

Making a Good Record: Minutes, Findings & Decision Documents

New York State Department of State

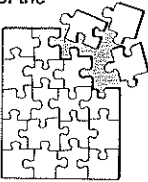
Course Overview

- Assembling a Record
- Minutes
 - Legal Requirements vs. Good Practice
- Record Keeping
 - Numbering systems, filing
- Findings
- Decisions
 - Voting
 - Community Opposition

The Record is the Assembled Facts

The material in the record tell the story of the application. Common items:

- Newspaper notices
- Minutes of meetings
- Application and supporting documentation
- SEQRA materials, such as the EIS
- Transcripts or summary testimony from public hearings
- Written submissions during the public comment period
- Expert opinion submitted orally or in written form



Make the Record Complete

Be sure to include:

- Expert opinion submitted orally or in written form
- Personal observations and knowledge of board members that are entered into the record
- The decision and any conditions placed on approval
- Findings of the board

Record Retention

The minimum length of time a record must be retained before being disposed of legally, according to the State Archives Records Retention Schedule

- Official minutes – permanently
- Hearing proceedings – permanently
- Recording of voice conversations – four months after transcription and/or approval of minutes or proceedings
- Project files – permanently
- Single family home variances – 25 yrs



See Record Retention Schedule

Tips for Board Members

Ex parte communication should not be concealed or disregarded (example: a phone call or letter from the applicant)



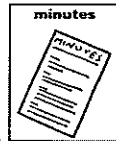
- Don't make statements that you would not be happy to see in print or that could be interpreted wrongly when intonation or nonverbal cues are missing. Example: Sarcasm "You bet we're going to deny you..."
- Don't declare your position on a project before all the facts are heard

Minutes

Minutes

Minutes are the historical record of an officially convened meeting of an organized public body

- Serve as a record of decisions and details
 - Tracks evolution of issues/applications
- Inform those not present of what happened at meeting
- Give future board members a sense of how the board operates



Minutes as Legal Protection

- Minutes often contain statements that indicate proper procedure was followed
- Records when a member with a conflict recuses herself
- Records when a member who was absent from the hearing on the project indicates they have reviewed the record
- Indicates that the media was notified of the meeting
- Indicates SEQR was followed

Must we take minutes of a meeting?

- Yes, if there are any motions made or votes taken
- See Public Officers Law §106 and Committee on Open Government Opinion (COG) Opinion 3154



- Minutes must be in writing, and cannot just be on tape or video tape
- See COG Opinion 3981

Motions & Resolutions

- Record verbatim
- Read back during the meeting to make sure they have been accurately transcribed
- Review list of conditions with board prior to vote

Who takes the minutes?

- Secretary or clerk
 - A board member can, but is NOT recommended and should never be the chairman
 - Board member can't be the secretary employed by the board (See AG. Inf. Op. 2005-17)
- Also known as a "Miracle Worker"
 - Expected to produce concise and coherent summaries of sometimes long and disjointed discussions
- Another alias is "The Diplomat"
 - Diplomacy and fortitude are needed to deal with some suggested "improvements" to the minutes

How detailed must minutes be?

- Minimum information (OML): Minutes of Resolution
 - Record of the motions, resolutions and votes
- Middle ground: Minutes of Narration
 - An accounting of the discussions that took place and important details
 - Consider presenting information logically, not necessarily chronologically
- Full account: Report
 - A full record of discussions that includes names of all speakers, movers and seconders of motions
 - Verbatim minutes are not usually desired or practical

Common Contents of Minutes

- Heading
 - Name of board, date, time, place of meeting
- Footer
 - Name of the computer file
- List of members attending
- Time meeting called to order and adjourned
- Approval of previous minutes, corrections of past minutes
- Summary of reports, announcements
- Summary of discussion
- Proposals, resolutions & motions
- Results of vote

Summary of Discussion in Minutes

Include:

- Key points
- Separate fact from opinion
 - Facts are objective and indisputable
 - Opinions are personal views.
"The event was a roaring success."

