the consideration of the board. Should a motion result in a tie vote or not receive the necessary 3 votes to decide in favor of the applicant, the opposite of the failed motion does not automatically prevail. The board must put forth a new motion to affirmatively set forth a decision.

depends (among other things) on the uniqueness of the property, which is a factual determination. It would be a contradiction to determine a property is unique based on the precedent of the "uniqueness" of a different property.

On the other hand, some other aspects of a variance determination have more to do with interpreting the zoning ordinance. For example, if the board finds that a particular kind of use is reasonable in a particular district (another element of the hardship determination) it would raise questions if the board found that the same kind of use was not reasonable in the same area in a later case.

Appeals of administrative decision tend to be more about what the ordinance means as it applies to a particular property, and once the board has decided what a particular word, sentence, or paragraph means, it may be inappropriate to decide differently in the future. Part of the point of an administrative appeal is not just to resolve a particular dispute, but to provide guidance to the administrative official in the future.

Special exceptions are specific uses allowed in a district provided they meet the criteria specified in the ordinance and the nature of one proposed use may not be exactly the same as another use which may meet the review criteria. Therefore, it is important that the board review each application individually on its own merits and come to a decision based on the specific facts of that application.

The board can simplify matters by considering each requirement necessary for the granting of a variance or special exception separately rather than treating the question as a whole. With this done, there should not be any confusion as to whether the final decision was based on legal grounds.

Caution, however, should be exercised not to treat the decision-making process merely as a tabulation of votes on the various approval requirements by each member. Failure to satisfy any one of the review criteria is grounds for denial and that "passing" on 3 of the 5 variance criteria should not result in an approval of the appeal. There should be one clearly stated motion to "approve for the following reasons..." or to "disapprove for the following reasons..." duly seconded, discussed, and voted upon by the whole board. If the motion fails, members have the ability to make a different motion to then act upon. Failure of a motion does not mean that the opposite prevails. The board should make every effort to propose a motion that a majority of board members can agree on.

In other words, if a motion to grant a variance fails by a 2 in favor, 3 opposed margin, that does not mean that the variance is automatically disapproved. In this case, one of the three members who disapproved the motion should now propose their own new motion to disapprove the application stating the reasons for denial. The board should then vote on that motion which would likely pass, 3-2. This is especially important when there are fewer than 5 board members present since motions could result in a tie. Alternate motions should be put forward but if the board truly cannot find something at least 3 members can agree on, the meeting should be continued until a fifth member can be present.

Under RSA 674:33 three votes are necessary to change any administrative decision or to decide in favor of any matter legally before the board. If there is not a full board, even with alternates serving, the chairperson could give the applicant the option of postponing the hearing until all members are present. If the applicant chooses to proceed with the hearing, he/she should be advised that a hearing before a 3- or 4-member board will not be grounds for a rehearing in the event the application is denied. The vote should be made on a motion to approve or disapprove the appeal and should incorporate all of the reasons for the decision. If a motion to approve does not receive

→ three votes, the application is not automatically denied. A further motion, with reasons for the denial, should be offered and another vote taken. The applicant and others should be able to understand the reasons for the decision even though they may not agree with it.

In determining the effect on the “neighborhood,” the ZBA is not limited to consider the effect only on owners or occupants of adjacent property. The ZBA members can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc. resulting from their familiarity with the area involved. The resolution of conflicts is a function of the ZBA. (See *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632, 644 A.2d 548 [1994].)

The following excerpt was taken from *Attaching “Conditions” to Approvals in Land Use Boards*, by Paul Sanderson, Esq., NHMA *Town and City*, November/December 2013.

II. Improving the Quality of Motions and Decisions

The language of your decisions is not being drafted for the benefit of those who are in the room making the decision; the language is drafted for those who will use the decision in the future to implement the approved project, or to take enforcement action if the landowner or a successor owner fails to live up to the conditions imposed upon the project. Remember, the relief offered by land use boards runs with the land, and is not personal to the person who initially sought the relief, unless you are dealing with the special disability exception for variances contained in RSA 674:33, V. Here are some thoughts:

A. A motion should be clearly stated, and a written copy should be provided to the person who is taking the minutes, when possible. Think about how many times each of you as board members has seen a situation where a discussion of an issue ends with a member stating, “Are we all agreed?” followed by heads nodding in unison. How is the person taking the minutes to record that action? What are the chances that at least one member perceives the “agreement” differently from at least one other member? How are the parties and the public to understand the action that has been taken? Please stop, and assure that all motions are clearly and verbally stated. When possible, a written copy should be provided to the person taking the minutes, to reduce the chances of error and misunderstanding.

B. The motion should describe the plan set submitted by the applicant that is actually being used to craft the approval. As projects become more complex, the number of submissions of different versions of the plans, in both paper and electronic formats, steadily increases. Thus, for the benefit of future officials and board members, the motion should describe the plan set being used as the basis of the motion. Often the engineer or surveyor will include a project or file number, and a block with the date of the latest revisions. Refer to that information in your motion. Don’t grant a final approval until the plan set that is to be recorded at the Registry of Deeds agrees in all respects with the motions and conditions of approval imposed along the way. That is, be sure that the “final approval” of the final plan set really does reflect completion of all of the “conditions precedent.”

C. Be careful that the words you use accurately describe what you want to accomplish. For example, don’t say, “I move to approve the ten foot variance.” While it may be clear to everyone in the room that night what the board is attempting to accomplish, how can a building official determine what that means five years later when a surveyor requests information to create a plot plan that will be used as part of the landowner’s mortgage closing process?