2013 Municipal Law Lecture

Takings and Exactions Revisited

Conditions of Approval:

How to Draft Language That is Both Clear and Defensible

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ABOUT THIS PRESENTATION

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I. The Notion of "Jurisdiction" and "Quasi-Judicial Decisions"

The Planning Board and the Zoning Board of Adjustment are the most common land use boards in New Hampshire, but some municipalities also have a Heritage Commission, a Historic District Commission, an Agricultural Commission, or a Housing Commission. Each one of these boards or commissions has been assigned to deal with a set of legal issues as defined in RSA 674. With the exception of the Heritage Commission and the Agricultural Commission, each one of these boards or commissions has also been given the authority to adjudicate the rights and liabilities of property owners with respect to the legal matters assigned to them. That is, RSA 674 has given each board or commission "jurisdiction" to deal with a set of issues, and has authorized the board or commission to conduct "quasi-judicial" proceedings that result in a decision that affects the rights and liabilities of an applicant landowner and "interested parties" such as direct abutters to the land in question. The boards do not go out to the community to develop their own cases; landowners come to the boards seeking relief in accordance with the requirements of the local Zoning Ordinance. The remainder of this presentation will deal only with the Planning Board and Zoning Board of Adjustment.

There are several important points to take away from the manner in which the legislature designed the land use review process:

A. The idea of "separation of powers". Note that while a planning board may draft a zoning ordinance, it is the people acting through the "legislative body" of the municipality that adopts the ordinance and any future amendments. While the "governing body" (meaning the

Board of Selectmen or City Council or Town Council) may propose a change in the ordinance, it is only the legislative body that decides whether or not the ordinance or amendment will be adopted. The executive authority resides with the governing body, the legislative authority resides with the legislative body, and the quasi-judicial authority over land use resides with the land use boards.

B. The idea of "checks and balances". The "governing body" has no authority to directly control the decisions of these land use boards, but it does have the authority to test their decisions, either by an appeal to the zoning board of adjustment, or to the Superior Court. The membership of land use boards is checked either by appointments made by the governing body or by direct election of the members by the legislative body. The planning board has an "ex-officio" member of the governing body as a voting member, which provides a check on the exercise of land use authority. The zoning board of adjustment has jurisdiction over "administrative appeals" which can directly affirm or overrule decisions made in the executive branch by a building inspector, or the selectmen themselves, subject only to a later appeal to the Superior Court.

C. Enforcement authority does not reside with the land use boards. While the planning board does have the authority to revoke a plan approval in accordance with RSA 676:4-a, the local land use enforcement process requires adoption of practices and procedures in accordance with RSA 674:51. Resort to the courts involves the expenditure of municipal funds, which must be approved by the governing body. Enforcement is often a team effort, involving the governing body, the building inspector or zoning compliance officer, the health office, the fire chief and the police chief. These officials cooperate with, but do not report to, the land use boards. The governing body may decide that an enforcement action will not be brought in a court, even if a citizen or members of a land use board think that an action should be brought. Goldstein v. Town of Bedford, 154 N.H. 393 (2006)

II. Understanding "Conditional Approval" and "Final Approval"

A planning board has the ability to attach conditions to any approval that is within its jurisdiction pursuant to RSA 676:4, I(i). A zoning board of adjustment has the ability to attach conditions to any relief that it within its jurisdiction in accordance with decisions of the New Hampshire Supreme Court. The conditions must be reasonable, and relate to the spirit of the ordinance in question and the actual use of the land, and not to the person who is to be using the land. See Wentworth Hotel v. Town of New Castle, 112 N.H. 21 (1972) and Peabody v. Town of Windham, 142 N.H. 488 (1997). The exception to this rule is found at RSA 674:33, V, relating to approving reasonable accommodations to persons with physical disabilities, which can be conditioned to expire only as long as the named person has a need to use the premises.

Since the land use boards clearly have the ability to add conditions to their decisions, what is the difference between a "conditional approval" and a "final approval"? The Supreme Court has indicated that the purpose of allowing conditional approvals is to avoid a requirement that any impediment to full approval must result in a formal disapproval of the application and the wasteful necessity of starting all over again. Sklar Realty v. Town of Merrimack, 125 N.H. 321 (1984).

