

2020 Webinar Series

ZBA Basics in New Hampshire

Stephen Buckley, Legal Services Counsel
Natch Greyes, Municipal Services Counsel

April 15, 2020



Today's Presenters



Stephen Buckley
Legal Services Counsel

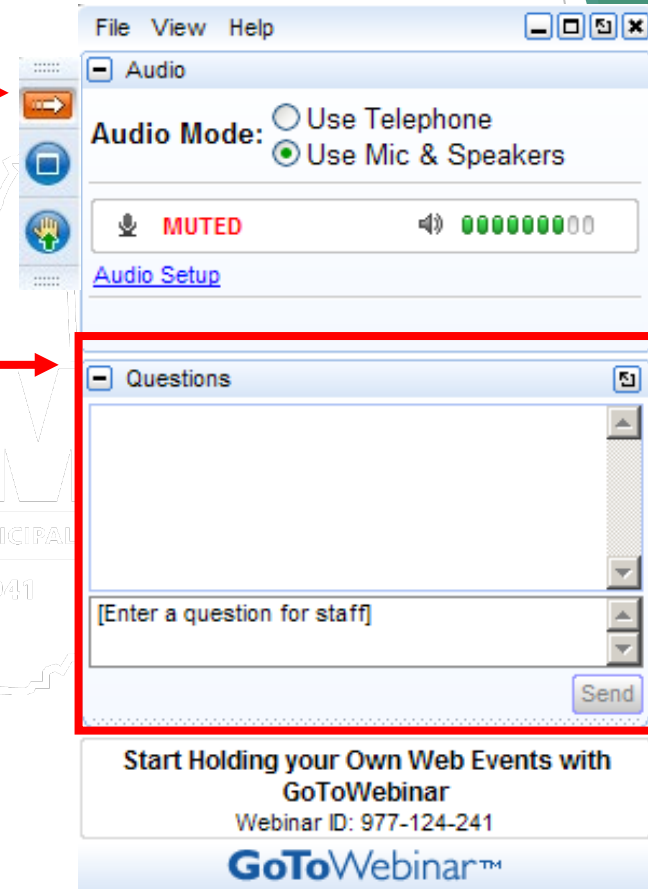


Natch Greyes
Municipal Services Counsel

How to Participate Today



- Open and close your panel
- Submit text questions
- Q&A addressed during the webinar session



The Zoning Board of Adjustment



ZBA Basics

Holding the Hearing & Making the Decision

Special Exceptions & Variances

Rehearings

What is the role of the ZBA?

Safety valve

Quasi-Judicial

No enforcement authority

Obligation to assist public
(reasonable)

Rules of procedure

No requirement for monthly meeting

What is the ZBA's jurisdiction?



- RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled, RSA 674:33, V
- RSA 236:115: Certificates of approval, junkyards
- Often serves as building code board of appeals

Appeals to the ZBA

- ▶ RSA 676:5
- ▶ ZBA hears appeals,
per RSA 674:33
- ▶ Heard within
reasonable time, per
ZBA rules
- ▶ ZBA may impose
reasonable fees
- ▶ ZBA may require
applicant to
reimburse for third
party review &
consultation



“One bite of the
apple”



Fisher v. Dover



Appeal to the board within a reasonable time (in your rules, RSA 676:5)



Hearing within 45 days



Notice to affected persons, RSA 676:7

Public Notice: 5 days
Individual Notice
Continuing the hearing



Opportunity to be heard, RSA 676:7

Certain individuals must be heard
Other may be heard



Decision based on facts and evidence, RSA 674:33, 91-A



Decision by impartial tribunal, RSA 673:14



Written decision with reasons, RSA 676:3

The Evidence



What does the board do during the hearing?

