

2022 Webinar Series



The Workings of a Planning Board

Presented by:
Stephen Buckley, Legal Services Counsel
Jonathan Cowal, Municipal Services Counsel

June 29, 2022

Our Presenters



Stephen Buckley
Legal Services Counsel



Jonathan Cowal
Municipal Services Counsel



Today's Presentation



Planning Board Procedures - Steve

Board Organization, Finances, Alternates, Preliminary Review, application procedures, vesting, consultants, waiver of regulations, public participation at hearings, weighing evidence, making the decision, approval types, appeal.

Planning Board Procedures - Jonathan

Right-to-Know Law, public meeting requirements, Conflicts of Interest, Ethics, Disqualification, Legislative vs. Quasi-Judicial, Recusal vs. Abstention, Avoiding Conflicts, Case Studies.

Planning Board Basic Organization



- Quorum. Majority of membership. RSA 673:10, III
- At least one regular meeting per month. RSA 673:10, II
- Chair and other officers elected from non-ex officio members for one-year term. RSA 673:8, 9
- Members appointed by governing body or elected
- One ex-officio select board member, up to 5 alternates as approved by town meeting.
- Rules of procedure. RSA 676:1
- RSA 676:4 mandates procedures for applications

Planning Board Finances: 673:16

- Board may appoint employees subject to the same employment rules as other corresponding civil employees of the municipality.
- The board may also contract with planners, engineers, architects, and other consultants for such services as it may require.
- The board may accept and use gifts, grants, or contributions for the exercise of its functions, in accordance with the procedures established for the expenditure of funds within the municipality.
- Fees collected by the planning board must be held in a separate, nonlapsing account, and not commingled with other municipal funds; such funds may be expended without approval of a local legislative body and must be paid out by the municipal treasurer only upon order of the local land use board or its designated agent.

Alternates - RSA 673:6



- ▶ Appointed Planning Board - Town Meeting can authorize 5 alternates
- ▶ Elected Planning Board may appoint 5 alternates
- ▶ Ex-Officio alternate appointed by city council, town council or select board
- ▶ Alternates may participate as non-voting members
- ▶ Chair designates alternate when regular member absent or is disqualified. RSA 673:11
- ▶ Only the Ex-Officio alternate may serve for the Ex-Officio member.

Planning Board members on other Boards



- ▶ Any two (2) appointed or elected members of a planning board in a city or town may also serve together on any other municipal board or commission, except that no more than one appointed or elected member of the planning board shall serve on the conservation commission, the local governing body, or a local land use board as defined in RSA 672:7. 15 *Land Use Planning and Zoning* § 27.06 (2021)

Preliminary Review

- ▶ Planning boards may mandate preliminary review, if authorized by legislative body. RSA 674:35, I
- ▶ Preliminary Conceptual Consultation, RSA 676:4, II (a): nonbinding, no abutter notification required, general discussion of type of development, etc.
- ▶ Design Review, RSA 676:4, II (b): still nonbinding, abutter and published notice required, but no public hearing, identify special studies that may be required, neighborhood or environmental impacts, specific issues with the parcel rough layout of lots and roads, topo maps, soils information⁸

Formal Application, RSA 676:4, I



Completed application.



Regulations specify what is completed application.



Checklist can specify types of plans, studies, designs, etc. to minimize review and revisions.



Fees for costs & consultants' studies; detailed accounting. RSA 676:4-b



Application accepted by vote at meeting, with abutter and published notice.

Timeline for Decision, RSA 676:4, I



Preliminary Consultation No Set
Time Limit



Application submitted 21 days
before acceptance at meeting



Notice to Abutters and public 10
days before meeting for plan
acceptance



Hold at least one public hearing and
make decision within 65 days of
plan acceptance



Issue written decision within 5
business days

New Statute - Planning Board deadline extended



- ▶ **Chapter 69 (HB 332)** extends the planning board's deadline by 30 days to act to approve, conditionally approve, or disapprove an application where the board determines that the development is one of regional impact. **Statute amended: RSA 676:4, I(c)(1). E.D. August 9, 2021.**

Alternative Site Plan Approval and Review Procedures



- ▶ The town meeting or town or city council may authorize the planning board to delegate its site review powers for minor site plans to a committee of technically qualified administrators. RSA 674:43, III.
- ▶ Establish Technical Review Group to provide advice to planning board applicants on their proposed projects.
- ▶ City Council or planning board establish thresholds based on the size of a project or a tract below which site plan review shall not be required. RSA 674:43, IV

Acceptance Vesting

RSA 676:12, VI

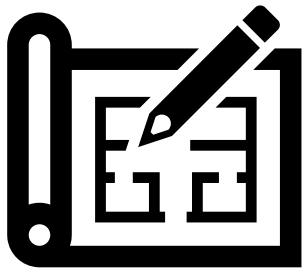
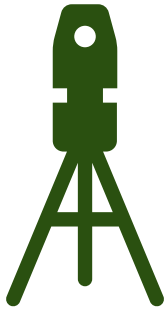
- ▶ No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