How would this concept work in practice? Assume a standard residential subdivision, with sewage disposal through private subsurface disposal systems. Such a plan requires approval of the subsurface system designs from the state Department of Environmental Services (DES). If that state agency approval is not in the applicant's hands on the date that the Planning Board makes a decision on the application, that is an "impediment to full approval". If the Planning Board could not craft a "conditional approval" that finds that the applicant has met all of the requirements of the local zoning ordinance, and will be granted a "final approval" once the required state DES permit is received, they would be forced to deny the entire application. The Court has noted, as has the legislature, that such a procedure is wasteful and unnecessary.

Therefore, "conditional approval" is an *interim step* in the process of the board's consideration of the application. A "final approval" cannot be given to the applicant until all of the "conditions precedent" have been met by the applicant. Simpson Development Corp. v. City of Lebanon, 153 N.H. 506 (2006). To understand this concept, we need to know the difference between a "condition precedent" and a "condition subsequent".

The Court has defined it this way. A "condition precedent" is some action that has to be taken by the applicant in order to remove an impediment to "final approval". These are the things that need to be done before the town will take the additional step of granting "final approval". A "condition subsequent" defines an action or behavior that binds the applicant, but does not need to be accomplished before "final approval" is granted. Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006).

Here are some examples of the two sorts of "conditions". There are many other possible examples, so this list is not exhaustive, or applicable to every application.

A. "Conditions Precedent" to Final Approval:

1. Receipt of regulatory permits from state or federal agencies, such as, but not limited to:

   A. DES subsurface waste disposal permit

   B. DES Alteration of Terrain Permit

   C. DES Dredge and Fill Permit

   C. NH DOT Driveway Access Permit from a State Highway

   D. Army Corps of Engineers approval, state programmatic permits

   E. Environmental Protection Agency, Notice of Intent to Comply with Stormwater General Permit(s) under the NPDES program for stormwater plans

2. Review of documents by counsel for the municipality, for issues such as:

   A. Financial security to be provided for the construction of a road

   B. Condominium documents, if a condominium conversion

C. Legal description of land to be deeded to a municipality upon acceptance of a road

D. Lesser interests to be deeded to a municipality, such as a drainage easement, or easement to install infrastructure such as a sewer or water line

E. Creation of a homeowner's association for the management of common areas, whether for drainage, infrastructure, recreation, access to water bodies, or open space

3. Actual posting of financial security, for items such as:

A. Placement of lot markers at corners following road and house construction

B. Road construction with the development

C. Infrastructure installation within the development, including water, sewer, electricity, gas, telephone or other data, sidewalks, traffic control devices, and road signs

D. Off-site improvements necessitated by the development itself to roadways, sidewalks, bridges, water, sewer, or other utilities. This may be to the municipality, or to the State in certain circumstances

4. Specifying time limits to achieve the "conditions precedent" without seeking extensions of time or other intervention from the board imposing the condition(s)

B. "Conditions Subsequent" to Final Approval

1. Hours of operation of a business location

2. Requirements for ongoing maintenance of infrastructure once it is installed, including drainage structures within a parking lot, maintenance of a sewer pumping station, maintenance of traffic control pavement markings and signage within a parking lot

3. Restrictions on the allowable scope of a "home occupation" business or other use allowed by special exception

4. Filing of "as-built" plans with municipal officials prior to acceptance of a road or other infrastructure

The importance of understanding the differences between the two types of conditions is immediately apparent. A subdivision plan or site plan cannot be recorded at the Registry of Deeds, and land cannot be conveyed by reference to such a plan, until "final approval" has been granted. When economic conditions are good, and demand for the new product is high, there is generally a short period between the entry of a "conditional approval" and the achievement of

"conditions precedent". When economic conditions are less favorable, the gap may extend over a period of years, and on occasion are never achieved. For this reason, many boards now impose time limits upon applicant to achieve conditions precedent to final approval, and require applicants to return to them in the event the time limits are not achieved. For more information on this issue, please see Lecture 3, Municipal Law Lecture Series 2009, What Do You Do When They Stop Building?

