

APPEALS OF ZBA AND PLANNING BOARD DECISIONS

PRACTICE AND PITFALLS

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I. Role of Counsel at the Local Land Use Board/Preparation for Appeal.

Our clients are in the development business to make money and, generally speaking, the less spent on soft costs, the greater the profit.

One threshold question, then, is when do you need to engage your lawyer to go to Planning Board and Zoning Board of Adjustment meetings and hearings, and when can you save some money, and leave your lawyer home?

We will try here to provide some guidance, based on New Hampshire law.

There is a basic principle of law that you cannot bring up an argument at an appeal that you did not bring up to start with. So, if an argument was not raised at the level of the Planning Board, or the Zoning Board of Adjustment, the Superior Court will not listen to it, and, if the argument is not raised at the Superior Court, the Supreme Court will not listen to it. This principle applies not just to land use law, but applies to everything, criminal law, real estate law, divorce law, etc.

So, it is useful, to discuss the potential legal issues with your lawyer before you go to the meeting, and, it is then important that you bring them up at the meeting or hearing. Depending on the comfort level you and other members of your presentation team have in raising the issue, you may or may not need us. But you do need to raise the issues.

If the project is a simple two lot subdivision, with no issues, we usually do not need to be there. If you have a critical lot line adjustment which creates an extra 60 feet of frontage for a future access road to backland for a potential 15 lot subdivision, it would be prudent to have counsel in attendance, just in case.

At the Planning Board level, when faced with a vote to deny in the early stages of review, one can often ask the matter be continued to another day, and, in the meantime consult with one's lawyer, or bring the lawyer and perhaps solve the problem, or at least be sure the matter is "preserved" as the courts say, for review at a higher level.

At the Zoning Board of Adjustment, however, one often gets but one bite at the apple - if you do not win the first round before the board, you are usually done then and there. It is much more important that a lawyer attend the ZBA meeting, both to try to get all the right evidence in before the board, and to make the right legal argument for the variance or special exception. This is especially true where, as you will hear later this morning from Chris Boldt and Sharon Somers, variance standards are changing constantly.

Although one appeals directly to the Superior Court from a Planning Board action (unless they are interpreting a Zoning Ordinance provision, in which case you first go to the ZBA), the rules for the ZBA require that you first ask the ZBA for a rehearing. Sometimes you get one, but not often. The appeal is then to the Superior Court where the Court very strictly enforces the rule that all issues needed to have been brought up to the ZBA in the Motion for Rehearing. Your lawyer should prepare that Motion, even if not present at the original hearing.

I know it is difficult to pay one of us to sit there for 3 hours, while the Board wades through other applications, only to have the Board call it a night, or get to the application, have your lawyer says nothing at all because the engineer and the applicant did it so well.

II. Local Land Use Board Practice Post Decision:

A. Planning Board Appeals.

There is no process under the state enabling legislation whereby a Planning Board can be forced to reconsider its decision, so if you have lost, you have 30 days in which to perfect an appeal to the Superior Court under RSA 677:15,I. Since these appeals are routinely decided on the record of the Board it is imperative that you have made a full record below. Unless evidence hurts your case, produce it in a format that is accessible and understandable to the reviewing court. If you orally referenced case law in your

arguments to the Board, which you feel the Board ignored, write a post decision letter to the Board repeating the argument and enclosing the case. The Board will not likely reconsider its decision on its own motion but it will be there for the Superior Court to see.

In drafting your appeal, get the facts in as concisely but as specifically as possible and do not hesitate to attach any "smoking gun" exhibits you have. While the Superior Court Judge will be unlikely to decide the case based on the facts, as the Court must defer to the Board's factual determinations (where there is evidence to support them). If there are facts which indicate potential bias or that the Board did not thoroughly consider your application, the Court will be more likely to find a legal reason to overrule the Board and/or to remand the case for further consideration. In short, first impressions matter, as Superior Court Judges do not have lots of time to spend on these cases.

Upon the filing of the case the Clerk assigns it to a Judge who, under the current practice of the Superior Court, will stay with the case through decision. There is a certiorari order issued normally as a matter of routine which directs the Board to file its record with the Court so the decision can be reviewed. You need to make a strong case in your appeal document to be sure the Court accepts the appeal and does not decide it quickly on the record without a hearing,, or on a motion to dismiss filed by the Board's counsel or any abutters or other parties, e.g., Board of Selectmen, entitled to intervene.

