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MODULE 4

CONDUCTING A TITLE 5 VARIANCE HEARING

The chatter in the room settles into a silence. An elderly couple sits attentively in the first row in front of the Board of Health. There are three hearings scheduled for that night, and you can't tell which one they are there for. An engineer approaches the meeting table and slowly flattens the plan on the table in front of the Board, carefully weighting down the curled up corners as he introduces himself for the record. He hands the "green cards[1]" to the Health Agent and prepares to speak. You've seen the plan before. It came in your Board of Health packet, and you've looked it over a couple of times, made some notes on it. You partially unfold your copy of the plan and review your notes. The proposed septic system is 60 ft. from the wetlands that abut the town's popular beach and shellfish area. Your local regulation states that the required separation between the septic leaching facility and the wetland must be a minimum of 100 ft. Your eyes strain over the plan, hoping that you will find the solution to the problem. There is nowhere on the lot that a system, complying with your requirements, could be constructed. The concerned expressions on the faces of the retired couple tell you - this is their lot, their proposed house, their retirement home. The presentation begins, and the engineer attempts to persuade the Board of Health that a variance to the regulation is appropriate and can be justified.

Although the details may be different, every Board of Health member reading this likely recalls at least one Title 5 variance hearing with participants like those described above. Indeed, for most Boards of Health in Barnstable County, Title 5 variance hearings represent the majority of their official meeting business. Many of us, watching the property owners' faces change as they sense the Board's possible denial or modification of the project, occasionally find ourselves thinking "what have I gotten myself into?" For those of you who have never felt this way, or who have never had any problem reviewing variances (you'd probably lie about other things too!), Module 4 is not for you. But if you are like these authors, you search for objective ways to evaluate projects, balance the environmental and public health concerns, and prevent undue hardship on individuals who want to make reasonable use of their property. You look for proven principles to rely on when the tempers flare, the emotions run high, and you see the reaction of the proponent as you deny or pare back his/her proposal. For the Board of Health member who has faced these situations, the structure of a properly-run variance hearing offers the opportunity where all pertinent facts are sorted out, public health and environmental concerns are articulated, and the proponent is given ample opportunity to demonstrate how they intend to compensate for their project's deficiencies in the code.

This module focuses on the Title 5 variance hearing. The goal of this module is to give Boards of Health guidelines for variance hearings that will allow for good decisions to be made. As you read about the attributes of a good hearing, you may think to yourself "our Board of Health already does that". If so, you can take pride in the fact that the good points described, may have come from your meetings. To compile this module, the authors have drawn upon their

experiences in serving all of the Boards of Health in Barnstable County, as well as upon the experiences of our own Boards of Health (we have both served as Chairpersons for a Board of Health). So, presented here is a culmination of this experience and advice from various individuals and documents.

BEFORE THE HEARING

The process of obtaining a Board of Health variance begins when an applicant submits a plan to your Health Agent that has deficiencies relative to Title 5 and/or local regulations. The system designer, on behalf of the applicant, then follows the procedures outlined by your Health Agent to prepare for a formal hearing before the Board of Health. The most common requirements are described below.

1. **Requests for Variances**: all requests for variances must be in writing and must state the specific provision of 310 CMR 15.000 for which a variance is sought (310 CMR 15.411) and the reason for the variance. Most health departments have developed a form on which variances are requested; this form is attached to the plans submitted to the Board for review. Most Boards also will want to make the applicant state in writing any requests for variances from *local* regulations; although this is not specifically required by Title 5, it will assist in keeping the written record clear.

{PRIVATE**}Note also that all Title 5 variances requested must be listed on the engineered plan (310 CMR 15.220 (4)(p)) for the system; it is also helpful to have all variance requests to local regulations similarly noted. The Board's formal approval of a variance should refer specifically to the engineered plan; having all variances listed on the plan simplifies recordkeeping and assists the Board in remembering what was approved if they must refer to the plan in the future for modifications to the system.**

2. **Notification of abutters:** No application for a Title 5 variance shall be complete until the applicant has notified all abutters by certified mail at least 10 days before the Board of Health meeting at which the request will be heard. This notification must state the date, time and place where the hearing will be held, reference the specific provisions of Title 5 from which a variance is sought, and must include a statement of how the variance standards (manifest injustice, equivalent or greater environmental protection) will be met. Many Boards require that this notification also be sent to abutters even when variances from ***local*** regulations are sought. Again, this is not required by Title 5 but many boards feel that it is important for abutters to be informed of decisions which may affect their property (in particular, variances for setbacks to their property sidelines, private well, etc.)

