

Danville Zoning Board of Adjustment
May 2, 2017
7:30 pm

Members present: Chris Stafford, Curt Springer, John Russo, Tara Burkhart, Walter Baird, Roger Denison

The Board of Selectmen recently appointed Walter as an alternate. Roger Whitehouse and Jason Holder will continue as alternates. Roger Denison will submit his paperwork to be signed to continue with the Board. Curt made and Chris seconded a **motion to thank Joe Luna for his many years of service**. The motion **passed** unanimously.

The minutes of April 11, 2017 were reviewed. It will be noted that Chris recused himself for the Meetinghouse portion of the meeting. Curt made and John seconded a **motion to accept the April 11, 2017 minutes as written**. Walter abstained. The motion **passed**.

Officer Nomination:

John nominated Chris for chairman, seconded by Walter. Chris accepted the nomination and all were in favor. Chris abstained. Tara nominated Curt for vice-chairman, seconded by John. Curt accepted the nomination and all were in favor. Curt abstained.

Rules of Procedure:

Curt had suggested adding something regarding ex-officios. There is nothing in the RSAs regarding the Selectmen members being a part of the ZBA. This is unlike the Budget Committee and the Planning Board including select board members. There has been feedback from Peter Loughlin regarding this also. It was agreed that nothing in the Rules of Procedure needs to address ex-officios.

There was a discussion about adding something regarding who votes and who does not during hearings. Chris suggested adding the following: *“Alternates are encouraged to attend all meetings and to participate with the Board during hearings. Only alternates designated as voting members during specific hearings can participate in deliberation and voting.”* There was a short discussion regarding who should or should not participate during deliberation. Curt said that participating in the deliberation is for the express purpose of influencing the vote and only voting members should be involved in this. The hearing portion is when questions are answered. Chris said that he wants to encourage alternates to attend and participate. Curt made and John seconded a **motion to accept the suggested changes to the Rules of Procedure section 2, paragraph 5 regarding alternates**. The motion **passed** unanimously.

The Board discussed how and when to continue hearings. It was suggested the following addition be made to Section 3 paragraph 6. *“For various reasons the ZBA may choose to continue a hearing or be requested by someone of standing to continue a hearing. A majority vote of the voting members of the ZBA is required to continue the hearing. If a date is chosen for the continuance is chosen during the hearing, no additional notice is required to be sent to the*

abutters. If a date is not chosen for a continuance, an additional notice must be sent to the abutters once a date has been set. If the continuance is held on the scheduled or noticed date, and the applicant does not appear or send a representative, the ZBA can proceed with the hearing or deliberation or motion and vote on a new continuance date. If the ZBA votes to continue a hearing but a date is not chosen during a hearing, the applicant and ZBA has up to six months to schedule the hearing with the appropriate notices. If after six months a continuance date has not been set, or the applicant has not communicated status to the clerk, the ZBA can choose to make a decision based on the information provided to date."

Chris said this addresses recent cases. The Board briefly discussed the cost of postage and that it would be difficult to have the applicant pay for re-notices if the applicant does not communicate with the Board. John made and Curt seconded a **motion to accept the suggested changes for section 3 paragraph 6 regarding continuances**. The motion **passed** unanimously.

The Board talked at length about adding a section about legal advice. This would replace the current section 6 to the following: *"The ZBA is a quasi-judicial board. The cases can raise various questions that can require legal advice. All legal advice should flow through the ZBA chairman. All legal advice will be distributed to the voting members for the specific case. Legal advice is subject to attorney/client privilege and should not be made public or distributed unless voted on by the ZBA members. Town counsel shall be used for legal advice unless town counsel cites a conflict of interest. In such cases, ZBA can seek alternate legal counsel but must inform the Board of Selectmen."*

Input regarding this included the idea that all members should be consulted before getting advice, and that questions for legal should come from the entire board. This may curtail some of the legal cost. Chris said that in general this is fine and appropriate as everyone can participate in the discussion. Some questions are raised when an application is submitted. Chris said that if the chairman has to wait to ask the entire Board, it could slow down the process. Curt said that some questions are obvious, such as a request for a rehearing, the granting of which has specific parameters to be met. He also said we need to have an economy of meetings and to extend the number of meetings just to accommodate everyone's questions to legal counsel is a disservice to the applicant. He said the chairman should have some level of discretion regarding what to ask and when to consult legal counsel. Curt said there is no policy about what work products are made public and which ones are not.

