

NEW HAMPSHIRE MUNICIPAL ASSOCIATION



Conditions of Approval: How to Draft Language That is Both Clear and Defensible

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There are rules that limit what you can require of an applicant

CONDITIONS OF APPROVAL

Conditions

- Conditions must serve a legal purpose under the zoning ordinance, RSA 674:16
 - Improper: In-law apartment use granted, but expires when your mother in law moves or the house is sold.
 - About the person, not the land
 - Proper: Relief granted – on condition that house not exceed a certain height.
 - Legal purpose of zoning, RSA 674:16, I(a).

Conditions

- Must relate to land – not to the person
 - Wentworth Hotel, Inc. v. Town of New Castle, 112 N.H. 21 (N.H. 1972) , except:
 - Variances for the Disabled, RSA 674:33, V
 - ZBA may order the variance to survive only so long as the particular person has a continuing need to use the premises
 - Waiver for Agricultural Uses, RSA 674:32-c
 - ZBA shall grant waiver to extent necessary to reasonably permit the agricultural use

Conditions

- Cannot delegate duties to other governments:
- Tidd v. Alton, 148 NH 424 (2002)
 - ZBA approved a special exception, subject to off-site improvements to be completed by the State.
 - Held, the same as waiving or varying the terms of the zoning ordinance, making the special exception unlawful.
 - Same rule would apply for a planning board, since without power to waive or vary the ordinance.

Can Send Applicant to Other Boards

- When a proposal requires both ZBA relief and Planning Board subdivision or site review approval:
 - Who hears the case first?
 - Whose conditions prevail?
 - Joint meetings (RSA 676:2) may help
- PB cannot put application on hold pending other approvals, RSA 676:4, I

Conditional Approval, RSA 676:4(i)

- The purpose of allowing conditional approvals is to avoid requiring that any impediment to full approval result in formal disapproval and the wasteful necessity of starting all over again.
 - Sklar Realty v. Town of Merrimack, 125 N.H. 321(1984).
- Conditional approval is only an interim step in the process of the board's consideration. For a valid, final approval under the statute, there must be no unfulfilled conditions precedent.
 - Simpson Development Corp. v. City of Lebanon, 153 N.H. 506 (N.H. 2006)

Precedent or Subsequent?

- Conditions precedent contemplate additional action on the part of the town and, thus, cannot constitute final approval.
- Conditions subsequent do not delay approval.
 - Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (N.H. 2006)

Implications, RSA 676:4, I(i)?

- Final approval may be granted without a hearing when conditions precedent are met.
- Changes to any conditions, whether precedent or subsequent, that are not “minor, administrative or dealing with other permits” require a public hearing prior to final approval.

Appeal and Review

- Planning board decisions ripe for review when the approval decision is made, not when final approval is granted.
 - Saunders v. Town of Kingston, 160 N.H. 560 (N.H. 2010)
- New RSA 677:15, I-a (eff. 8/31/2013) requires appeal from the PB to ZBA prior to filing Superior Court appeal if dealing with meaning of the ordinance, RSA 676:5, III.

Conform Your Conditions to Expert Guidance

DEALING WITH THE EXPERTS

Duty in Adjudication

- The petitioner is responsible to provide the Board with evidence sufficient for it to make a decision.
 - Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 79 (2004)
- A board is entitled to rely in part on its own judgment and experience, but may not deny approval on an ad hoc basis because of vague concerns.
 - Derry Senior Development, LLC v. Town of Derry , 157 N.H. 441 (2008)

Trap: Ignore the Expert

- A land use board is a trier of fact and must base decisions on the evidence.
- If an expert testifies, and the opinion is uncontroverted, the trier of fact must as a matter of law find in favor of the expert.
 - Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (N.H. 2007)

Trap: Using Internet Research as “Evidence”

- “...the lay opinions of certain ZBA members, based upon general information not specifically addressed to the subject site, ...[are] insufficient to counter the uncontroverted expert opinions presented by [the applicant]”
 - Continental Paving, Inc. v. Town of Litchfield, 158 N.H. 570 (N.H. 2009)

Board's Independent Expert

- Land use boards have authority to hire experts to advise them, & charge applicant
 - RSA 676:4, I (g) (PB) and RSA 676:5, IV (ZBA)
- PB and ZBA, if both review the matter, may not seek duplicate expert opinions, and must justify all costs and expenses by detailed invoice. RSA 676:5, V.

