

CHALLENGING OR APPEALING AN ADMINISTRATIVE ZONING DECISION

By: Maria Dolder

The Zoning Board of Adjustment (also the "ZBA") is "Quasi-Judicial", which means that it is given the legal status to hold public hearings and make decisions to vary the provisions of the Zoning Ordinance, not changing the ordinance nor the zoning districts and more importantly, not to practice law. The Board may consult with the Planning and Community Development Department, the Selectmen and other departments when carrying out its function. The ZBA may also consult with the municipal attorney with any legal questions or concerns that the Board may have.

In order to better understand the process of appealing an application to the ZBA as well as the courts, it is imperative to understand the original application process. When applying for a variance, special exception or equitable waiver, the applicant must complete the required application, pay a fee and submit appropriate documentation. Some municipalities require a pre-application meeting with the applicable town official. The application will ask for the applicant to explain why his request should be granted and to discuss how his request meets all the requirements of the relief being requested. Once the application is accepted, it will be placed on the agenda for the next Zoning Board of Adjustment hearing and public notice is provided, including notification to abutters. At the hearing, the applicant, attorney and other agents (developer, builder, etc) as well as any interested parties (such as abutters) will be able to make a presentation, answer questions the board might have and provide further detail regarding the application. The board then makes its decision. Any interested party has thirty days from the date of the decision, as outlined below, to appeal the Board's decision. It is always important to remind the applicant of the thirty day appeal period and inform them that any work they perform during the appeal period is done at their own risk. Generally, this is more important if there was opposition to the proposal at the Board level.

Procedural Requirements

When an applicant (or interested party) wishes to appeal the decision of the Zoning Board of Adjustment, they must follow very specific steps outlined by the legislature. It is important to note that there are extremely specific deadlines regarding filing dates and the Supreme Court has held to those in their rulings. In fact, if the appealing party fails to meet a required deadline, the Superior Court does not have jurisdiction to hear the appeal. In addition, an applicant must typically exhaust their administrative remedies prior to filing suit with the courts. The appeal process falls into two sections. The first is the administrative appeal process and the second is the appeal process through the court. Each will be discussed in detail.

The importance of providing a detailed and thorough record when an application is originally filed cannot be stressed enough. It is the applicant's burden to prove to the ZBA that he meets all of the required criteria for the relief being requested. It is also important to remember that in order to obtain a variance, special exception or equitable waiver, an applicant must establish that he meets all of the applicable criteria. For example, if a Zoning Board determines that an applicant meets 4 out of the 5 criteria to obtain a variance, the variance must be denied. As a result, the application process should not be taken lightly. Furthermore, upon appeal to the ZBA, a party is not generally allowed to raise issues that were not mentioned in the original application or before the Zoning Board unless the information was not known at the time of the hearing.

Administrative Appeals

It should be noted that RSA 674:15 requires that before taking any action authorized by statute, the zoning board of adjustment shall conduct a hearing at which parties in interest and others shall have an opportunity to be heard. With that said, if an applicant has completed their application properly, has submitted all required documents and gone through the public hearing process with the ZBA, then they may appeal a denial of their application. In addition to the applicant, interested parties (under RSA 677:7, a party of interest is defined as “[a]ny person whose rights may be directly affected by the outcome of the appeal”) may also appeal a decision of the ZBA. When an application is granted or denied, the Zoning Board is required to provide a detailed outline in the decision explaining the reason(s) for the denial or the support for granting the relief.

Except in very limited circumstances, the first step in the appeal process is to file a Motion for Rehearing with the Zoning Board. This process is set forth in RSA 677:2. The Motion for Rehearing must be filed with the Zoning Board within 30 days after the decision of the Zoning Board. Pursuant to the statute, the 30 day time period begins with the day following the date upon which the Board voted to approve or deny the application.

The Motion for Rehearing is a very important step in the appeal process. If the party fails to do this, except in very limited circumstances, he will lose his right to appeal the decision to the Superior Court. In filing a Motion for Rehearing, the party must set forth every ground upon which he claims that the decision of the ZBA was unlawful or unreasonable.

Preparing and submitting a Motion for Rehearing is a critical part of the appeal process because a party is not permitted, unless approved by the court for good cause, to set forth any reason that is not specified in the Motion to the Court on appeal. Basically, if the party does not raise it in the Motion for Rehearing, he will generally not be allowed to raise it to the Court. Once filed, the Zoning Board then has 30 days to either grant or deny the application or suspend its decision for further review.

If the Motion for Rehearing is denied, the next step is to appeal to the Superior Court.

Judicial Review of Local Decision-Appeals to the Court

Pursuant to RSA 677:4, any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable. For purposes of this section, "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2. In addition, any hearing by the superior court upon an appeal under this statute shall be given priority on

the court calendar. (RSA 677:5). Furthermore, the filing of an appeal shall not stay any enforcement proceedings upon the decision appealed from, and shall not have the effect of suspending the decision of the zoning board of adjustment or local legislative body. However, the court, on application and notice, for good cause shown, may grant a restraining order. (RSA 677:9).

RSA 677:6 sets forth the burden of proof in zoning appeals. The statute states that in an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be *prima facie* lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities on the evidence before it that said order or decision is unreasonable.