{PRIVATE**}**Note that variances for residential facilities of less than 5 units will be deemed constructively approved if the Board of Health does not act upon it within 45 days after receipt of a **complete** variance application (310 CMR 15.411(4))

The Health Agent/Board of Health also has several responsibilities prior to the hearing:

The hearing must be posted 48 hours in advance in the Town Clerk's office or other prominent place in town hall. Usually, postings consist of the Board of Health meeting agenda, with individual hearings assigned a specific time to be heard.

Many Boards require the applicant submit complete engineered plans seven days before the hearing. This gives the Health Agent, the Board, and the public time to review the plans before the hearing. The plans should be available in the Health Department for any member of the public who wishes to view them prior to the meeting. When the applicant has completed the variance application, notified the abutters, and the hearing has been scheduled and posted, it's time for the hearing.....

THE HEARING

In overview, the purpose of the Board of Health variance hearing is to give applicants the opportunity to present evidence as to why they believe, in their situation, Title 5 requirements should be varied. It is also an opportunity to hear from the abutters whether the variances, if granted, would aggrieve their legitimate interests. Section 15.410 Variances - Standard of Review states that variances shall be granted only when, in the opinion of the approving authority:

> *the applicant has established that enforcement of the provision of Title 5 from which a variance is sought would be manifestly unjust, considering all the relevant facts and circumstances of the individual case;* ***and***
>
> *the applicant has established that a level of environmental protection that is at least equivalent to that provided by Title 5 can be achieved without strict application of the provision of Title 5 from which a variance is sought.*

As you enter into the variance hearing, it is very important that the Chairperson keep the discussion focused on the pertinent facts as much as possible. There are standards of review, explained below, that should serve as your guidelines. Try to remove yourself from any personal feelings you might have regarding the particular situation. Make sure that all variances have been properly identified on the plan (it has been the experience of these authors that some variances are inadvertently omitted, and more can become apparent during the hearing process). Discuss each variance individually, keeping in mind the rationale of the regulation(s) from which the applicant seeks relief.

Manifestly unjust or "how much is too much ?"

Manifestly unjust - adverbial phrase describing an action that manifests injustice

Manifest (to show clearly, demonstrate) injustice (inequity, unfairness)

When is something manifestly unjust? Those of us on Boards of Health have often felt that this concept is somewhat poorly defined. In many ways, an action that is manifestly unjust is like what a distinguished member of Congress once said about pornography, - "I don't know what it really is, but I'll know it when I see it." An important function of the Board of Health variance hearing is to determine whether it has been established that an enforcement of any provision of Title 5 manifests injustice "considering all the relevant facts and circumstances of the individual

case". Accordingly, the hearing is the opportunity for the relevant facts to be reviewed so that the Board can form an opinion. Title 5 intends that actions having potential for manifesting injustice be determined by the situation. The Code defines three situations, and gives the approving authorities some guidance regarding how each should alter the consideration of manifested injustice:

1) the repair of a failed system where no increased flows are anticipated;
2) repair to an existing system where there will be increased flow; and
3) new construction.

Manifestly Unjust as Applied to Repairs of Existing Systems (No Increased Flow)

We can all sympathize with this situation. The homeowner has a failed septic system. They simply want to fix or replace the existing system, and are not doing any improvements to the property that would cause increased flows. For *upgrades of existing systems with no increase in flow*, variances should be judged by the standards set forth in sections 15.403 through 15.405, Local Upgrade Approvals and Maximum Feasible Compliance. For these systems, where full compliance with the code cannot be obtained, the Board shall vary the requirements of Title 5 *to the least degree necessary to achieve the best feasible upgrade*. These sections of the code prioritize variances in order of least to most potential public health threat. For these systems, in determining whether full compliance is feasible, the board should appropriately consider not only the physical possibility as dictated by conditions on the site, but also the economic feasibility of upgrade costs[2].

