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Planning - Zoning - Economic Development - Conservation

Memorandum

Date: September 21, 2016

To: Patrick Dwyer, Chair, & Members, Zoning Board of Adjustment

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Discussion of Potential By-Law Amendments regarding members arriving late to meetings**

Please find this memo as a response to the discussion that took place at the August 31, 2016 ZBA meeting, where potential future amendments to the by-laws were discussed.

As I understand the discussion, some members of the Board wish to pursue an amendment to the Board's by-laws, to indicate that if a member is late to a meeting/hearing, that that member would not be permitted to participate as a voting member of the Board for the case being heard at that time. Other members of the Board disagreed with such a provision, citing concern that such a "rule" would result in a "forced recusal," about which the Board was unsure of the legality.

Prior to sending any questions regarding this topic to the Town's Legal Counsel (and incurring expenses to the Town's budget), I offer the following perspective and recommendation as a professional planner with nearly 20 years of experience in planning and zoning in NH local government.

Statutory Background:

The key to this discussion is NH RSA 673:14, which I have included, and added emphasis to certain portions below:

> *673:14 Disqualification of Member. –*
>
> *I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity* ***if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.*** *Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.*

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, ***upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding****, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.*

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairperson shall designate an alternate to act in the member's place, as provided in RSA 673:11.

Discussion/Recommendation:

The term "disqualification" as used in the statute is interchangeable with the term "recusal" as is typically used by an individual that chooses not to sit for a case. As outlined by the statute, there are limited times where it is legally required for a member to recuse (or disqualify) oneself, and there is no statutory authority for the Board to force any member to recuse/disqualify oneself, as any vote on such a situation is, per the statutory requirements, non-binding and advisory only. Ultimately, under NH law, it is up to the individual member to determine the appropriateness of recusing/disqualifying oneself, and nobody else.

While the decision to recuse/disqualify is up to the individual member, a failure of a member to recuse/disqualify his or herself from a case can lead to grounds for an applicant, abutter, or other impacted party to have grounds for an appeal of the decision (first with a re-hearing request, then to Superior Court). A member should certainly bear this in mind when determining the appropriateness of participating in a hearing.

Because of the construct of RSA 673:14, I do not recommend that the Board move forward with a by-law amendment to force a member that is late to recuse/disqualify from the case, since it is not within the Board's power to compel such an action to the member. It certainly is good practice, and can eliminate potential appeals if the late member voluntarily recuses/disqualifies, but I do not believe the Board can force such action under NH law.

Should the Board wish to discuss this further with me, please let Robert know, and I will be sure to attend an upcoming meeting.

Cc: Jillian Harris, AICP, Planning & Zoning Administrator
Robert Price, Assistant Planner