Another implication of determining which type of condition is involved is the potential need to schedule a further public hearing in the Planning Board prior to issuance of a "final approval". The Planning Board must hold an additional public hearing on the matter unless the conditions precedent involve "minor", "administrative", or "possession of permits and approvals granted by other boards or agencies". It is not unusual for the permits or approvals granted by other agencies to require some substantive change in the plans conditionally approved by the Planning Board or Zoning Board of Adjustment. If plans must change substantively in order to comply with these other approvals, a public hearing on the changes must be held with appropriate notice to all interested parties. RSA 676:4, I(i).

There will probably always be disputes about whether a condition is a "condition precedent" or a "condition subsequent", because it also impacts when those who are unhappy with a decision may appeal that determination. With a Zoning Board of Adjustment, the time for appeal is relatively clear, in that a person must file a Motion for Rehearing within 30 days of a decision, and an appeal with the Superior Court within 30 days of the denial of a Motion for Rehearing. These time limits are strictly construed by the Courts. See RSA 677:2, and Bosonetto v. Town of Richmond, 163 N.H. 736 (2012).

With the Planning Board, the appeal issue has been less clear, in part because there is no requirement for anyone to file a "Motion for Rehearing" to highlight the part of the planning board decision causing disagreement. In addition, it was unclear about when the appeal period commenced for planning board decisions. Was an appeal required when a conditional approval was voted? Did the appeal period commence only upon "final approval"? Did the right to appeal attach when the Planning Board made an important interim decision, such as on the meaning of the zoning ordinance? Also, should the appeal be made to the Zoning Board of Appeals, or to the Superior Court, or both?

These questions lead to litigation attempting to interpret the meaning of RSA 677:15, which is the statute governing appeals from planning board decisions to the Superior Court, and RSA 676:5, III, which is the statute governing appeals to the Zoning Board of Adjustment based upon interpretations of the meaning of the Zoning Ordinance. As a result of several cases, the rule that emerged was that a planning board decision about the zoning ordinance itself was appealable to the Zoning Board of Adjustment when the decision was made. Atwater v. Town of Plainfield, 160 N.H. 503 (2010). This might be at an early phase of the review, prior to the entry of a conditional approval, and well prior to entry of a final approval.

As to other Planning Board decisions, not involving the interpretation of the ordinance, the matter is subject to an appeal when the decision complained of is made. Usually this is at the time of entry of the conditional approval, but conceivably could be at an earlier point. Saunders v. Town of Kingston, 160 N.H. 560 (2010).

In an effort to reduce uncertainty in this area, the Legislature passed an amendment to RSA 677:15. New section 1-a, effective August 31, 2013 reads as follows:

> "I-a.(a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.
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> (b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III."

Therefore, careful advocates will now examine any decisions made by the Planning Board at any point in the process of review of a subdivision or a site review, with an eye to determine whether or not such decisions should be appealed to the Zoning Board of Adjustment. Failure to undertake such an appeal might prevent the party from appealing the matter in the future. These appellants may well have quite a task in front of them explaining to members of the Zoning Board of Adjustment why that Board should review these decisions reached at what appears to be the middle of the review of an application in the Planning Board. If the Zoning Board of Adjustment determines that the Planning Board did commit an error in the interpretation of the Zoning Ordinance, the Planning Board will have to understand that the

appeal was sought because the statutory scheme punishes those who fail to raise questions at the earliest point of decision, and that it is not an attempt by the Zoning Board of Adjustment to somehow substitute their judgment for that of the Planning Board members.

With all of this, it would be easy for Planning Board members to conclude that they should not attempt to review a matter until all of the other interested agencies or boards have made their decision. In fact, some boards reached this conclusion, and refused to accept an application as "complete" until the other necessary approvals or permits were in hand and filed with them. The legislature found this procedure to be inappropriate, and in 2010 adopted the following amendment to RSA 676:4:

> "39:1 Board's Procedure on Plats; Completed Application. Amend RSA 676:4, I(b) to read as follows:
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> (b) The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. A completed application sufficient to invoke jurisdiction of the board shall be submitted to and accepted by the board only at a public meeting of the board, with notice as provided in subparagraph (d). ***An application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i).*** The applicant shall file the application with the board or its agent at least 15 days prior to the meeting at which the application will be accepted. The application shall include the names and addresses of the applicant, all holders of conservation, preservation, or agricultural preservation restrictions as defined in RSA 477:45, and all abutters as indicated in the town records for incorporated towns or county records for unincorporated towns or unorganized places not more than 5 days before the day of filing. Abutters shall also be identified on any plat submitted to the board. The application shall also include the name and business address of every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the board. Since construction of any structure near streams or rivers downstream of a dam can increase the hazard classification of the dam established by the department of environmental services, the application shall identify the nearest dam upstream and include the name and address of the dam owners.
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> 39:2 Board's Procedure on Plats; Conditional Approval. Amend RSA 676:4, I(i) to read as follows:
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> (i) A planning board may grant conditional approval of a plat or application, which approval shall become final without further public hearing, upon certification to the board by its designee or based upon evidence submitted by the applicant of satisfactory compliance with the conditions imposed. ***Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or***

federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits. Final approval of a plat or application may occur in the foregoing manner only when the conditions are:

(1) Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or

(2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or

(3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies, ***including state and federal permits.***

All [~~other~~] conditions ***not specified within this subparagraph as minor, administrative, or relating to issuance of other approvals*** shall require a hearing, and notice as provided in subparagraph I(d), except that additional notice shall not be required of an adjourned session of a hearing with proper notice if the date, time, and place of the adjourned session were made known at the prior hearing."

Thus, Planning Boards must go forward with their review process once an application has been received. They can add conditions precedent to their decisions to protect them in the event that others with review powers come to different conclusions about the project under review.

III. Dealing with the Experts

When land use board members are serving in their quasi-judicial roles, they are held to much the same standards as are judges in our state courts. Applicants and abutters and other interested parties alike are constitutionally entitled to receive decisions that are based upon the evidence, and issued by persons who approach the adjudication neutrally. These requirements are the subject of Lecture 2 in this year's series, "Conflicts and Ethical Considerations for Land Use Board Members".

In addition to these personal ethical considerations, land use board members now must often deal with the information presented to them by experts hired by applicants, abutters, or other interested parties. Most of us who serve on land use boards are not substantive experts in any of these specialized areas. That is most of us are not professional engineers, licensed land surveyors, wetlands scientists, soil scientists, licensed subsurface system designers, hydrologists, licensed real estate appraisers of value, lawyers, traffic consultants, or other types of licensed professionals. Instead we bring our own mix of skills and life experience to the task of adjudicating applications. Given that many board members do not have the training or experience to evaluate or challenge the opinions of these substantive experts, what strategies are available to deal with this specialized information? How can board members proceed when they receive conflicting testimony from experts hired by opposing parties? How will the findings from the actual hearings on the matter be crafted into conditions of approval?

The Legal Standards

It is easy to forget that the burden to produce information sufficient for a board to make a decision lies with the applicant. That is, the applicant must give the board enough information to show an entitlement to relief under the ordinance in the planning board, or entitlement to relief from the ordinance in the Zoning Board of Adjustment. Summa Humma Enters. V. Town of Tilton, 151 N.H. 75 (2004). Thus, the first strategy in adjudication is for each board member to assure himself or herself that the applicant has provided enough information to justify the relief sought.

Just as it is not enough for an applicant to just come in and tell a story, board members are not completely free to just decide who they wish to find credible, or which opinions have merit. While board members can and do rely upon their own judgment, knowledge of the community, and life experiences, they cannot "...deny approval on an ad hoc basis because of vague concerns." Derry Senior Development, LLC v. Town of Derry, 157 N.H. 441 (2008).

Recently the Supreme Court has given us some guidance in how land use board members should deal with expert opinions offered to them.

The Unchallenged Expert

If an applicant, abutter, or other interested party offers the opinion of a qualified expert, and the opinion of that expert goes unchallenged by others, a reasonable trier of fact must find in accordance with the expert opinion. In Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007), a Zoning Board of Adjustment adjudicated a request for a variance. The applicant brought in expert opinion regarding the impact of the project design on a wetland, finding that the project would do no harm to the area. The expert's opinion was not challenged, or in any other way controverted by findings made on the record. Despite the presence of the opinion in the record, the ZBA denied the variance. The Supreme Court reversed, finding that no reasonable trier of fact could find other than in accordance with the expert opinion. Simply put, an expert cannot be ignored.