Manifestly Unjust as Applied to Repairs of Existing Systems Where There Will be Increased Flow

Variances for *increased flow to existing systems* are covered in section 15.414 of the code. The first thing you should read in this section is that "A showing by the person requesting the variance that the proposed variance would satisfy the maximum feasible compliance provisions.....shall not presumptively entitle such person to a variance" (Section 15.414). This simply means that merely showing that the system fits maximum feasible compliance should only be a part of the defense of the variance request. The remainder of the this section sets out the remaining items that the Board should consider in its decision regarding the variance. As you read the following "tests", keep in mind that some of the items are cut and dry, while others are the subject of opinion. You might want to have your copy of Title 5 opened to Section 15.414 as we wade through the following conditions on which your decision in this scenario should be based.

1. The applicant has established that strict enforcement of the provision from which a variance is sought would be manifestly unjust, considering at a minimum that:

a) the owners of any system for which permit applications were filed after March 31, 1995 shall be deemed to have had knowledge that full compliance with the code is preferable;

Authors' comment - We don't really know for sure what to make of this. It appears that, in situations where the applicant is repairing a revised-code system and adding flow to it, the Board should be inclined to consider the foreknowledge regarding the Code as a strike against the variance request (since they knew when they installed the system to be repaired that the Code strove for full compliance).

b) the costs of full compliance with the requirements applicable to new construction shall be compared to the costs of compliance with a variance; and

Authors' comment - Here, it appears that the Board should make a comparison. If the costs "applicable to new construction" (we assume this means full compliance with the Code with the exception of minor variances) are unreasonably high compared costs incurred by granting the variance (perhaps the 10% rule mentioned on the previous page might be applied), the Board is guided to look more favorably upon granting the variance.

c) whether an upgrade in full compliance with Title 5 is feasible without increased flow,

Authors' comment - Here it appears that Board should inquire as to whether full compliance could be met *without* increased flow. If it could, the Board must decide in light of site conditions, whether a variance to Title 5 or local regulations is warranted. In these situations, variances to Title 5 are not recommended, however, variances to local more-stringent regulations might be carefully considered. If full compliance under existing flows could *not* be met, then the Board should seriously consider denying the variance, since the increased flows will put the system *even further* out of compliance. But don't stop here! Subsection (3) below does give some instances where the Board might consider a variance for increased flows, even though a system with existing flows would require variances.

2) The system cannot be brought into full compliance through any of the following:

a) an upgraded system which is in full compliance with sections 15.100 through 15.293 of the code;

Authors' comment: This is obvious. If it could be brought to full compliance, it should be.

b) use of an approved alternative system;

Authors' comment: This is particularly applicable to nitrogen loading in designated nitrogen sensitive areas, and situations where either vertical separation to groundwater or size of leaching facility are issues.

c) use of a shared system;

Authors' comment: In some situations, shared systems may be feasible to overcome the need for variances in a particular situation (remember we are talking about applications involving increased flows to existing systems).

d) connection to a sewer system.

3. *The upgraded system with increased flow provides better protection of public health and safety and the environment than the existing system with no increase in design flow.* Increased flows not in compliance with Title 5 will rarely provide better protection than existing flows to a system constructed in compliance with the current or 1978 codes, but are more likely to constitute improvements over nonconforming or failed systems.

Subsection 3 presents some interesting possibilities for Boards of Health to improve the protection of the public health and safety of the environment. As it states, it is likely a rare situation where this test can be successfully met. It is the opinion of these authors that using standard technology (septic tank - leaching facility) it would be nearly impossible to prove that a project with increased flows could be shown to have environmental or public health benefits over allowing the repair of the system without increased flows. Generally, more flow in nonconformance means more risk to the public health and environment. But, suppose we had the situation where an applicant wished to add a bedroom, but the septic system, even under the existing flow, could not be repaired to meet Code. Now suppose that the applicant states that, in order to get his desired bedroom, he/she is willing to install an advanced treatment unit that reduces pathogens and/or nitrogen. On the one hand, the Board could insist that the existing flows be maintained. In some instances like this, the applicant may just not do the project planned, or any improvements, and the existing cesspool will continue to present some risk[3]. On the other hand, the Board might approve the alternative septic system and improve the overall situation, even over a standard septic system with the reduced flows. In this way, with appropriate technical savvy and understanding, the Board can "negotiate" a better situation. The Board gets better overall environmental protection, and the applicant gets a new bedroom.

