

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053
MEETING MINUTES - FEBRUARY 18, 2009

DATE: FEBRUARY 18, 2009

BOARD MEMBERS PRESENT: YVES STEGER, ACTING CHAIR
BARBARA DILORENZO, VOTING MEMBER
VICKI KEENAN, VOTING MEMBER
JIM SMITH, VOTING ALTERNATE
MICHAEL GALLAGHER, NON-VOTING ALTERNATE
MATTHEW NEUMAN, NON-VOTING ALTERNATE
LARRY O'SULLIVAN, CLERK

ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/
ZONING OFFICER
MIKE BROWN, TOWN COUNCIL LIAISON

Acting Chair Yves Steger opened the meeting at 7:00 PM. He appointed alternate J. Smith to vote for absent member Neil Dunn.

Approval of January 21, 2009 minutes- Y. Steger entertained a motion to approve the minutes of the January 21, 2009 meeting. L. O'Sullivan so moved. B. DiLorenzo seconded. The motion was approved, 5-0-0.

Election of Officers- L. O'Sullivan nominated V. Keenan as Chair of the Zoning Board of Adjustment. B. DiLorenzo seconded. The nomination was approved, 5-0-0.

L. O'Sullivan nominated Y. Steger as Vice Chair of the Zoning Board of Adjustment. J. Smith seconded. The nomination was approved, 5-0-0.

B. DiLorenzo nominated L. O'Sullivan as Clerk of the Zoning Board of Adjustment. V. Keenan seconded. The nomination was approved, 5-0-0.

Y. Steger passed the gavel to new Chair V. Keenan.

Motion to Rehear- A request to rehear Case No. 1/21/2009-2 was submitted to the Board on February 18, 2009. The consensus was to address the issue at the March 18, 2009 meeting so it could be properly noticed and reviewed at a public meeting.

Workshop- The ZBA entered into a workshop, joined by R. Canuel and M. Brown. The following items were discussed:

1. **Alternate members;** R. Canuel explained that the only time an alternate member of the ZBA can vote on a case before the Board is when they are appointed by the Chair to vote in the absence of a full member. Otherwise, they can ask questions and provide input but can only vote in a non-binding capacity as a “non-voting alternate”. Once a full member vacates their seat permanently, however, the Chair cannot appoint an alternate member to serve out the remainder of that term. The only body who can fill the vacancy with a new appointment is the Town Council. New legislation may take effect in January, 2010 to broaden the ZBA Chair’s authority but only to fill a vacancy temporarily, until such time as the Town Council can appoint a new full member.

L. O’Sullivan noted that in the information provided by staff for this workshop, (see attachments), there were differing opinions on the proper role of alternates. One document from the New Hampshire Local Government Center suggested that alternates should not even sit with the Board if they are not appointed to vote for an absent member. L. O’Sullivan stated his preference for the Londonderry ZBA’s tradition of having alternates take an active role in hearing and discussing cases. Not only does this provide the Board with the potential to hear differing perspectives, he stated, it also increases the ability to gather and process information being presented. R. Canuel verified that while there are differing philosophies, it is up to the individual Board as to how to utilize their alternate members since no state law restricts them from doing so. Members discussed how valuable it is for alternates to gain necessary experience by being engaged in the process alongside full members rather than simply observing as an audience member would. M. Brown added it would be counterproductive for everyone involved to have alternates who have not been adequately prepared to fulfill their duties. J. Smith added that with the new technology made available to the Board (e.g. computers, internet access), alternates restricted to the audience would be at an even greater disadvantage.

2. **Quorum issues;** In discussing the role of alternates, Y. Steger brought up the scenario where neither five full members nor enough alternates are available to comprise a full Board. The Londonderry ZBA has traditionally given applicants the choice to either continue the case to the next meeting or present with the knowledge that they must convince a minimum of three members as opposed to simply getting approval from the majority of the total number present. It should also be made clear to the applicant at that time that if they choose to proceed and are denied, the lack of five members is then not grounds for a rehearing, nor does State law allow them to reapply with the same request.