Don't include:

- Offensive or inappropriate language (even if used at meeting)
- Subjective interpretations of the mood or tone of speakers or audience (Mr. Jones *snapped* at the chairman.)
- Items not discussed during meeting
- Typographical & grammatical errors (Proofread)

How much detail should hearing minutes contain?

A more detailed record should be made of a hearing

- Stenographic is best
- If taping, take notes to go with tape
- Written record does not have to be verbatim



Make sure the Record is Clear

- Have speakers identify themselves
- Beware of rustling of papers near microphones
- Ask for clarification when it is unclear to whom the speaker is referring ("they", "he", etc.)
- Require visual references to be described or "read" into the record

Must minutes be approved?

- There is no requirement in state law that the board approve the minutes
- Local by-laws or rules of procedure may require approval
- Approving minutes is typically done

Good Practice:

- Distribute minutes before next meeting
- Review near beginning of next meeting
- Record any corrections or additions
- Group should vote to approve minutes

Making Minutes Available

Open Meetings Law §106

- Minutes of meetings of all public bodies shall be available to the public within two weeks from the date of such meetings
- Minutes taken of an executive session must be available to the public within one week
- Decision not invalidated if minutes are late

- Best practice is to distribute minutes in a timely manner
- Prepare minutes within time required and make available to public
- Mark as "unapproved", "draft", or "non-final"

To apply for grants to help finance the cost of records management, contact the State Education Department, State Archives and Records Administration at (518)474-6926.

Record Keeping

Numbering Systems

Assign a project number

- Example: Z06-1, Z06-2, P05-1, P05-2

Develop cross references to help identify projects by:

- Applicant Name
- Project Name
- Location
- Tax Parcel ID #
- Code Section

Why use Tax Parcel IDs?

- Over time, street names change, houses are renumbered, new parcels are created
- The tax parcel i.d. system is infinitely expandable
- The history of the parcel can be traced
- The town assessor can look into improvements on a property being reassessed
- Allows the information to be cross-referenced in a Geographic Information System (GIS)

Filing Records

- The Town/Village Clerk maintains custody of all records and is automatically designated the records management officer
 - See Article 57-A of the Arts & Cultural Affairs Law
 - Others can actually file the records in their offices
- File records in a way that allows someone else to find them
 - Most planning and zoning-related records must be kept indefinitely
- Plan for Possible Court Challenges
 - Keep track of when actions were taken



Findings are an analysis which applies law to facts, leading to conclusions

Findings

Drafting the Findings

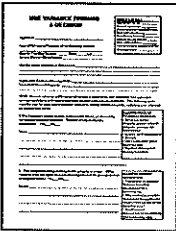
- Findings describe the reasons for the denial or approval of an application, and may also support why a condition was imposed.
 - Not applicable to legislative acts
- Findings should be able to support a decision if it is challenged in court
- Conclusory statements are not "Findings"
 - A decision based upon conclusory statements, which is not supported by factual information contained in the record, will be struck down

Possible Content of Findings

- Applicant and interested groups
- Action requested by the applicant
- Property information: ownership, use, zoning
- Surrounding neighborhood
- Analysis of board
- Legal standards
- Facts as they relate to the legal standards

Applying the Legal Standards

- List all applicable standards contained in state statutes and local laws/ordinances
- Under each standard, list the matters of evidence that go to support or refute satisfaction of the standard
- Weigh the evidence listed under each standard.
- Determine whether compliance with each standard is established by the facts, or would be established if conditions were added to the approval




Decisions should consist of the date action was taken, the motion that was passed, the type of vote cast by each board member present, and any conditions imposed

Decisions

Familiarizing Yourself with the Record

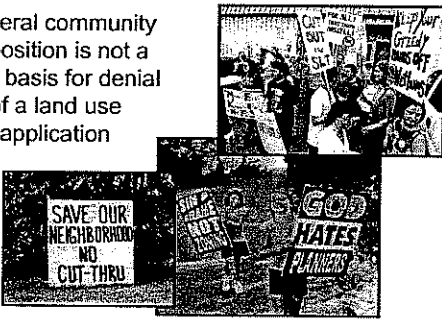
Don't vote on application if you miss the applicant's presentation of the project, the public hearing, or other meetings at which the application is discussed, unless you familiarize yourself with the record



Look at the minutes, review the application, review comments from the public hearing

Community Opposition

General community opposition is not a valid basis for denial of a land use application



Making a Decision

A decision is a motion for final board action which passes by a majority vote.