Manifestly Unjust as Applied to New Construction

The case where the Board of Health receives the most guidance from Title 5 as to what is manifestly unjust is the case of variance requests in conjunction with new construction. In order for an applicant to demonstrate that a denial of a permit for **new construction** is manifestly unjust, the denial "must be shown to deprive the applicant of substantially all beneficial use of the subject property to be manifestly unjust" (15.410 (2)). In your tenure, you will likely, at least once, face the question of "what constitutes the denial of substantially all beneficial use". You might initially think that denying a permit and thereby preventing the construction of a home might constitute the denial of essentially all beneficial use. There are court decisions, however, where the Board of Health's denial of a permit, which then essentially made the lot unusable for the building of a house, did not constitute the depriving of substantially all beneficial use. While this type of case is rare, it deserves mention.

Key points to remember when you consider variances for **new construction** are:

- Full compliance with Title 5 is generally deemed necessary to protect the public health

and the environment;

- The two burdens of proof of the applicant are 1) to demonstrate that they can achieve a level of protection at least equivalent to Title 5 without strict application of the Code, ***and*** 2) that strict application of the Title 5 would be manifestly unjust.
- This is an opportunity to *prevent* environmental degradation *before* it begins

Evaluating Environmental Protection

Remember, that an important test in the quest for variances is the applicant's ability to establish that "a level of environmental protection that is at least equivalent to that provided under 310 CMR 15.000 can be achieved without strict application of the provisions" from which a variance is being sought. For many, the concept of equal environmental protection is confusing, and the fact that some of the qualities of the fully-compliant Title 5 are not quantified makes it difficult to determine whether a proposed mitigating measure provides that same environmental protection. One important thing to remember, however, is that a fully-complying Title 5 system is generally considered to offer the required degree of environmental and public health protection. In many cases (every town in Barnstable County), Boards of Health have passed requirements more stringent than Title 5 to address local conditions that warrant such. Therefore, for Boards of Health in Barnstable County, it can be said that the basis for judgment, or the question you should ask yourselves when you hear a variance request is:

> ***"Does the proposed variance, in conjunction with the mitigating measure or circumstances being proposed by the applicant, provide for an equal degree of environmental protection as would a septic system in full compliance with Title 5 and local regulations?"***

Modules 2 and 3 spent considerable time discussing what particular aspects of septic system requirements are most critical to the protection of public health and the environment. You may want to review them if you have questions, but briefly, the most critical are:

- vertical separation to groundwater
- horizontal distance to critical resources such as watercourses and wells
- loading rates (as expressed by appropriately sized leaching facilities or methods of effluent distribution)

How does a board evaluate whether the applicant is providing an equal degree of environmental and public health protection? First, and most importantly, the Board must identify the public health threat that might occur with the type of variance requested. Most variances you encounter will be setback variances from property sidelines, foundations, or critical resources like groundwater, wetlands or wells. As you will remember from the discussion in Module 3, setback requirements from sidelines, foundations and swimming pools are generally based on structural stability concerns or concerns about property access for construction and maintenance. Setbacks from groundwater, wells, and many wetlands are based on public health concern for pathogens and, secondarily, nutrients.

Once the Board has identified the possible public health or environmental threat that might occur if a variance is given from the requirements of Title 5, the Board can begin to consider whether, and how, this concern might be mitigated. Table 1 presents a brief summary of common variances seen by Boards, with their public health concerns, and some suggested mitigation strategies for these concerns.

And now, back to the actual hearing procedure.....

{PRIVATE}**TYPE OF VARIANCE**	**ASSOCIATED CONCERN**	**APPROPRIATE MITIGATION**
Horizontal setback to property lines	Distrubance of neighbor's property-access for repair and maintainance	Negotiate with neighbor; financial assurances that neighbor's property will be restored if damaged; make sure installer is aware of setback and damage issues.
Horizontal setback to cellar wall, slab foundation, swimming pool	Structural stability of foundation or pool; leakage of effluent into cellar or pool	Discuss structural issues with structural engineer; for effluent leakage, demonstrate that septic tank is watertight, locate SAS below floor elevation of foundation, waterproof barrier on outside of foundation or pool.
Reduced size SAS	Hydraulic disposal of effluent; increased loading rate with associated breakthrough of pathogens	Hydraulic disposal not usually a problem in sandy soils; use of advanced treatment which reduces BOD will aid in hydraulic disposal. For pathogen issue, require at least 5 feet between bottom of SAS and groundwater, adequate horizontal setbacks to water bodies or wells, possible pressure dosing of SAS.
Horizontal setback to private well	pathogens entering well	Do not vary to less than 50 ft. separation. If less than 100 ft. separation, relocate well if possible. If not possible, demonstrate that SAS is hydraulically down-gradient of well. Possibly condition variance to include periodic testing of well.
Horizontal setback to wetlands, watercourses, vernal pools	pathogens and nutrients entering sensitive areas	For pathogens -- Maintain required vertical separation between bottom of SAS and groundwater. Do not allow increases in design flow or square footage of building. Do not allow reduced size SAS, consider requiring pressure dosing of SAS. For nutrients -- consider requiring alternative system with nitrogen removal.