The Expert vs. the Internet

Often, the issues in a land use matter will be apparent in advance of a hearing. Members are free to do their own research on the issues to help inform themselves about standards of practice and why a person might recommend one type of design as opposed to a different type of design. However, such personal research is not a substitute for the opinion of a qualified expert, and will not overcome the weight of the testimony of an expert. In Continental Paving Inc. v. Town of Litchfield, 158 N.H. 570 (2009), that is just what happened. In dealing with a variance related to the setback of a road from an environmentally sensitive vernal pool, the applicant presented the testimony of a qualified wetlands expert who had actually reviewed the site, and concluded that the proposal would not injure the vernal pool. Board members chose to discount that opinion in favor of a general opinion piece found on the internet that recommended a greater setback of the road from the pool. This opinion piece was not based upon an actual review of the site in question. The Board denied the variance on this ground.

The Supreme Court reversed indicating that the lay opinions of the board members, based upon general information not addressed to the specific site was insufficient to overcome the

weight of opinion of the qualified expert who had visited the site and could speak to the actual condition of the area and how the design worked to protect the sensitive area.

State Regulations and Town Regulations

It is very common for zoning ordinances to refer to state based regulations as the appropriate performance standard to use in designing a project. This is often done with specifications of materials for highways and other types of infrastructure, such as water and sewer lines. That is what happened in the case of Derry Senior Development, LLC. V. Town of Derry, 157 N.H. 441 (2008). In that case the dispute related to the size of infrastructure piping to be used in the design of the project. State regulations referred to a size, based upon the size of the project. Local officials desired a larger, and more expensive, pipe in an effort to deal with future needs in the area. The Supreme Court held that based upon the actual language of the local ordinance and regulations, compliance with the state regulations created a presumption that the town's regulations were in fact met, and allowed the smaller specification to be used.

Recently the Court clarified that holding in the case of Limited Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488 (2011) in which the applicant argued that compliance with state regulations automatically meant that local regulations were satisfied. The Court held that this only created a presumption of compliance, which could be overcome by other language in the ordinance or by other facts. The key lesson here is to use care in drafting the terms of the local zoning ordinance and regulations. If local officials or the Boards wish to specifically reserve the freedom to impose a more restrictive standard based upon defined criteria, they must expressly state that intention in order to overcome the presumption.

You Can Have an Expert Too

Hopefully these previous cases will show why it is so important to have your own expert who can review the submissions of experts hired by the applicant, an abutter, or another interested party. As a non-expert member, even if you think you can adequately deal with the opinion evidence that is offered in a specific substantive area of review, your questions will of necessity be based upon your life experiences and your own internet reviews or other research of the issue. The cases discussed above show that such opinions will likely not survive in a court appeal, and will result in either a reversal of your decision, or a remand back to your board for further proceedings. Such results are expensive and time consuming, and are often completely avoidable by retaining an expert to review the information and report to the Board.

The legislature has provided two statutes that authorize land use boards to obtain the expert assistance that they need at the expense of the applicant. See RSA 676:4, I(g) for the Planning Board and RS 676:5, IV for the Zoning Board of Adjustment. The primary limitation is that the two land use boards may not hire two separate experts to deal with the same issues, and the two boards must justify all of their costs and expenses by providing detailed invoices to the applicant upon request.

While the retention of an expert or experts may initially seem to be an expense that an applicant would resist, the development community has come to realize that review of plan submissions by the municipality's expert often has two very positive results. First, the peer expert review of a proposal results in suggestions for improvement and the correction of errors

that will result in an improved project. Secondly, when two experts agree on an issue, it is that much more difficult for such opinions to be challenged, either at the land use board or on appeal. Thus, a final approval is often achieved more quickly, and without a protracted period of litigation, which ultimately results in savings to the applicant and the more efficient and timely delivery of the actual project.

IV. Improving the Quality of Motions and Decisions

Perhaps the most important point to make here is that 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.

The Special Situation of the ZBA Three Vote Rule

In general, we do not recommend that Zoning Boards of Adjustment vote separately upon the legal elements of a variance. We realize that some boards have long followed this practice, but there is a potential for a problem. This arises from the requirement in RSA 674:33, III that the concurring vote of 3 members of the Board is required to decide in favor of an applicant "on any matter on which it is required to pass".