- Clearly word motions
- Record each member's vote

A Quorum must be Present

- Every motion or resolution of a planning board shall require for its adoption the affirmative vote of a majority of all the members of the planning board. (TL 2§271, V L §7-718, and GCL §27.)
- Every motion or resolution of a county planning board or regional planning council shall require for its adoption the affirmative vote of a majority of all the members of the board. (GML §239-c and §239-h.)

Decisions by Zoning Boards of Appeals

When Acting in their Appellate Jurisdiction

- A motion/resolution of the ZBA will only pass if it gets the support of a majority of the whole membership of the board.
- If a motion to approve a variance request or in favor of the applicant's interpretation of zoning fails, the request is denied.
- Additional votes may be taken within the statutory time frame without triggering the rehearing process.

When Acting in their Original Jurisdiction

- Original jurisdiction includes non-appellate duties granted to the ZBA by the Governing Board.
 - Example: Site Plan Review, Special Use Permits
- If the motion fails, no action has been taken

When County Referral is Required

If referral to the county planning agency is required under General Municipal Law §239-m or -n, the referring body can't make a decision until the earlier of the following occurs:



Genesee County Planning Board

- The referring body receives the report of the county planning agency, OR
- Thirty days have passed after the county's receipt of a full statement

If the county recommends disapproval or modification, a majority plus one vote is required for the board to approve the application without the recommended modifications.

How are decisions recorded?

- They may be in a "Decision Document"
 - It would contain the motion, any conditions, the vote of each member
- They may be copies of letters sent to applicants
- They could be recorded in the minutes which indicate the vote on a relevant motion
 - If so, be sure to file draft minutes to meet the filing deadlines for decisions
 - Decisions must be filed within 5 business days
- Establish locally what constitutes a decision

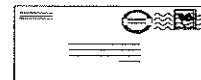
■ **Filing:** When the records are placed under the control of the municipal clerk

■ The municipal clerk should stamp all records with the date they are received

■ Filing establishes the start of the 30 day appeals period for an Article 78

Tying Up Loose Ends

- Send copy of decision to applicant
- If the application was referred to the county, send the county a copy of the decision
- Attach findings to the decision document
- Have Legal Counsel or other Professional Staff periodically review board decisions



Resources: Minutes

- www.casagordita.com/minutes.htm
- www.elimina.com/minutes/minute-taking-excerpt.pdf
- www.jwatsonassociates.com/Articles/WriteMinutes,NotHours.htm
- www.meetingwizard.org/meetings/taking-minutes.cfm?re=8
- iaia.essortment.com/takingmeetingm_rga.htm
- www.99-conference-call-services.com/0619-teleconferenceing-meeting-minutes.htm
- www.dos.state.ny.us/coog/findex.html

Continuing Education Credits

Attorneys:

- This course has been approved for 2 hours of Continuing Legal Education (CLE) credit towards Professional Practice requirements.
- There is a fee of \$25 payable by check, credit card or voucher to the Albany Institute of Legal Studies
- See the Attorney Instructor for the paperwork

Code Enforcement Officers:

- This course has been approved for 2 hours of in-service credit by the Office of Fire Prevention and Control
- Course Number - 49-5625
- In-Service Number - 681000-0507-0010

Presenters

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Planning Board DECISION

OFFICE USE ONLY
Application No.: _____
Date Received by _____
Municipal Clerk: _____

At a meeting of the Planning Board on _____, 20____, the following motion was made _____:
(name of planning board member)

- I move that the Planning Board
- deny
 - approve
 - approve with conditions (see below)

- the application for
- Site Plan Review Approval
 - Preliminary Subdivision Approval
 - Final Subdivision Approval
 - Special Use Permit Approval
 - Other _____

made by _____
(applicant name)

for property located at _____
(address / tax map number)

Approval of this application is subject to the following conditions:

Additional conditions are attached.