Horizontal setback to surface or subsurface drains	Pathogens	Maintain required vertical separation between bottom of SAS and groundwater. Do not allow increases in design flow or square footage of building. Do not allow reduced size SAS. Drains that regularly or periodically intercept groundwater and carry groundwater away from an area must meet specified setbacks per 15.211.
System component too close to drinking water supply line	Pathogens entering water supply	Locate SAS at least 18 inches below water line. If sewer lines cross water supply lines, construct both pipes of class 150 pressure pipe, test both for water tightness.
Reduction in vertical separation between bottom of SAS and ground water	Pathogens entering groundwater	Do not vary to less than 4 ft. separation in sandy soils. Do not allow increase in design flow or square footage of building. Do not allow reduced size SAS or reductions in horizontal setbacks. Consider requiring pressure dosing of SAS and possible disinfection of effluent, depending on sensitivity of site.

The hearing procedure

At the advertised time, the chairman calls the meeting of the Board of Health to order. He/she simply says something like "I would like to call this meeting of the Happytown Board of Health to Order". To start the individual hearing, the Board of Health chairman generally announces the individual hearing by calling out the property address. The applicant and/or his representatives come forward. The applicant and/or his representatives (engineers, attorneys, environmental scientists, etc.) introduce themselves for the record. They submit evidence that abutters have been notified; this usually consists of the green cards received back in the mail from certified letters sent to the abutters. The hearing cannot be held if this notification has not been completed. Also, ***the hearing may not commence before the time listed*** on the public notice. All persons who speak at the hearing, whether applicant, applicant's representative, or concerned citizen, should be identified for the record. It is helpful to have a piece of paper available where persons who speak can list their names. Some boards like to have their Agent give a brief synopsis of the situation at the start of the hearing; other boards allow the applicant's representative to do so.

In the first stage of the hearing, the applicant (this is usually performed by the applicant's engineer or other representative, for simplicity we will refer to these as the applicant) presents his case. They should attempt to show that the variance he/she is requesting, in concert with some mitigating action, meets the intent of Title 5 to provide equal environmental protection. Alternately, the applicant may attempt to show that circumstances present at the property alone warrant the variance because the system with the variance and no mitigating action still provides the same degree of environmental protection as afforded by the system should it be installed in

full conformance with the code. This latter case, where the applicant, in essence, is suggesting that circumstances alone compensate for the deficiencies in the code, should be subject to severe scrutiny. ***Remember, full compliance with the code is presumed to be necessary in the vast majority of cases to protect the public health and the environment***.

During this initial part of the hearing, the applicant may present any evidence he wishes to support his case. The Board should listen to the evidence and asks as many questions as they wish to clarify what is being presented. They may also ask their Agent's assistance and feedback to interpret the information which is presented.

The role of the Health Agent during the hearing is many-fold: to ensure that the hearing procedure meets legal requirements, to inform the board of the requirements of Title 5, to be a source of unbiased information and to provide professional judgment as to whether the applicant has met the test of equal environmental and public health protection. If the Health Agent believes that the applicant has not sufficiently proven equal environmental protection and/or manifest injustice, the agent may suggest additional information the board may wish to require from the applicant.