- Collect evidence and determine the facts
- Apply legal tests (e.g., the variance criteria)
- Develop a record for court review

Board has considerable discretion to choose between competing expert opinions:

- General studies and articles may not be enough to contradict specific expert opinion
- Board may question expert's qualifications, methodology, etc.
- Board may rely on personal knowledge of the area
- BUT uncontradicted expert testimony overcomes general member knowledge

All land use boards may hire consultants, RSA 673:16

ZBA may ask applicants to pay for special investigative studies

The Decision

RSA 674:33 & 676:3



- 3 members must concur
- Must use one consistent voting method, RSA 674:33, I(c)
- Decision must be in writing
- State reasons
- Conditions?
- Issue decision in 5 business days



Special Exceptions

- Permission to do something zoning ordinance permits under specific circumstances
- Must be in zoning ordinance!

Variances

- Permission to do something not permitted by zoning ordinance
- Five criteria, RSA 674:33, I



Variance Criteria 1 & 2



1. The variance will not be contrary to the public interest.

Examine whether the variance would

- (a) alter the essential character of the locality or
- (b) threaten public health, safety or welfare.

2. The spirit of the ordinance is observed.

Examine the effect of the variance in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.

Variance Criteria 3



Substantial justice is done.

→ Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. Courts will also look at whether proposed development is consistent with the area's present use.

Variance Criteria 4

The values of surrounding properties are not diminished.

In considering whether an application will diminish surrounding property values, consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. It is the board's job to weigh competing evidence.



Variance Criteria 5

Literal enforcement of the zoning ordinance would result in an **unnecessary hardship**.

1. ***“UNNECESSARY HARDSHIP” MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:***

- (i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY;***
- (ii) THE PROPOSED USED IS A REASONABLE ONE.***

OR If #1 not satisfied:

2. AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.



Time for exercising variances and special exceptions



2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, . . .



RSA 674:33, I-a



2018 amendment allows for termination of variances granted prior to 8/13/18 by zoning amendment

Rehearings, RSA 677:2

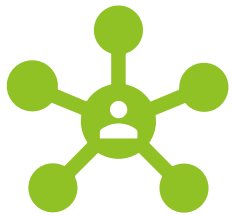
- Motion must be filed within 30 days
- ZBA may even consider its own decision within time period
- Hold meeting to determine whether to grant rehearing
- Grant rehearing when board committed technical error or there is new evidence that was not available at the time of the first hearing
- If rehearing is granted, may consider certain issue(s) or rehear entire case

Beyond the rehearing

- ▶ Affected party with standing may appeal to Superior Court within 30 days, RSA 677:4
- ▶ Be sure to compile and preserve “the record” as completely as possible.
- ▶ If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.



Virtual Meeting Procedures During the Pandemic, Part I



- ▶ Emergency Order #12 waived the provision of RSA 91-A, III(b) requiring that a quorum of a public body be physically present unless immediate action is imperative.
 - ▶ In other words, meetings can be conducted entirely remotely now.
- ▶ Emergency Order #12 does require that any remote meeting have a telephonic connection for the public.
 - ▶ Other technological options are encouraged:
 - ▶ Conference call lines
 - ▶ Streaming services
 - ▶ Etc.
- ▶ Promote available technological options as well as access information in all notices of meeting.
- ▶ Chair should clearly and succinctly explain process at beginning of meeting –
 - ▶ E.g. Public comment period and how that will work.

Virtual Meeting Procedures During the Pandemic, Part II



- ▶ Boards participating remotely must still:
 - ▶ identify the reason why the in-person attendance of any remote board members is not reasonably practicable in the minutes of the meeting;
 - ▶ identify any persons present in the location where the board member is calling from; and
 - ▶ take all votes by roll call.
- ▶ In addition, there must be a mechanism for the public to alert the public body during the meeting if there are problems with access.
 - ▶ Intended to allow the body to know whether there is an issue with the conference call overall, not an issue with the public just hearing a particular speaker.
- ▶ The meeting must be adjourned if it is determined that the public is unable to access the meeting, e.g. the conference call software stops functioning.