RECORD OF VOTE	MEMBER NAME	AYE	NAY
Chair	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____

(Recorded by Planning Board Secretary/Clerk)

(Date)

USE VARIANCE FINDINGS & DECISION

(Dept. of State Example)

OFFICE USE ONLY
Application No. UV- _____
Date of Application: _____ (Postmarked or Hand Delivered)
Date of Public Hearing: _____
Date Notice Published: _____
Date of County Referral: _____
Date of Final Action: _____
Date of Filing of Decision with the Municipal Clerk: _____

Applicant: _____

Appeal Concerns Property at the following address:

County Tax Map Section: _____ Block _____ Lot _____

Zoning District Classification: _____

Use for which Variance is Requested: _____

Applicable Section of Zoning Code: _____

Permitted Uses of Property: _____

TEST: No use variance will be granted without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. The following tests must be met for each and every use allowed by zoning on the property, including uses allowed by special use permit.

1. The Applicant cannot realize a reasonable return, as shown by competent financial evidence. The lack of return must be substantial.: Yes ___ No ___

Proof: _____

- | |
|--|
| ILLUSTRATIONS OF FINANCIAL EVIDENCE <ul style="list-style-type: none">• Bill of sale for the property, present value of property, expenses for maintenance• Leases, rental agreements• Tax bills• Conversion costs (for a permitted use)• Realtor's statement of inability to rent/sell |
|--|

2. The alleged hardship relating to the property is unique. (The hardship may not apply to a substantial portion of the zoning district or neighborhood.): Yes ___ No ___

Proofs: _____

- | |
|--|
| ILLUSTRATIONS OF UNIQUENESS <ul style="list-style-type: none">• Topographic or physical features preventing development for a permitted use• Why would it be possible to construct the applicant's proposal and not any of the permitted uses?• Board member observations of the property and surrounding area. |
|--|

3. The requested use variance, if granted, will not alter the essential character of the neighborhood.: Yes ___ No ___

Proof: _____

ILLUSTRATIVE NEIGHBORHOOD CHARACTER FACTORS
• Board members' observations of neighborhood.
• Expected effect of proposal on neighborhood, for example, change in parking patterns, noise levels, lighting, traffic.

4. The alleged hardship has been self-created. : Yes ___ No ___

Proof: _____

SELF-CREATED
• What were the permitted uses at the time the property was purchased by the applicant?
• Were substantial sums spent on remodeling for a use not permitted by zoning?
• Was the property received through inheritance, court order, divorce?

DETERMINATION OF ZBA BASED ON THE ABOVE FACTORS:

The ZBA, after reviewing the above four proofs, finds:

- That the applicant has failed to prove unnecessary hardship through the application of the four tests required by the state statutes.
- That the applicant has proven unnecessary hardship through the application of the four tests required by the state statutes. In finding such hardship, the ZBA shall grants a variance to allow use of the property in the manner detailed below, which is the minimum variance that should be granted in order to preserve and protect the character of the neighborhood and the health, safety and welfare of the community:

(USE) _____

CONDITIONS: The ZBA finds that the following conditions are necessary in order to minimize adverse impacts upon the neighborhood or community, for the reasons following:

Condition No. 1: _____

Adverse impact to be minimized: _____

Condition No. 2: _____

Adverse impact to be minimized: _____

Condition No .3: _____

Adverse impact to be minimized: _____

Condition No. 4: _____

Adverse impact to be minimized: _____

Chairman, Zoning Board of Appeals Date

RECORD OF VOTE

	MEMBER NAME	AYE	NAY
Chair	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____

Legal Memorandum LG03
ROLE OF FINDINGS IN LOCAL GOVERNMENT DECISIONS

"The absence of ... findings and the inadequacy of the evidence in the record to support respondent's determination requires vacatur of that determination and remittal of the matter to respondent for a hearing, proper findings and a new determination...." *Graham v. Town of Tully Planning Board*, 654 NYS2d 542 at 543 (1997).