After the applicant has finished presenting his information, the hearing should be opened up to members of the public who wish to speak. The chairman calls upon and recognizes each person individually. Again, each person who speaks should identify themselves for the record. Members of the public (and this includes their representatives such as attorneys and environmental scientists) may submit information to document their concerns or to dispute information the applicant has offered. They may also request that the Board continue the hearing if they feel they need more time to review information that the applicant has presented. It is usually reasonable to honor this request and continue the hearing until a later date; failure to do so may create legitimate grounds for an appeal. After the public has finished speaking, the applicant should to be allowed to respond to concerns raised by members of the public, either to rebut these concerns or explain how they will be potentially mitigated.

During the public comment part of the hearing, it is important that the Board interact with the public as much as is reasonable. As Board of Health members, we are the officials chosen to protect the interest of the public health and the environment. Where appropriate, the board should explain the reasoning behind their disposition toward a variance request (remember there has not been a vote yet, but the general leaning of the Board may be obvious at this point). For the most part, the public, yes even contrary abutters, respond positively if they are assured that the Board has thoughtfully considered their concerns, and presents sound arguments when dismissing any particular concern. Listening to and addressing the public's concerns will establish your pattern of fairness and encourage sound and consistent decisions.

It has been these authors' experience that, while many of the concerns raised by the public are legitimate, the public also raises issues that should not or cannot be considered by the Board of Health as part of its decision. For example, on a large condominium project, abutters may argue that the project "buildings are too big", are "too intensive a use of the land", "cover too much of the property", etc. These are really not legitimate Board of Health issues. Although it may be somewhat out of the Board of Health responsibility, it is often helpful, when non-Board of Health issues are brought into your hearing, to explain the regulatory constraints of the Board. Reminding the public that various town boards and commissions have been formed to protect

other interests such as zoning, conservation or planning sometimes helps to put things in perspective. In some instances the Board may want to refer members of the public to these other Boards or town officials (zoning enforcement officer, Zoning Board of Appeals, Conservation Commission, etc.) who have the authority to address their concerns.

In short, during the public comment period, the Board should make reasonable effort to address, or allow the applicant to address, all the abutters' concerns. The Board should explain, where possible, their reasoning if they are tending to dismiss the concern or if they feel there has been adequate mitigation proposed. All rebuttals and discussion should be metered through the Chairperson, who should maintain the decorum of a public meeting. If things get out of hand, keep the gavel handy!

After hearing everyone who wishes to speak, the board may wish to further discuss what they have heard. After discussion, the Board has several choices. The Board can decide to approve the variance (possibly with conditions), deny the variance, or decide that they need more information or time to make their decision.

The Motion

A decision of the Board of Health begins with a motion. A motion is a statement describing a proposed action to be taken by the Board of Health. The three most common motions, at this point in the hearing, are motions to approve the variances, deny the variances, or continue the hearing. Before any subject is open to debate, a motion must be made and seconded. The sequence of events is usually the following:

1) member makes a motion
2) another member may at this point attach a detail to the motion before it is seconded
3) the chairman restates the motion and calls for a second
4) someone seconds the motion
5) the motion is open for debate and amendments may be offered
6) if no amendments are made, a vote is called on the motion; if amendments to the motion are made, a vote is called on the amendments first, then there is a vote called on the motion.

A typical motion might be expressed like:

"I move that the variances requested for 10 Megabyte Drive be approved with the conditions that there be a use restriction, registered with the deed, for a three bedroom residence, and the applicant shall be required to relocate the water line servicing the property so that it is greater than 10 feet from any component of the septic system."

Now, a dyed-in-the-wool Robert's Rules of Order person might find some fault in the way the sequence above is presented, but it presents an acceptable way to present and vote on a decision. In practice, this more informal way of modifying the original question before it is seconded, helps many individuals follow the flow of the hearing (as opposed to letting the original motion proceed to being seconded, and then having a board member offer an amendment. For instance, the above motion probably started off like:

"*I move that the variances requested for 10 Megabyte Drive be approved"*
Then another member probably said informally:
"Don't we want to have a restriction on the use of the house formalized and that waterline moved?"
The first member then probably said:
"Oh yeah!, Sorry, I was sleeping a bit there"
"I move that the variances requested for 10 Megabyte Drive be approved with the conditions that there be a use restriction, registered with the deed, for a three bedroom residence, and the applicant shall be required to relocate the water line servicing the property so that it is greater than 10 feet from any component of the septic system."

In essence, the first member modified his/her motion before it was seconded as the result of informal prompting, and "withdrew" his first motion. This more informal way of getting to the first motion is quite common (especially when the meeting is running long and late).