J. Smith posed a scenario where abutters may attend a hearing and even take on the expense of having professional representation only to be inconvenienced when an applicant seeks a continuance due to lack of a full Board. In that instance, he asked whether the abutters should be taken into consideration so that they are not additionally burdened in terms of time or money by having to attend further hearings. R. Canuel cautioned that the option to defer to another meeting would belong to the applicant solely and would not be a choice for an abutter. If the Board chose to deny a continuance, the applicant could opt to withdraw without prejudice and then reapply. This would then burden the applicant with the cost of an additional application fee. The consensus of the members was, however, that the denial of a continuance would be highly unlikely for this Board based on past practice.

3. **Split vote;** Y. Steger broached the subject of cases resulting in a two-to-two vote when only four members are voting. A tie vote can either be viewed as a failure of the application or a “non-action” on the Board’s part since court rulings have determined both. Y. Steger stated one of the attached handouts recommended that individual Boards add their particular preference to their rules of procedure. Past practice of the Londonderry ZBA has been to treat a two/two tie as a failure. It is therefore important to clarify to applicants who choose to present to a four member board that any result other than three votes in favor of their request will mean failure. M. Brown suggested that the Board add language to their Rules of Procedure to clarify this interpretation and provide the Board and Town with a legal safeguard.

4. **Abstentions;** In discussing the split vote scenario above, Y. Steger noted that abstentions are still counted in a Board’s vote total. If only four members were present for a case and two approved, one denied and one abstained, the request would still fail. In all voting situations before the Board, the basic rule is the same; an applicant must have three votes in the affirmative to gain approval. R. Canuel confirmed that RSA 674:33 states “the concurring vote of three members of the board shall be necessary” for a motion to carry.

5. **Public input;** L. O’Sullivan pointed out the advisement from one of the accompanying documents that the Board only hear testimony from the applicant and those *directly* affected. The Londonderry ZBA, he said, has typically allowed all members present to speak, either in favor or in opposition. V. Keenan noted that page 23 of “Roles and Responsibilities of the ZBA,” states any members of the public, not just residents, are allowed to attend public meetings under State RSA. M. Brown pointed out, however, that page 25 of the same document further clarifies that the right to be present does not translate into the right to “speak or add documents to the record.” L. O’Sullivan stated that during his tenure on the Board, rarely, if ever, has the public been restricted from speaking, whether directly affected or not. M. Brown replied that it is the Board’s prerogative to decide if others not directly affected should be heard but they are not bound by law to do so. In fact, he said, all boards and commissions risk doing a disservice to all involved by leaving input so open ended that evening meetings run into the next day just for the sake of hearing repetitive, irrelevant and unnecessary testimony. M. Neuman suggested placing a time limit on those allowed to speak, with possible extensions if the Board sees fit. J. Smith echoed M. Brown’s comment that common sense is the key and said it is the responsibility of the Chair to discern when testimony is superfluous.

The discussion progressed to the legal definition of an abutter under NH law, namely that abutters are defined as those property owners whose property “adjoins or is directly across the street or stream from the land under consideration” (RSA 672:3). Past practice of the Londonderry ZBA, however, has been to notify all property owners within 200 feet of the property in question, acknowledging that those who may still feel the effects of a granted request should at least be made aware of a potential impact.

6. **Motions;** L. O’Sullivan initiated a discussion on how motions have been made in the past by the ZBA. At one time, a single motion was made and if seconded, then discussed, possibly amended and then voted on. At some point in time several years ago, he stated, a verbal vote

was taken first in an attempt to clarify the wording and any restrictions deemed appropriate, followed by the second written vote to approve the actual request. Conceivably, he argued, a board member could disagree with how a motion was made but still be in favor of its general intent to approve or disapprove. R. Canuel advised using the designated deliberation period to agree on the wording of a motion and any restrictions attached, then voting only once on that motion. Following further discussion, M. Brown suggested that like all other Londonderry land use boards and legislative boards, the ZBA should simply make a motion of proposed action and if seconded, discuss and amend if necessary, then vote accordingly. The only time a second vote would be needed for the final decision is if an amendment had to be voted on first. Board members agreed that using only one motion was preferable.

7. Planning Board issues vs. ZBA issues; V. Keenan brought up the common occurrence in meetings where testimony or comments from the public may be related to a request but are not the jurisdiction of the ZBA in particular. Typically questions and/or issues that are appropriate for the Planning Board will be raised, making it important for the Board to focus on the specific zoning issue at hand and redirect unrelated matters to the appropriate forum. Valuable time would then not be spent on subjects over which the Board has no authority.