Case law reporters are replete with cases which end with similar statements. While the local government body which has made the determination subject to remand has the opportunity to justify its decision, this opportunity is not without cost to both the local government and the community. Local governments must bear the expense of defending board decisions, while applicants or others aggrieved must bear both the expense of the challenge and the cost of lost economic benefit while the project awaits finality. This problem can be avoided. This paper will provide local government boards having discretionary decision-making responsibilities with "rules of thumb" for defensible findings which justify a final determination, whatever it may be.

Local boards, such as planning boards, zoning boards of appeals, historic preservation boards and environmental quality review boards are subject to standard rules of administrative law in that they are not granted unfettered decision-making authority. They may make a decision only when all of the requirements specified in state statute or local law are addressed. The making of administrative findings provides administrative boards with the vehicle for demonstrating their full compliance with all procedural and substantive requirements of law.

What are findings? Simply put, findings are statements which, with analysis, connect the legal requirements governing the granting or denial of relief requested to the facts contained in the record. They are something more than mere reiteration of legal requirements and facts. Proper findings can demonstrate that the "administrative agency determination is shored up by substantial evidence." (See *300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 NY 2d 176 at 181 (1978)).

Conclusory statements are always inadequate to sustain a decision upon review by a court. (See *300 Gramatan Ave. Associates, supra*; *Liebring v. Planning Board of the Town of Newfane*, 144 AD2d 903 (1988); *Bowers v. Aron*, 142 AD2d 32 (1988); *Morrone v. Bennett*, 164 AD2d 887 (1990)). Further, a decision based upon conclusory statements, wholly unsupported by factual information contained in the record, will be struck down as arbitrary and capricious without opportunity for remand. (See *Frangella Mushroom Farms, Inc. v. Zoning Board of Appeals of the Town of Coeymans*, 87 AD2d 962, aff'd 57 NY2d 811 (1982).)

How may findings be supported by the record? First, findings must specifically identify facts found in the record which the board considers relevant in the application of the substantive legal standard relating to their decision. Second, findings must evidence some *analysis* of those facts in relation to the substantive legal standard.

The record is largely composed of facts which come to the board via different avenues: copies of newspaper notices, transcripts and minutes of meetings, public notices, the application and supporting documentation (such as an environmental impact statement), testimony of interested members of the community presented at public hearings, written submissions during the public comment period, expert opinion submitted orally or in written form, and through personal observations and knowledge of board members. A decision which successfully relates the factual evidence to the applicable legal standards in the findings, is given great deference in court:

"It is well settled that a determination of a Zoning Board of Appeals should not be set aside unless illegal, arbitrary or an abuse of discretion....If a decision is rational and is supported by substantial evidence, a reviewing court may not substitute its judgment for that of a zoning board of appeals even if an opposite conclusion might logically be drawn (Rice, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 63, Village Law, §7-712-c, at 461...).... Those conclusions are supported by the record and provide ample support for the ZBA's determination...." (citations omitted; *Village of Honey Falls v. Town of Mendon Zoning Board of Appeals*, _ AD2d _, 654 NYS2d 534 at 535 (1997)); see also *Fuhst v. Foley*, 45 NY2d 441 (1978)).

When reviewing a decision of an administrative body, courts will limit their review to "ascertaining whether the determination has a rational basis and is supported by substantial evidence." (*Hanson v. Valenty*, 198 AD2d 598 (1993)). Findings provide the courts with the material for conducting this limited review ("[t]his necessarily requires the zoning board to set forth in its determination the evidence it relied upon in reaching its conclusions...." *Hanson*, at 598-599). For example, in *Sasso v. Osgood* (86 NY2d 374 (1995)) the court specifically identified facts in the record (referring to "photographs and other materials in the record") which amply provided the rational basis for the zoning board of appeals' conclusion that each standard for issuing the variance in question had been met.