AVOIDING CONFLICTS

- ▶ Do not use social media to broadcast opinions on pending applications
- ▶ Avoid contact with applicants and abutters
- ▶ Disclosure to Parties
- ▶ Land Use:
 - ▶ Advisory Vote, RSA 673:14, II
 - ▶ (Alternates, RSA 673:14)
- ▶ Recusal, not abstention



November
2019

Download a copy of The ZBA Handbook From the Office of Strategic Initiatives

The Zoning Board of Adjustment in New Hampshire

A Handbook for Local Officials

NH Office of Strategic Initiatives
Johnson Hall
107 Pleasant Street
Concord, NH 03301
Phone: 603-271-2155
Website: www.nh.gov/osi



<https://www.nh.gov/osi/planning/resources/zoning-board-handbook.htm>

Complimentary Webinar



[REGISTER TODAY!](#)

Complimentary Webinar



[REGISTER
TODAY](#)

nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

Complimentary Webinar



nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

Upcoming Virtual Workshop

Hot Topics in Road Law - A New & Improved Hard Road to Travel Virtual Workshop

9:00 am - 12:30 pm (pre-registration is required)
Friday, April 17, 2020

Cost: \$65.00, does not including publication.



How Does the Select Board grant permission for use and repair of a Class VI Road?

What can we do about Postal Service Vehicles causing ruts in road shoulders?

What are the rules governing CDL licensing for municipal employees?

Join NHMA Legal Services Counsel Stephen Buckley and Municipal Services Counsel Natch Greyes for the answers to these questions --- and many more! The attorneys will discuss the designation and management of Class VI roads, including how and when building permits can be issued under RSA 674:41, granting permission for use of Class VI roads by OHRV's and snowmobiles, and allowing abutting property owners to undertake private repairs. This virtual workshop will also cover management of local highway construction, repair and maintenance through the office of an elected or appointed road agent or expert agent, and the requirement of CDL licensing for municipal highway employees. This virtual workshop will also provide a review of the local regulation of highways by the select board including, parking, street numbers, street names, weight limits, mailbox location, as well as driveway regulation by the planning board.

Online pre-registration required!

**Questions? Call 800.852.3358, ext. 3350,
or email NHMAregistrations@nhmunicipal.org**

[REGISTER TODAY!](#)

**[REGISTER
TODAY](#)**

Upcoming Virtual Workshop

A Guide to Effective Code Enforcement Virtual Workshop

9:00 am—12:00 pm
Friday, May 8, 2019



Cost is \$65, includes supplement to:
*A Guide to Effective Enforcement: Investigating and
Enforcing Code and Land Use Violations*

Building inspectors, code enforcement officers, fire chiefs, health inspectors, and various other municipal officials are responsible for the enforcement of a variety of codes, regulations, and ordinances related to the use of land. These include both local regulations, such as zoning ordinances, site plan and subdivision regulations, health regulations, and the conditions of approval that accompany many land use board approvals, as well as state law, such as the State Building and Fire Code and statutes governing junkyards.

Effectively enforcing these various codes and regulations can pose a challenge to municipalities. Join Attorneys Matt Serge and Christine Fillmore from the law firm of Drummond Woodsum, for this half-day virtual workshop which will provide municipal officials with practical guidance on how to navigate the nuanced procedures associated with code enforcement, as well as practical advice in pursuing an enforcement action against non-compliant property owners. Our legal experts will address some of the most difficult issues under the law, including junkyards, dilapidated buildings, and health codes. There will be ample time for questions and answers on all aspects of the law.

Height (primary): 35' max.

Check out NHMA's
Guide to Effective
Enforcement at
www.nhmunicipal.org



DrummondWoodsum
ATTORNEYS AT LAW

For registration information, visit www.nhmunicipal.org
under Calendar of Events.

Questions? Call 800.852.3358, ext. 3350, or email
NHMAregistrations@nhmunicipal.org.