Continuing the Hearing

In some instances, the Board may decide that they need more information in order to make an informed decision, or that substantial changes to the applicant's plan are needed. In these instances, the Board should vote to continue the hearing to a specified date. When the Board votes to continue the hearing, it should make a practice of giving the applicant clear direction as to the information it will require or the changes that must be made before the Board can render a decision. When a hearing is continued, notification to abutters of the next scheduled meeting is not required; it is assumed that interested abutters have attended the meeting and will now be apprised of the date of the next hearing on the matter. In some instances, the applicant may request the continuance before any substantive discussion has occurred. This may occur because the engineer was not able to complete the plan or fulfill some other requirement before the meeting, and needs more time to complete the tasks.

Resist the Temptation !

Been there -Done that! These authors know that occasionally there is a temptation to continue the hearing, even though the Board probably has enough information to make the decision. In some cases, it is just a delay of the inevitable negative vote. In fairness to the applicant, when you are about to motion to continue a meeting, ask yourself "*Is there any information that the Board can reasonably expect to have presented at a future meeting, which would alter their disposition toward a particular case".* We hope that we have not offended some folks by suggesting that this can occasionally happen, however, we have been in the "heat" of a meeting where a tough decision is called for, and the Board feels that they just need a little "breathing room" to make the decision without the pressure that has built up in the meeting to that point. The temptation is to continue the meeting, while giving the applicant only vague charge to gather some piece of information that will likely not change your disposition in the case. This is not to say that there are not valid reasons for continuing a hearing for purposes of gathering more information or reviewing information presented. We are only encouraging Boards not to delay the inevitable, and earnestly consider whether additional information is really necessary to decide on the case.

Taking the Matter Under Advisement

In ***rare*** instances, another option of the Board in hearing a variance case is to take the matter under advisement. In this case, the Board may decide that they have gathered as much evidence as they need, but that they wish to consider the matter for a time before voting, instead of voting at the current meeting. Be aware that when taking the matter under advisement, ***the legal record becomes closed and no additional evidence may be gathered or considered before taking a vote***. This option should be used only in the event that all pertinent information has been presented and perhaps Board members feel that the need to review a report or other document that was presented prior to rendering a decision. In cases where the Board needs to review documents, it is these authors' preference to continue the hearing rather than take it under advisement.

Approval of the Variance

An obvious option of the Board at a hearing is the approval of the variance. The approval should reference the engineered plan and, because there are frequently multiple versions of this plan, the date of the plan approved.

Every variance approval should be accompanied by a set of the Board's findings. Findings are simple statements of fact that the Board has built upon in order to arrive at their decision. In short, they are the Board's rationale for approving the variance. The findings should reference in what way the applicant has demonstrated an equal degree of environmental protection and manifest injustice. A sample finding?

For instance:

One set of findings might be:

"Finding that this is repair to an existing septic system where there is no proposed increase in flow;that the applicant has adequately demonstrated that the groundwater flow in the area is in a direction away from the critical resource (that being the adjacent pond); that the applicant has compensated for the reduction in vertical separation to groundwater by providing pressure distribution of effluent - The Board of Health approves the variances requested for 75 Park Place, and the Plan # 1234, Fabio Engineering, Inc., Dated June 14, 1998, with the following conditions....."

Why are findings important?

Findings offer a number of advantages to a Board of Health. From the legal perspective, they are the part of the enduring record that shows that the Board thoughtfully considered the relevant facts in a case before a decision. As such, they stave off the possible accusation and the legal challenge of being "arbitrary and capricious". It is difficult to prevail in legal challenge to a Board of Health decision that is accompanied by valid findings. The persons appealing the Board's decision will have to make compelling arguments to refute each of the Board's findings in order to have the Board's decision overturned. This is true for approvals as well as denials of variances.

Findings are also helpful if the Board is called upon to review the case in the future. For approvals, this often occurs when the board receives a request to modify or expand the septic system. For denials, this most often occurs when a later applicant tries to build on a lot that was previously denied. These requests often come years after the original variance request, and Board membership has often changed significantly in the interim. Findings provide the Board with information about how the previous board viewed the situation, what facts relating to the case have already been established, and provide guidance on how to view the new variance request.