As set forth above, an applicant attempting to overturn the decision of the Zoning Board with the Superior Court bears a high burden of proof. In fact, the trial court must treat the factual findings of the Zoning Board as *prima facie* lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. The review by the Superior Court is not to determine whether it agrees with the Zoning Board's findings, meaning whether or not the Superior Court would have granted the variance, but instead is to determine whether there is enough evidence upon which the decision of the Zoning Board could have been reasonably based. The appealing party bears the burden of persuading the

trial court that, by the balance of probabilities, the board's decision was unreasonable. The Court's have consistently found that if any of the Board's reasons for denial support its decision, then the appeal fails. Similarly, the Supreme Court "will uphold a trial court's decision on appeal unless it is unsupported by the evidence or legally erroneous". *Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95, 99 (2010).

It is important to note that all evidence transferred by the zoning board of adjustment or the local legislative body shall be considered by the court regardless of whether or not the evidence would be considered admissible if originally offered in the trial of an action at law. (RSA 677:10). This can be a difficult concept for attorneys who do not practice in the area of land use. This, however, is yet another reason that it is extremely important to establish a good record at the municipal level.

It is also important to understand that costs will not be assessed against the municipality unless it is demonstrated to the court that the zoning board of adjustment acted in bad faith, with malice or with gross negligence in making the decision appealed from. (RSA 677:14). This is an extremely high threshold to meet and the courts rarely, if ever, award costs against a municipality in zoning appeals.

Standing Issues

Pursuant to RSA 677:2, the Selectmen, any party to the proceedings or any person directly affected by the decision may apply for a rehearing before the Zoning Board. RSA 677:4 goes on to state that an appeal from the Zoning

Board's decision on the motion for rehearing may then be brought to the Superior Court by any "person aggrieved" by the decision. The statute defines a "person aggrieved" as any party entitled to request a rehearing under RSA 677:2. The Courts have provided further clarity in this definition and have held that a "person aggrieved" is defined as someone who has a "direct definite interest in the outcome of the proceedings." *Goldstein v. Town of Bedford*, 154 N.H. 393, 395 (2006). Standing is not extended to all people within a community who might feel as though they are harmed by the Zoning Board's decision. *Id.* Whether or not a party has sufficient interest in a proceeding in order to establish standing to challenge a Zoning Board decision is a factual matter to be determined by the Court on a case by case basis. *Id.* It is clear, however, that direct abutters have standing to challenge decisions affecting their neighboring properties.

Trial of an Administrative Appeal/Litigating a Zoning Case

Declaratory Action/Trial Strategies

Given the standard of review and role of the Superior Court, most zoning appeals at the Superior Court level are done through offers of proof made by the attorneys. One of the reasons for this practice is due to the fact that the hearing is based upon the record of the proceedings before the Zoning Board. As detailed above, it is not the function of the Superior Court to rule on whether or not it would have granted the requested relief, but instead is to determine whether there is enough evidence on the record upon which the decision of the Zoning Board could have been reasonably based. As a result, the Courts are generally hesitant to allow the introduction of evidence that was not presented to the Zoning Board for its consideration.

Use of Experts

Experts, such as surveyors or engineers, may be needed at the municipal level if items such as drainage, traffic or parking requirements are an integral part of the relief being requested from the Zoning Board. If an expert was used at the Zoning Board level, but the Zoning Board's decision was in direct contradiction with the expert's conclusions, this evidence can be helpful in proving that the ZBA decision was not reasonable. With that said, the Courts have held that the members of the Zoning Board may use their own personal experiences and knowledge of the area in making a decision. This has been held as being reasonable, even in the face of expert testimony to the contrary.

Local Government Perspective

When thinking of a zoning case, it is important to remember that most Zoning Boards are made up of volunteers from the community. The members of the Boards are not generally lawyers and are giving their time to the community because they are interested in helping with zoning matters. It is helpful when either town counsel or the zoning staff are able to assist new Board members with learning proper procedure and handling the application process. From the municipality's perspective, having a clear decision outlining all of the reasons for the denial or approval, along with clear meeting minutes is imperative in the appeal process. Given the burden of proof that the appealing party must meet, the more detailed reasons that a Zoning Board can provide in its decision, the more difficult time a party challenging the decision will have in arguing that it was

unreasonable. Since all factual findings of the Zoning Board are deemed as *prima facie* lawful and reasonable by the Court, counsel for the municipality will generally focus on the facts that were presented to the Board and highlight the reasonableness of the Board's decision. The municipality will prevail as long as the Court finds that at least one reason for its decision was reasonable.

Mandamus, Prohibition and Injunction

As stated above, the filing of an appeal does not automatically stay any enforcement proceedings upon the decision appealed from, nor does it suspend the decision of the zoning board of adjustment or local legislative body. (RSA 677:9). However, the court, on application and notice, for good cause shown, may grant a restraining order. This can be useful in situations where an abutter is appealing a decision granting an application and the abutter is concerned about the project being constructed while the appeal is pending. Although possible, this is generally not necessary because most developers will not proceed with constructing a project while an appeal is pending before the Courts.