CODE ENFORCEMENT
429
BUILDING DEPARTMENT

REGISTER
TODAY!

nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

Academy for Good Governance

Primex **NHMA**

Academy for Good Governance

New FREE Certificate Program

The Academy for Good Governance is a series of six courses created by NHMA and Primex, exclusively for elected governing body members (select board, town council, city council, board of aldermen, school board, and village district commissioners). Courses are taught by experienced attorneys and staff from NHMA, Primex, HealthTrust, and the New Hampshire School Boards Association (NHSBA). Attendees will receive education and training intended to make them more knowledgeable and effective in their governing body roles.

Attendance at the Academy is free and open to governing body members from municipalities and school districts that are members of NHMA and Primex. Space is limited, and registration will open on the NHMA website on April 6th. Attendees must attend all six courses to receive a Certificate of Completion. All classes run 5:00 pm – 7:00 pm.

CREATE NEW CONNECTIONS

Questions?
Call NHMA's Event Coordinator Ashley Methot at 800.852.3358 or email NHMAregistrations@nhmunicipal.org.

Don't miss this chance to build your skills and connect with fellow municipal officials!
Find out more: www.nhmunicipal.org/workshops

DATES AND LOCATIONS:

Governance & Governing Body Authority
Presented by NHMA/NHSBA
Wednesday, June 3, 2020, NHMA Offices

Financial Responsibility
Presented by NHMA
Wednesday, June 17, 2020, NHMA Offices

Employment Liability/Harassment
Presented by Primex
Wednesday, September 16, 2020, Primex Offices

Contracts and General Risk Management
Presented by Primex
Wednesday, September 30, 2020, Primex Offices

Health Care and Affordable Care Act
Presented by HealthTrust
Thursday, October 8, 2020, NHMA Offices

Effective Public Meetings
Presented by NHMA/NHSBA
Wednesday, October 21, 2020, NHMA Offices

WHO CAN ATTEND?

Select board members ★
Town councilors ★
School board members ★
City councilors ★
Board of Aldermen ★
Village district commissioners ★

If interested, contact
Ashley Methot at
amethot@nhmunicipal.org

Upcoming Trustee Training



2020 MUNICIPAL TRUSTEE TRAINING

BACK BY POPULAR DEMAND!

Terry Knowles, formerly with the New Hampshire Charitable Trusts Division at the Attorney General's Office, is coming out of retirement to explain the duties, responsibilities, and reporting requirements of municipal trustees and how these trustees interact with other municipal officials.

TENTATIVE AGENDA

9:00 am - 9:15 am:

Introduction to Charitable Trusts Division
Tom Donovan, Director, Attorney Generals Office

9:15 am - 10:45 am:

A Little Help From My Friends
Terry Knowles, Emeritus Assistant Director

10:45 am - 11:00 am: Break

11:00 am - 12:15 pm:

Governance and Right-to-Know Law
Stephen Buckley and Natch Greyes
NH Municipal Association

12:15 pm - 1:00 pm: Lunch

1:00 pm - 2:00 pm:

Breakout sessions with Cemetery Trustee and Trustees of Trust Funds representatives

2:00 pm - 2:15 pm: Break

2:15 pm - 3:30 pm:

Trust Fund Administration
Jamie Dow

NH Department of Revenue Administration

REGISTRATION FEE

\$65 per person
(Includes continental breakfast and lunch)

WHEN

**Wednesday,
June 10, 2020
9:00 am—3:30 pm**

WHERE

**NHMA Offices
25 Triangle Park Drive
Concord, NH 03301**

CONTACT INFO

**Ashley Methot
Events Coordinator
25 Triangle Park Drive
Concord, NH 03301
603.230.3340
amethot@nhmunicipal.org**

FOR ADDITIONAL DETAILS VISIT

www.nhmunicipal.org

**REGISTRATION OPENS
EARLY APRIL 2020**

REGISTRATION
TO OPEN IN
MAY



*for attending
our webinar
today!*

NHMA'S MISSION

Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.



nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org