The point was made that if legal advice is kept non-public it prevents that from being used against us later.

Chris read a portion of the Wakefield Rules of Procedure regarding taking legal counsel. It implies that they are willing to have a continued meeting to obtain that advice. Chris asked if there is concern regarding the chair representing the input of the entire board and whether or not the entire board wants to be part of the process in forming questions for legal counsel. He asked if the consensus is that it's more important for everyone to have a say in what is posed for legal advice or if it's more important to not have an extra meeting. Walter said he has no problem having another meeting. He said sometimes there is so much information offered at one meeting that it is difficult to process it all at once. He also said he is big proponent in knowing what

questions are asked of legal counsel. This provides a paper record, whether it's released to the public or not. Chris said that usually Peter adds the question when he supplies response. John and Tara said they are fine with an extra meeting.

Curt reiterated that sometimes legal questions are obvious, such as in the case of a continuance. Chris said that each case is different and there is no set standard. There are cases in which legal advice is needed during a meeting. There was a short discussion about having a non-public meeting to discuss possible questions to legal counsel. Curt said he's not sure a non-public meeting can be held to ask what questions to pose to legal. Chris said the Board seems to want this paragraph modified to say an extra meeting may be held to come up with questions to pose to legal.

It was agreed that questions going to counsel should be voted upon first and be presented in writing.

Curt mentioned the idea of this Board having its own budget line for legal advice rather than having this in the Selectmen's budget. Chris said it is very difficult to budget for ZBA legal advice and having "legal" budgeted once by one board is easier to manage. One of the reasons for creating this document is to alleviate a conflict of interest or alleviate bias from one board to another. Roger said that seeking legal advice as a Board and not individually will be more thrifty than one person making inquiries. It was noted that the Planning Board has a peer review account for some applications from which an attorney hired by the town can be paid. Otherwise the Planning Board has no line item for legal advice. Chris said that checks to pay for legal advice are cut by one person and this Board is not going to be cutting checks. Creating another structure and another budget is not the way to go right now. Curt said there must be trust and this Board should not be accountable to others regarding its procedures.

It was agreed that any paper copies marked as privileged and given to members should be destroyed by those members when the copies are not needed. The following wording was agreed upon as follows:

"The ZBA is an independent quasi-judicial board. The applications and hearings can raise various questions that require legal advice. All legal advice requests require a quorum of ZBA members to vote on the questions to ask. The questions should be submitted to legal counsel by the acting chairman. All legal advice received from legal counsel shall be distributed to all non-recused ZBA members and alternates for the specific case. Legal advice is subject to attorney/client privilege and should not be made public or distributed unless voted on by the ZBA members. It is the responsibility of each ZBA member to treat each attorney/client privileged document as confidential and stored appropriately and destroyed after use. Town counsel shall be used for legal advice unless town counsel cites a conflict of interest. In such cases, ZBA can seek alternate legal counsel but must inform the Board of Selectmen."

Curt made and John seconded a **motion to approve the addition to this section regarding legal advice**. The motion **passed** unanimously.

There was a short discussion about adding wording regarding who takes over when the chairman does not chair a meeting. Chris said the procedure is clear and this new section regarding legal counsel clarifies the process.

Walter said he'd like to see the Rules of Procedure online. These changes will need to be voted on at the next meeting before they can be accepted.

Walter mentioned RSA 676:5. He explained that the Board can set a date within which an appeal can be made. It is suggested that this be 30 days which we already have, but a caveat can be added that allows the Board to determine when the decision was made. There was a discussion regarding the fact that decisions by the Planning Board should be obvious. Curt said he'd like to run this by Peter Loughlin for his advice. Chris said the set date of 30 days is a common practice among New Hampshire municipalities. It was pointed out that administrative decisions are those made by the Board of Selectmen, building inspector, or other town entity and the suggestion is that the ZBA should be able to determine when the decision was or could have been commonly known. A decision by the Selectmen may be considered "known" when the meeting was held in which it was discussed. In the case of the building inspector, the decision date may not be as obvious but would still need to be determined by the ZBA. A building permit is not noticed to abutters so the date that a decision to issue a permit is known to an abutter may be when a foundation is poured. The ZBA should be able to determine when the appeal clock starts for these types of administrative decisions.

It was agreed that Peter will be asked about adding the words, "Appeals from an administrative decision shall be filed within 30 days of the decision or when reasonably known as determined by the board."

At 9:03pm Walter made and John seconded a **motion to adjourn**. The motion **passed** unanimously.