Imagine a request for a variance, and a separate vote on each of the 5 elements as follows:

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminish Value	All 5 Elements
1	Y	N	Y	N	Y	N
2	Y	N	N	N	Y	N
3	Y	Y	N	Y	Y	N
4	N	Y	Y	Y	N	N
5	N	Y	Y	Y	N	N
# Members in Favor	3	3	3	3	3	**0**

You can readily see that while none of the members appear to be in favor of granting the variance, each element has garnered three positive votes. Has this variance been granted or denied? We do not know the answer to this question based upon any reported New Hampshire court case. Please do not become the municipality where this issue is raised and tested. Instead, please make your motion to grant or deny the variance, and base your vote as a member on whether or not all five elements have been met.

Clarity is the Goal

As noted above, the key to creating language used in decisions is to strive for clarity, and remember that the language will be used by future municipal officials and board members to assure that the approved land use remains in compliance with the conditions imposed by the boards. 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. While it might seem unnecessary to state such a requirement, 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?", following 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, if a written copy can be provided to the person taking the minutes, the chances of error and misunderstanding are greatly reduced.

B. The motion should describe the plan set submitted by the applicant that is actually being used to craft the approval. Imagine a project that goes first to the Zoning Board of Adjustment for a variance as to the proposed use. The variance is approved using that plan set, with a condition that it be approved by the Planning Board under its site review jurisdiction. The Planning Board process results in revisions to the information shown to the ZBA, plus the creation of additional sheets in the set. The NH DOT reviews and approves a driveway application to the site using a plan version that differs from that shown to the ZBA, and less formal than the one approved by the Planning Board as its final site review plan. Also, the applicant has sought DES subsurface and wetlands permits using the plan set shown to the ZBA, but not the plan set ultimately approved by the Planning Board during site review.

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, it is very helpful to describe the plan set 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?

Instead, say something like,

> "I move to approve the applicant's request for a variance from section ___ of the zoning ordinance to permit the construction of a single family structure that is located twenty feet from the easterly sideline of the land shown on Tax Map ___ Lot ___ when thirty feet is required, in accordance with a plan entitled, _____ as drawn by ____ dated _____, and submitted by the applicant as part of this hearing, with the following conditions: _____.

D. Don't expect the parties draft the language that you want. If the parties are represented by lawyers, you can expect to receive a written proposed motion to support the view of the party being represented, and a written request for findings of fact. The lawyers are thinking about creating and protecting the "record" that would be presented to the Superior Court upon appeal, and about having the Board establish the "facts" that the Court will rely upon as it examines a certified record. That is, the lawyers are approaching the case as litigators and advocates for their client's position.

If the parties are primarily represented by an engineer or a surveyor, the Board is much less likely to receive such documents, and instead will receive a great deal of graphical evidence (plans), and perhaps written reports that describe the outcome of wetland studies, drainage calculations, or traffic counts or traffic movements during a study period.

That is, don't expect the lawyers to create graphical plans, and don't expect the engineers to craft a motion and request for findings of fact that would satisfy a judge. Each profession has a different set of skills, and a different way of presenting information. As board members, you must sift through all of this and reach your own conclusions as to whether or not the requested relief should be granted.

It is not realistic, except in the most straightforward of uncontested matters, for the members to simply attend a Board meeting and hope that one member will be able to

immediately craft a clear motion for approval with accurate, complete and meaningful conditions that capture all of the thoughts of the Board. A well-crafted decision takes time, and advance preparation. It need not be completed in a single meeting if the Board needs to consider drafts of the decision, or to obtain legal advice regarding aspects of the decision. Please do not say to the person taking the minutes or the chairperson, "You know what I mean, just clean it up for the minutes and notice of decision."

It is perfectly lawful to request a party to file proposed documents, or to request staff for the board to prepare a proposal in advance, or for a board member to craft and bring a proposal to a meeting to use as a basis for discussion. See Webster v. Town of Candia, 146 N.H. 430 (2001). What is not lawful is to deliberate as a board on such proposals outside of a public meeting, either by holding an unnoticed meeting of the members, or through e-mail. See RSA 91-A:2, and 2-a. Your discussions on the proposed documents must take place only within a duly noticed and convened public meeting, and not otherwise.