► Once a subdivision or site plan is disapproved by the Planning Board a second application for the same development project cannot be considered and approved unless it is materially different in nature and degree from the first application. *CBDA Dev. v. Thornton*, 168 N.H. 715 (2016)

► In order to permit the Planning Board to approve a site plan that was previously denied it is sufficient if the second site plan was modified to address the Board's specific concerns about the initial site plan. *Kulick's Inc. v. Town of Winchester* (9/16/16)

Only One
Bite of the
Apple

Third Party Consultants - RSA 676:4-b



- ▶ May require applicant to pay for third party consultant review and construction monitoring
- ▶ Cannot substantially duplicate same review at ZBA

Waiver of Regulations:

RSA 674:36, II (n) - RSA 674:44, III (e)

- ▶ The basis for any waiver granted by the planning board shall be recorded in the minutes of the board.
- ▶ The planning board may only grant a waiver if the board finds, by majority vote, that:
 - (1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations;

OR

 - (2) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.

Public Participation at Hearings - RSA 676:4, I (e)



- ▶ “At the hearing, any applicant, abutter, holder of conservation, preservation, or agricultural preservation restriction, or any person with a direct interest in the matter may testify in person or in writing.”
- ▶ “Other persons may testify as permitted by the subdivision regulations or the board at each hearing.”

Deliberation & Weighing the Evidence



- Get all necessary information before closing public hearing
- Board can deliberate and vote at later meeting
- Avoid *ex parte* contacts with parties or deliberation among members outside meeting
- Board may rely on personal knowledge of the area; and not bound to accept conclusions of experts
- Cannot ignore uncontradicted expert testimony, unless board can adequately explain why in written decision.

Dartmouth v. Hanover

New Hampshire Supreme Court

November 6, 2018

- ▶ Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.
- ▶ Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.

Degree of Discretion



- ▶ *Summa Humma v. Town of Tilton*, planning board limited the height of a flagpole.
- ▶ Owner argued there was no local ordinance that prohibited his proposed 90-foot-tall flagpole.
- ▶ Where the role of site plan review is to ensure that uses permitted by the zoning ordinance are appropriately designed and developed, restricting the board's authority to the specific limitations imposed by ordinances and statutes would render the site plan review process a mechanical exercise.
- ▶ The planning board properly exercised its authority to impose conditions that are reasonably related to the purposes set forth in the site plan regulations.

Three Ponds Resort, LLC v. Town of Milton

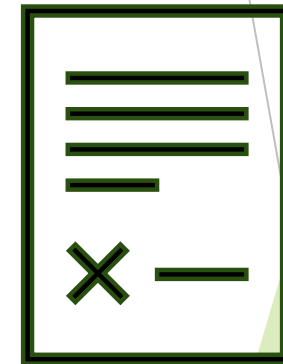


- ▶ The Supreme Court distinguished *Condos East* and *Continental Paving* ruling that the ZBA was entitled to question and reject the conclusions of the expert's traffic assessment by relying on objective facts provided through the testimony of town residents and the personal knowledge of board members
- ▶ Critical examination of the methodology of an expert traffic report, combined with direct evidence of objective evidence provided by abutters, residents and board members can support a land use board's decision to reject the conclusions of expert testimony and reports.

Written Notice of Decision



- ✓ Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
- ✓ RSA 676:4, I (c) (1) also requires decision to approve, approve with conditions or disapprove.
- ✓ Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
- ✓ A tie vote is not a decision.

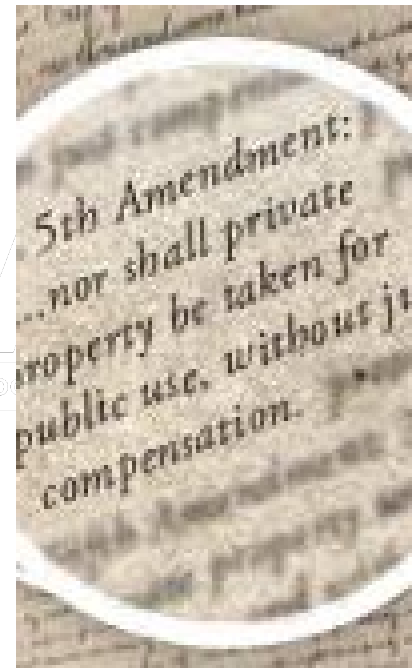


Conditional Approval

- ▶ Representations by applicant are not binding unless clearly made a condition of approval.
- ▶ Conditions must reasonably relate to ensuring compliance with relevant criteria.
- ▶ Standard conditions.
- ▶ Conditions precedent.
- ▶ Conditions subsequent.
- ▶ Compliance hearing.

“Grandfather Rights”

- Planning Board Regulations may define “substantial completion of improvements etc.” and “active and substantial development etc.”
RSA 674:39, III.
- Failure to define “active and substantial development” awards 5-year exemption automatically.



