

Zoning Board of Adjustment
May 18, 2022
Public Hearing

Members Present: Walter Baird, Roger Whitehouse, Chris Stafford, John Russo

Others Present: Gail Turilli, Barry Hantman

Review of March 16, 2022 minutes:

Chris mentioned on line 69, add the vote of 5-0, line 76 change "justify variance" to "could be considered substantial justice". Roger mentioned on line 86 to add the vote of 5-0. Roger **made** and Chris 2nd a **motion to accept the minutes as amended**. All in favor, **motion carries**.

Election of Officers:

John **made** and Walter 2nd a **motion to nominate** Roger Whitehouse for Vice Chairman. Roger accepts the nomination. All in favor, **motion carries with a vote of 3-0 with Roger abstaining**.

Roger **made** and John 2nd a **motion to nominate** Chris Stafford for Chairman. Chris accepts the nomination. All in favor, **motion carries with a vote of 3-0**.

Chris mentioned he would like to have a discussion on the voting section of the Rules of Procedure regarding tie votes. There are different interpretations on what to do when there is a tie vote. In one case, a hearing can be continued with a 2-2 vote, bring in a 5th member to come up to speed and be the tie breaking vote. Another case is that you could say in the Rules of Procedure, that you need three votes to make a decision, if only 2 votes, it would be a denial. Roger believes it is stated in the ZBA handbook that if it's a tie, it would be a denial.

Chris wants this to be crystal clear as it is getting harder to fill a 5 person board with only one alternate. We could run into a case where we could have 4 people or have 3 and one abstains. He feels it's unfair for an applicant to come to a hearing and not get a decision or a default negative due to not enough board members. His personal opinion is that he likes the idea if there are only 4 people to bring in another person and bring them up to speed. It puts a lot of pressure on that person but at least a decision is made with a majority vote, not by default. Walter states he is not in favor of this. If there are people in the audience, the other member that is brought in doesn't see or hear what those people have to say. Typically, not a lot of what people in the audience say is captured in the board's notes.

Barry Hantman commented that a motion doesn't pass in a tie. Typically, a board like this has a motion to approve something. If there is a tie, the motion doesn't pass. The fact that the motion to approve doesn't pass, doesn't necessarily mean that it's denied unless you end the hearing without approving it, then it's denied. The Board could choose make a motion to deny or continue as it is up to the Board once the motion doesn't pass to determine the next step. Walter noted that the Board gives the applicant the choice to move forward with a four person Board and it's on them if there is a tie and fails. John also explained that there have been cases where the Board let the applicant know that there is a four member Board if they decide to move forward and there is a tie vote, they have the understanding that if it fails, it can't be appealed because they agreed to move forward. Roger feels at this point it would need to be in the Rules of Procedure, and update Zoning to have it state that in a hearing, you

would need 3 positive votes to move forward. Walter states this needs to be in the Rules of Procedure and not in Zoning. Chris clarified that this is not a Zoning issue but a meeting, procedural issue. Walter mentioned to Roger that as far as Rules of Procedure, this could be put into Planning.

Chris asked Barry if the Planning Board has ever had a case with a tie vote. Barry stated yes and that a tie is not an approval. The Board will then entertain a motion to deny for specific reasons. Any denial from the Planning Board has to be accompanied by specific reasons as to why it was denied. Usually a separate motion is made to deny then list the specific reasons why. Typically, the Board does get a majority. Everyone understands that it's more procedural than anything else. The Board didn't approve it and the only other option is to document the reason for the denial. Chris feels there would still be a risk that you have two opposing positions so that people in favor of a variance or people who oppose might vote the same way if there is some criteria as to why it is denied. There is still a risk for a tie. Barry stated if that happens, the clock runs out. Chris mentions that he brings this up because at the last ZBA hearing he knew there was a risk that this could happen but, it didn't. Suggests there should be something in the Rules of Procedure if not addressed now. There are some articles about this: ZBA decisions, quorums, voting and fairness, that had that very specific case where there was a tie vote. John asked if the vote was appealed. Chris noted that it stated in the Rules of Procedure, the Board can define how the tie vote is handled. Walter noted there is also a statute as Roger mentioned that states the need for three votes for something to pass. If you have four people there is a potential for a 3-1 vote but a 2-2 vote wouldn't pass.