State Regulations

- May create a presumption that town's regulations are satisfied.
 - Derry Senior Development, LLC v. Town of Derry , 157 N.H. 441 (2008)
- Not automatic, depends upon the language of the local ordinance.
 - Limited Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488 (N.H. 2011)

It is all about being CLEAR and PRECISE

IMPROVING THE QUALITY OF MOTIONS & DECISIONS

Motions

- Motions should be made in accordance with your rules of procedure.
 - Such rules are required by RSA 676:1
 - ZBA's should not take separate votes on each element of a request, but instead create a motion to grant or deny the entire request.
 - Why?, the 3 affirmative vote rule of RSA 674:33,III.

Example: Was This Variance Granted?

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 Favor this Element	3	3	3	3	3	0

Failed Motions?

- Issues for your rules of procedure:
 - If an even number of members, effect of a tie vote?
 - Effect of a failed motion?
 - Just an opportunity for a new motion?
 - Some ZBAs say 2- 2 is denial (3 vote rule).
 - No NH court decision; other states divided.
 - Effect of abstention? So long as a majority of the board is present, only a majority of the votes actually cast is necessary to support an action.
 - Town of Merrimack v. McCray, 150 N.H. 811 (N.H. 2004)

Drafting a Motion For Approval

- Relief runs with the land, so take care and be precise.
 - Don't say: "Move to approve a 10 foot variance..."
 - Do say: "Move to grant a variance from section ____ to allow a side setback of 10 ft. where 20 ft. is required..."
- Not required to grant what the applicant seeks; craft the relief you feel is appropriate

The Decision

- Written decision is required, & if a denial, the reasons must be specified.
 - RSA 676:3, I
- The written decision is an opportunity
 - To communicate exactly what relief was granted, or why a request was denied.
 - To create a record for future local officials to use in understanding what relief was granted to an applicant.

Findings of Fact

- The basis for decision may be in the notice of decision, or the minutes, or both.
 - Did the board properly apply the ordinance?
 - What were the board's reasons for the vote?
- Necessary for meaningful review by Court, and if not present, case may be remanded.
 - Limited Editions Properties, Inc. v. Town of Hebron
162 N.H. 488 (N.H. 2011)

Enforceable Decisions

- When creating conditions about the scope of relief granted, be as specific as possible.
- In *Bennett v. Hampstead*, 157 N.H. 477 (N.H. 2008) based upon a clear and detailed notice of decision, town was able to receive:
 - Injunctive relief requiring landowner to conform to the scope of an approval, RSA 676:15
 - Recovery of its attorneys fees and costs, RSA 676:17

Codes Incorporated by Reference

- Caution: conditions that require applicant to “meet the requirements of the Police and Fire Departments.”
 - Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62 (N.H. 2012)
 - Incorporated state fire code, which gave authority to chief to require sprinklers, even when land use board could not.
 - Resulted in penalty to landowner of \$55,000 plus attorneys fees.

Reminders

THE RIGHT TO KNOW LAW APPLIES

Deliberations

- If deliberating at a different time:
 - Observe the right to know law and deliberate to decision in public, RSA 673:17.
 - Do not allow ex-parte contact with board members in the interim days.
 - Members should not discuss the case between themselves in person, by phone, or by e-mail, unless it is to receive legal advice from counsel for the land use board.

Deliberations: Obtaining Legal Advice

- Consultation with counsel is not a “meeting”.
 - Need not be posted.
 - No minutes are required.
- What if the board meets to review a letter from counsel? Is this “consultation”? No...
 - Advice from counsel is privileged, not a public record subject to disclosure.
 - But, if the advice or letter is disclosed in public, the privilege may be waived.

The Decision

- Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
 - (no more 144 hours!)

Thank you!

- For more information – please contact us:
 - Call NHMA Staff Attorneys at:
1-800-852-3358 ext. 3408
 - E-mail at: **legalinquiries@nhmunicipal.org**

Helpful Websites:

www.nhmunicipal.org

www.nh.gov.oep