The board must discern, however, truly factual information from mere "general sentiment," for the latter cannot support a finding:

"We conclude that the denial of the petition for an area variance is arbitrary and capricious and is not supported by substantial evidence.... The record shows that respondent's determination was not the result of a balancing of all of the appropriate factors (*see*, Town Law, §267-b...), but was the result of general community opposition." *D'Angelo v. Zoning Board of the Town of Webster*, 229 AD2d 945 (1996) leave for appeal denied 89 NY 2d 803. (See also *Market Square Properties v. Town of Guilderland*, 66 NY2d 893 (1985), where the court held that, "[w]hile expert opinion regarding traffic patterns may not be disregarded in favor of generalized community objections...here there was other basis in the record for respondent's determination...to which evidence respondent's discretion and common sense judgments might be applied in accordance with the town ordinance....").

First hand observations of neighbors incorporated into the record are distinguishable from "conclusory or general observations" and may be considered by a board in its discretion. (See *Michelson v. Warshavsky*, _ AD2d _, 653 NYS2d 622 (1997)). Similarly, personal observations and knowledge of board members may provide the factual basis for a decision, so long as those observations and knowledge are entered into the record. (See *Filangeri v. Pulichene*, _ AD2d _

645 NYS 2d 151 (1996); *Tunis-Huntington Dodge, Inc. V. Horn*, 29 AD2d 990 (1968)). It is axiomatic that information within the knowledge of the administrative decision maker but **outside** the record of the matter before it cannot be utilized to support its decision. (See *Simpson v. Wolansky*, 38 NY2d 391 (1975); *Mulligan's Night Club & Cafe, Inc. v. Buffalo Common Council*, 184 AD2d 1016 (1992); *Langhorne v. Jackson*, 206 AD 2d 666 (1994).

Courts will defer to the determinations of an administrative body relating to credibility of witnesses, the weight of evidence and relevance of evidence to the applicable legal standards:

"The agency's assessment of the credibility of witnesses, inferences to be drawn from the evidence and findings of fact are conclusive if supported by substantial evidence...."
Jackson's Marina, Inc. v. Jorling, 193 AD2d 863 at 866 (1993). (See, also, *Hirsch v. New York State Department of Motor Vehicles*, 182 AD2d 761 (1992), citing *PASNY v. Williams*, 101 AD2d 659, leave for appeal denied 63 NY 2d 605).

If a board has failed to make findings, courts generally will remit the matter back to the board:

"Here, respondent [planning board] failed to make findings supporting its determination that development of lots 1 through 10 was acceptable but that, absent a second access, development of lots 11 through 25 was unacceptable. The absence of such findings and the inadequacy of the evidence in the record to support respondent's determination requires vacatur of that determination and remittal of the matter to respondent for a hearing, proper findings and a new determination...." (citations omitted; *Graham v. Town of Tully Planning Board*, _ AD2d _, 654 NYS2d 542 at 543 (1997)).

Occasionally, however, a failure to making findings and lack of sufficiency of the record will result in annulment of the board's decision and remittal with direction that the permit be issued. (*Van Wormer v. Planning Board of the Town of Richland*, 158 AD2d 995 (1990)). Where remand for the purpose of making factual findings will serve no purpose "because the record clearly indicates that the Board's action in revoking petitioner's excavation permit is contrary to law [relating to reconfirming uses]" the court may step in to decide the matter even absent the existence of findings by the local zoning board of appeals. (See *Syracuse Aggregate v. Weise*, 51 NY 2d 278 (1980).

Findings memorialize the process the administrative board undertakes when it makes a decision. It must first collect the evidence found in the record, then appraise the evidence by assigning it appropriate weight and credibility. Only then may the board correlate the evidence with the applicable legal standard to result in findings which, cumulatively, yield the board's final decision. The board which clearly memorializes this process by including detailed and carefully written findings in its decisions has given itself the best insurance against successful challenge.

This memorandum provides general information and guidance only. The authors encourage local board members