E. Be very careful before incorporating any codes or other requirements by reference if the Board does not have a clear understanding of the implications of the action. For example, Boards will often require an applicant to "meet the requirements of the Police and Fire Departments." This can have unexpected consequences.

See Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62 (2012), where that type of requirement was added as a condition of approval. Once the applicant met with the Fire Chief, the unusually steep nature of the lot and its driveway caused the chief to require the installation of residential sprinklers in a house, since the fire equipment could not get close enough to the house itself to provide service. The landowner balked at the requirement, altered the structure and took residence without an occupancy permit. In an enforcement action, the landowner defended by citing to a state statute that prohibited a planning board from imposing such a condition. The Supreme Court found that the requirements of the State Fire Code controlled the situation, and not the planning board statute. In the end, the landowner was required to pay $55,000.00 in fines plus the case for remanded for a finding as to the payment of attorney's fees.

Clarity in the Written Notice of Decision Assists in a Later Enforcement Action

All decisions of land use boards must be reduced to writing, and along with the minutes of the meeting, must be available to the public within five business days of date the vote was taken. RSA 676:3. The written notice of decision must, if a request was not approved, also contain the reasons for the disapproval. If approved, any conditions of approval must be detailed in writing. While the requirement of a written notice of decision is a basic component of the idea

of procedural due process, and thus has a constitutional basis, there are other reasons why a Board will want to have a complete and accurate Notice of Decision.

Whether the application is approved, approved with conditions, or disapproved, there is likely to be someone who is unhappy with the decision that is made. The written decision is an opportunity to both record and communicate exactly what relief was granted, or detailed reasons why relief was denied. This will create a record for use in any current appeals of the decision, or a record that can be used by future officials or board members to determine whether the use of the land complies with the relief that was granted.

This can be very important when the matter comes up to the Superior Court on appeal. As the Supreme Court recently explained in Limited Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488 (2011), when the Court reviews a matter, the basis for the board decision may be found in the notice of decision, or in the board minutes, or both. The Court is looking to understand whether or not the Board properly applied the ordinance, and what were the reasons behind the votes taken by the Board. If these items are absent, the Supreme Court has warned us that those are the cases that are likely to be remanded.

The exact scope of relief granted by a board can be a very important issue in a later enforcement action. See, for example, the decision in Bennett v. Hampstead, 157 N.H. 477 (2008). The town's zoning board of adjustment (ZBA) granted Bennett a special exception "to permit a home occupation— use of premises in connection with landscaping and property maintenance business." When applying for the special exception, Bennett informed " the ZBA that fertilizer and other materials would be stored in the garage, that there would be one full-time employee plus two college students working during the summer, that the proposed business would not be injurious or obnoxious, and that the lot was screened from view." Years later, an inspection showed (1) " that trees had been cleared in the rear of the Bennett property, eliminating visual screening of the operations" ; (2) " [l]arge piles of mulch, loam and compost were stored outside, as well as pallets with pavers and bricks, concrete partitions filled with different types of stone, and other landscaping materials" ; and (3) that there was " a large dump truck, a large front-end loader, a large tractor, a bulldozer, a Bobcat, a skid steer, three large trailers to transport tractors, two pickup trucks, and a backhoe all parked outside" in the yard. She also learned that Bennett had two to three full-time employees, three to four part-time employees, and six to eight part-time summer employees.

The trial court granted the town's request for a preliminary injunction, and enjoined Bennett from operating a construction business on the property, causing noise by the screening of loam, and engaging in the commercial composting of any materials on the property. The court further directed Bennett to remove any piles of commercial compost stored on the property, and cease operation of noisy and heavy equipment at the back of the property except during business hours. The trial court did not, however, prevent Bennett from operating its landscaping business.

That is, the Court directed him to return the scope of the business to the scope that had been approved by the ZBA when the special exception was granted.

This successful result would not have been possible without adequate records from the action of the ZBA when it granted the special exception. Because the scope of the special exception was clear, there was sufficient information to support the land use enforcement action. This is the goal for all of the boards, to make decisions that are sufficiently detailed and clear that a future municipal official will be able to taken enforcement action in reliance upon them.