A final advantage to the practice of incorporating finding into decisions is that they are a good tool for maintaining consistency when similar cases are heard. You may occasionally hear the plea *"But Mr. Jones, two doors down, was allowed to put a bedroom on and enlarge the system with variances. Why can't I"*. A review of the findings in Mr. Jones' case should reveal a finding that differs from that of the case before you to the point where the variance could be granted in Mr. Jones' case and a similar variance should be denied in the case before you (for instance the distance to wetlands might be different).

Conditions

The Board (and DEP) may also set conditions on the variance approval (15.413). Conditions may include anything the board believes necessary to insure that the system is installed correctly and functions effectively. This may include such diverse requirements as: having the engineer or land surveyor certify that the system was installed at the correct elevation or location; having a registered land surveyor prepare a plot plan showing the exact location of the system relative to property bounds or other setbacks; periodic inspection or maintenance and reporting of results of such; effluent or groundwater quality monitoring and reporting of results; relocation of a neighbor's well; deed recordation requirements; financial assurances; or other qualifications on the use of the system.

All approvals of variances must be in writing. Any conditions shall also be expressed in writing as part of the variance approval. A copy of each variance must be posted for 30 days following its issuance. The variance must also be available to the public in the office of the town clerk or Board of Health while it is in effect. It is a good idea to require that conditions which materially effect the property, in obvious and substantial ways, into the future (i.e. use restriction) be recorded with the deed prior to issuance of either the Disposal Works Permit or the Certificate of Compliance.

Denial of the Variance

If the Board does not believe that the applicant has demonstrated equal environmental protection and/or manifest injustice, they may choose to deny the variance. Again, all denials should be accompanied by a set of findings. Findings should state why the board believes that the applicant cannot or has not demonstrated equal environmental protection and manifest injustice. All denials of variance requests must be made in writing and must state the Board's reasons for the denial. These reasons can generally come directly from the Board's findings. Note that any denial of a variance may direct the applicant to upgrade an existing system consistent with the requirements of 15.404 (Maximum Feasible Compliance) and 15.405 (Local Upgrade Approval) (15.413).

A sample set of findings from a variance denial might be:
A variance to allow a leaching facility to be installed 85 feet from a private well; variance is ***denied***

The Board of Health finds that:
1. The applicant wishes to install his leaching facility 85 feet from the private drinking water well located on adjacent lot 12.
2. The applicant has not demonstrated that there is no other feasible location on the applicant's lot where the leaching facility could be located to maintain the required distance to the well on lot 12.
(and/or)
3. The applicant has not demonstrated the direction of groundwater flow.
4. The Board of Health therefore does not believe that the applicant has demonstrated that a degree of environmental and public health protection equal to that provided by the requirements of 310 CMR 15.000 will be provided by the variance as requested.

AFTER THE HEARING

As stated above, a copy of each variance must be posted for 30 days following its issuance in the office of the Town Clerk or Board of Health while it is in effect. The applicant must also file a copy of each variance granted by the Board of Health with DEP. DEP will review the variance for all the issues raised before the Board of Health and may review other issues raised by the application. DEP has 30 days after receipt of the variance request to approve, disapprove, or modify the variance granted by the board of Health. If DEP does not act upon the variance request within 30 days, it is presumptively approved. During this time, no work authorized by the variance shall be done by the applicant.

No DEP review of the following variances is required after Board of Health approval:

1) For systems under 10,000 gpd, variances granted under the Local Upgrade Approval and Maximum Feasible Compliance (15.402 through 15.405). Remember, **these sections of the code apply only to system upgrades where there is no increase in design flow above the existing approved capacity of a system.**. The system owner shall provide a copy of the local upgrade approval to DEP after is it issued by the Board of Health and before construction begins.

2) reduction of system location setbacks from property lines, provided a survey of the property line shall be required if a component ids to be placed within 5 feet of the property line, and no such reduction shall result in the leaching facility being located less than 10 feet from the leaching field on an abutting property (15.412(4)).;

3) reductions in system location setbacks from cellar wall, swimming pool, or slab foundations.

Good Luck

Well, the rest is up to you ! What we hope we have given you here is the basis for conducting a good Board of Health hearing. As you know, good

Title 5 variance hearings, which serve the public interest, emerge from having a knowledge of the code, a clear sense of jurisdiction and procedure, a large dose of common sense, and respect (not necessarily acquiescence) for all points of view.

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