Barry mentioned he would be cautious. His personal opinion would be to run this by town counsel if the Board were to bring in another person who was not a part of the discussions. There is the potential for a lawsuit bringing in someone who was not a party to the entire discussion. Chris does agree with Barry in a case where the Board has already gone the whole deliberation. At the last hearing, the Board had a case where there was not a 5 member Board for the first hearing, had a site visit and then a second hearing. A fifth member was brought in for the second hearing and it was explained that this member has read all the documentation, come up to speed, sat through the second hearing and could then vote. If the Board were to go through the whole thing, make a decision and doesn't have a majority, bringing in a new person wouldn't be a good idea. Walter stated that this is a Quasi Judicial Board and doesn't like this idea at all. When there is a tie vote, the applicant is given a heads up. John feels that this covers the Board.

Chris feels that maybe something needs to be placed in the Rules of Procedure about this. There is nothing about quorums that states 3 people are needed to approve a variance, special exception, etc. Walter noted that this is a statutory issue and feels something can be put in stating that you have to have 3 votes for a pass. Roger stated that this is a 5 member board so with 3 members, it would be 75%. Walter stated that 3 members would be 60%. Roger noted that there needs to be a certain percentage of board members present at hearings. Chris explained that the board needs 3 people to hold a meeting, and 3 votes to approve anything. Roger questioned the need for 5 people being present in a board of 7 members on Planning. Barry disagrees. He states that a board needs 3 people to hold a meeting and you have to have a majority to approve. If there are 3 people present, one person is in favor and 2 abstain, then it would pass in his opinion. Walter stated in ZBA that 3 positive votes are needed in order to pass. Barry noted per RSA 673:8, it requires the concurring vote of 3 members of the ZBA to reverse the administrative official or to rule in favor of the applicant. He withdraws his prior comment. Barry also mentioned that RSA 673:10 and 674:33 III also references this situation. Walter explained that is why the board gives the option to move forward with a 3 or 4 member Board. Roger stated that it's in accordance to 91-A:2 II if looking at the RSA's. Chris noted that he has not looked at

97 this recently and it is already in the Rules of Procedure. Per RSA 674:33, a minimum of 3 yes votes is
98 required to grant or approve any matter legally before the Board. Roger questioned if the conversation
99 is now mute. Chris mentioned that the other option is if there is a tie vote, bring someone else in but,
100 there is a downside to that. Walter recommends putting this in the Rules of Procedure for clarification.
101 Chris noted that this is already in the quorum section. Walter questioned putting something else in
102 regarding a tie that would be more explanatory. Chris explained that whether it's a tie or no tie, if there
103 are not 3 yes votes, it's not a decision. Roger agrees with Walter where it states that 3 votes are needed
104 to pass, if there are not 3 yes votes, it's denied.

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106 Chris noted the Board can add a simple sentence to clarify and added: If less than 3 votes, the
107 application is denied. Walter **made** and Roger 2nd a **motion to update the Rules of Procedure** with the
108 addition of the sentence noted above. All in favor, **motion passes with a 4-0 vote**. The change will be
109 typed up and voted on at the next meeting to finalize the change. John asked if a member has been part
110 of a case, could they call in if unable to make a meeting and still vote. Barry stated that the RSA's do not
111 permit remote participation. Walter asked about adding a person to catch up and if something should
112 be added to the Rules of Procedure about that for example: if someone accepts the Board as is, then no
113 further members can be added on at that point. Roger stated the Board has already set a precedence
114 by doing it once. Chris stated that's an area that needs more flexibility than less as there have been
115 issues getting members but, its very important as to how it's done. If the Board is in the middle of a
116 hearing, something could come up, an emergency. If there is a 5 person Board, someone doesn't show
117 up at the last minute but, it's an extended hearing or multiple hearings, someone could catch up. If that
118 person is coming to the next meeting, could come up to speed, get feedback and make a decision based
119 on all of the evidence. A better quality decision is made the more people that are present. Walter
120 noted if it's a 4 member Board, the applicant accepts it, then bring in a 5th member, he doesn't feel as
121 though that 5th member can get up to speed as that member is not seeing the attendee's comments and
122 not everything is reflected in the minutes. Barry stated that some applications do take several meetings
123 and it's important to have flexibility, 3 members for voting at the final meeting/hearing. He
124 recommends that the person voting has enough knowledge of the meeting prior to voting. Chris
125 mentioned that he would like to have more alternates on the Board and a posting will be put on the
126 town website and bulletin board.

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128 Roger **made** and Waler 2nd a **motion to adjourn**. All in favor, **meeting adjourned at 8:10 pm**.

129
130 Respectfully,
131 Gail L Turilli