B. ZBA Appeals; Role of the Motion for Rehearing.

While all of the above generally applies to ZBA appeals, under RSA 677:2, you must, as indicated above, first, before appealing to the Superior Court, file for a rehearing of the Board's decision. You have 30 days to do that from the Board's action. The Motion for Rehearing is a dry run for your court appeal as it must contain any argument you intend to use in the Superior Court to claim the Board's decision was unlawful or unreasonable. The temptation and the practice often is to "kitchen sink" the motion, putting in the most unlikely arguments in order to preserve them. If counsel has been involved throughout the proceedings, that motion can be more focused and tailored and designed even to convince the ZBA to consider granting

a rehearing, where it could change its mind. At the rehearing stage before the ZBA, the quest remains to get 3 votes to grant your application. Motions for Rehearing can also be used to "sculpt" the Board's decision, so perhaps focus on a denial based only upon the weakest ground, where you may have strong evidence that might appeal to the Court later. Motions for Rehearing that allege procedural errors provide the ZBA with an opportunity to cure the problem and, if ignored by the ZBA and the error is prejudicial to the applicant, they can lay the ground for, at least, a remand to the Board to follow the correct process.

III. The Land Use Board Appeal Hearing.

These hearings are usually scheduled upon filing, at the time of the Clerk's Order of Notice that is placed on your petition when it is sent for service on the municipality. Of late, hearings in Rockingham and Strafford have been scheduled within 90-120 days. You can seek to expand the scope of the hearing to include testimony or additional evidence other than what is in the record which is filed with the Court by the Board within 30 days. A careful review of the record to be sure that all information which was before the Board is forwarded to the Superior court is imperative. In the run of the mill land use appeal the Court will be reluctant to expand the record or take testimony. However, if you have a technical issue, e.g., a wetland delineation or traffic issue, it is worth seeking to produce your expert(s) for live testimony before the Court, especially if they participated below and their conclusions were un-rebutted by other experts. Normally an hour is assigned to the argument with each side splitting the time. Depending on the Judge and also what else may be on the court's calendar for the hearing date, an expansion of time requested by motion can be obtained. In almost all cases, unless you feel it will hurt you or you have solely a procedural issue, you should also ask the Court to take a view of the property at issue, which can put the case in context. You will also submit requests for findings and rulings and a memorandum of law where you provide written support for your arguments and, if necessary, the basis for an appeal to the Supreme Court.

At the oral hearing you want to focus on the major argument(s) you have. You need to read the Judge to see which, if any, interest the Court. If the Judge seems unexcited about the merits of the denial you need to quickly focus your arguments on any deficiencies in the Board's process to salvage a remand and perhaps a subsequent negotiated resolution, or a better record

for a further appeal where you might get a different Judge. Visuals, including highlighted plans and, clear blown up photos of the property or the neighborhood, can help a lot to get the Court's attention. For you to be successful the Court must find that the Board acted unlawfully or unreasonably, and you need to organize your presentation and arguments, concisely addressing that standard. We all know that many incorrect and often crazy things happen during a Board's consideration of any application, but the Court's interest is in something that stands out as not only wrong or even unfair, but which also resulted in an erroneous decision by the Board. Do not waste precious time on arguments that merely make the Board look bad or attack the abutters.

IV. Role of the Abutters or Other Third Parties.

If you are fortunate, the abutters opposed to your project will seek to save money and will depend on the municipality to handle the defense of the denial of your application. This makes it possible to seek, especially in Planning Board cases, a negotiated resolution with the municipality. If abutters seek to intervene, the Superior Court will grant them the status of a party if they have been aggrieved by the decision of the Board or would be aggrieved if your appeal were successful. In considering that, a failure to participate below can be used to object to their participation in the Superior Court.

Of late, the court system has been required to be more user friendly to a number of potential litigants who, for financial or other reasons, seek to participate in cases on a pro se basis. We have been involved recently in a pro se appeal of a complicated ZBA decision that was very well presented by the abutters, perhaps with the help of counsel who ghost wrote some of their pleadings. Beware that the general attitude of the Courts is to be open to pro se participation and that some of the Court's procedural rules regarding deadlines and the like may not be enforced rigidly against them.

There has also been a marked increase of intramural disputes between land use boards and/or the Board of Selectmen in towns. As the applicant, you can get caught in such turf battles and often find yourself allied with one Board against another. Though the Superior Court is sometimes skeptical of such situations (if it detects merely second guessing of another Board), the Court will grant relief which could include overturning your approval on appeal, or remanding the case, if

it appears one board usurped the jurisdiction of another or otherwise acted illegally.

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