R. Canuel noted that overlap is inherent in the process when someone seeking Planning Board approval for a project must first seek ZBA approval for one or more aspects of the proposal. The Board therefore is often faced with the need to make the delineation between topics while still hearing all the facts they need to properly decide on a request. One way to aid in that pursuit, R. Canuel explained, is to have a joint meeting with the Planning Board as allowed under State RSA. Doing so can also provide increased continuity between the two boards particularly as the complexity of various issues increases. Y. Steger asked if having a representative of the Planning Board attend a ZBA hearing would suffice. While it would not be considered a joint hearing, R. Canuel replied that it certainly may be prudent to request such representation at a hearing to receive needed input on an individual case. He reminded members that in general, if the Board does not feel they have adequate information to make a decision or need clarification on a matter, they always have the ability to continue a case to their next meeting.

8. Conditioned approvals; L. O'Sullivan asked whether the Board should place conditions and/or restrictions on an approval if they believe they may not be enforceable. R. Canuel stated that the ZBA's duty is solely to place whatever restrictions they deem are necessary on an approval and that it is then the Building Department's responsibility to enforce them. M. Neuman and M. Brown agreed that the Board's decisions should definitely not be inhibited by any doubt or question of enforceability. J. Smith asked whether it is wise to set restrictions that are unrealistic or impractical. B. DiLorenzo stated that the ZBA needs to be unrestrained by such considerations in order to make it clear to all parties involved what the Board intends and expects. R. Canuel reiterated that regardless of when a complaint is made or an issue arises, the Building Department will decide on necessary enforcement actions.

9. Disqualification; R. Canuel pointed out a common misconception that Board members can be disqualified from hearing a case by request of the applicant or another affected member of

the public. It is the responsibility of individual Board members to disclose such things as any personal interest, proximity to the location in question, and/or personal or business relationship with the applicant before a case is heard. The Board may then decide whether a recusal by that member is necessary.

Variations for the disabled; R. Canuel wanted to make the Board aware of changes in State statute regarding how the point of hardship is applied in cases of variations for the disabled. In such situations, the applicant is not required to prove hardship associated with the property. The remaining four points of law, however, must still be met to the satisfaction of the Board. M. Neuman asked what the definition of disabled would be under this scenario. R. Canuel noted that there are accessibility standards that can be applied and added that the Board can condition an approval whereby the variance is only valid as long as the person involved needs the accommodation provided by that variance.

Energy structures; Y. Steger inquired as to what rules govern energy structures such as wind mills. R. Canuel replied that legislation has been passed that leave such items as wind energy systems and solar power systems exempt from ordinances. In the interest of better energy production and energy savings, the intention is to promote such systems, not interfere with their potential.

Chair V. Keenan asked for any further business from the Board. Seeing none, she entertained a motion to adjourn the meeting. B. DiLorenzo so moved. J. Smith seconded. The motion was approved, 5-0-0.

The meeting adjourned at 8:50 PM.

Attachments:

“Roles and Responsibilities of the ZBA,” by Paul G. Sanderson, Esq. and Chris Northrop, October 25, 2008.

“Understanding Zoning Variations,” Susan Slack, Esq., OEP Conference, April 28, 2007.

“The Basic Functions of the N.H. Zoning Board of Adjustment,” H. Bernard Waugh, Jr., September, 2003.

“Municipal and Regional Planning Assistance, Zoning Board FAQ’s,” NH Office of Energy and Planning, 2009.

“What is the Role of Alternate Land Use Board Members?” NH Local Government Center, July/August 2007, *Town and City*

“Zoning Board of Adjustment Decisions: Quorums, Voting and Fairness,” NH Local Government Center, February 2008, *Town and City*

“Londonderry Zoning Board of Adjustment Workshop,” R. Canuel, Town of Londonderry
Senior Building Inspector/Zoning Officer/Health Officer, February, 2009

RESPECTFULLY SUBMITTED,

JAYE A TROTTIER
SECRETARY

APPROVED MARCH 18, 2009 WITH A MOTION MADE BY LARRY O’SULLIVAN,
SECONDED BY BARBARA DILORENZO AND APPROVED 4-0-1 (NEIL DUNN ABSTAINED
AS HE HAD NOT ATTENDED THE FEBRUARY 18, 2009 MEETING).