Housing Appeals Board



- Three members, appointed by the Supreme Court
- Will hear appeals of final decisions of municipal boards regarding “questions of housing and housing development.”
- Party has option of appealing to superior court or HAB; appealing to one waives right to appeal to the other.
- Hearing procedure is identical to procedure in Superior Court.
- Standard of review is identical to that in superior court.
- Board must hold hearing on the merits within 90 days after receipt of notice of appeal and must make decision within 60 days after hearing.
- Decisions may be appealed to N.H. Supreme Court.

Superior Court Appeal RSA 677:15

- ▶ Court will issue a certiorari order
- ▶ The certiorari order will request delivery of certified copy of board's records to court
- ▶ Certiorari order will stay all proceedings - don't sign plan, do nothing in furtherance of the approval
- ▶ Planning board is not the proper party, only the town is the proper party.
- ▶ Trial is on the record, no testimony
- ▶ Court can reverse or affirm - is the board's decision illegal or unreasonable
- ▶ Costs not allowed against town unless town acted in bad faith

HB 1661 - Significant Provisions

Effective 8/23/22



- ▶ All land use board fees shall be posted/published in a location accessible to the public during normal business hours - failure to post fees in that fashion at the time an applicant submits an application - such fees shall be deemed waived for that application. Website posting will be sufficient. RSA 673:16, III.
- ▶ A decision by a land use board shall include specific findings of act supporting that decision. Any decision that disapproves an application without findings of fact supporting disapproval could be grounds for automatic reversal and remand by the Superior Court. RSA 676:3, I
- ▶ Governing body can no longer grant an extension for timely planning board action under RSA 676:4, I (f)

HB 1661 - Significant Provisions

Effective 8/23/22 (cont.)



► **NEW:** 674:17,IV:

If a municipality allows an increased density, reduced lot size, expedited approval, or other dimensional or procedural incentive under this section for the development of housing for older persons, as defined and regulated pursuant to RSA 354-A:15, VIII, it may allow the same incentive for the development of workforce housing as defined in RSA 674:58, IV. Beginning July 1, 2023, incentives established for housing for older persons shall be deemed applicable to workforce housing development.

HB 1661 - Significant Provisions Effective 1/1/23



- ▶ Amendments to Planning Board's Procedures on Plats/Plans by amending RSA 676:4, I (c) (1):
 - ▶ Where the board needs more information and the applicant will not consent to a time extension the board may deny without prejudice permitting resubmittal of the same or similar application.
 - ▶ Upon failure of board to take final action within the 65 day time period the governing body is required to certify the plat or plan is approved.
 - ▶ Upon failure of the governing body to certify such approval shall provide sufficient grounds for the Superior Court to approve the plat or plan and possibly award attorneys fees to the applicant.

The Right-to-Know Law

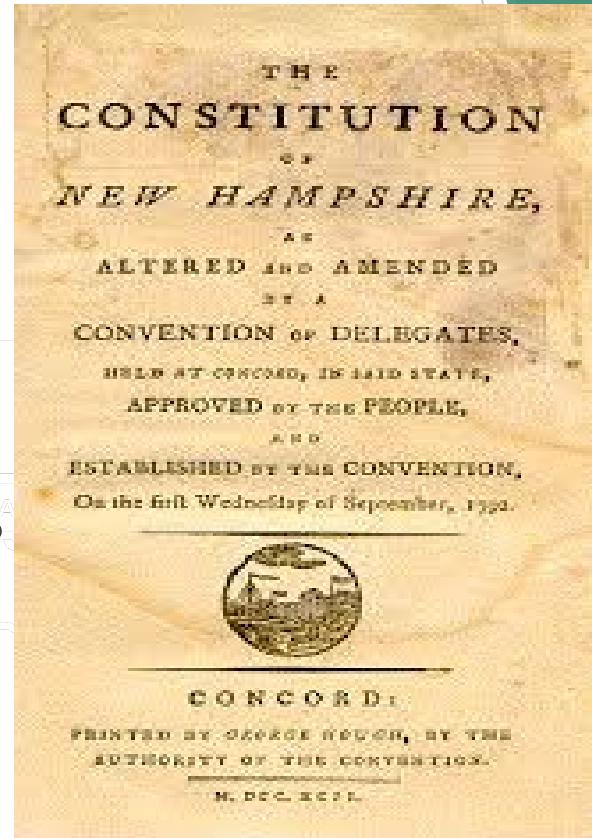
RSA Chapter 91-A



PART I, ARTICLE 8 OF THE NH Constitution: Government ... should be open,

SECTION 1 OF RSA 91-A:

The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.



What is a Public Meeting?

RSA 91-A:2

Quorum

Public body

Convenes so that they
can communicate
contemporaneously

To discuss or act upon a
something over which
the public body has
supervision, control,
jurisdiction, or advisory
power

“Public Body”



RSA 91-A:1-a, VI:



- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto

“Convene”

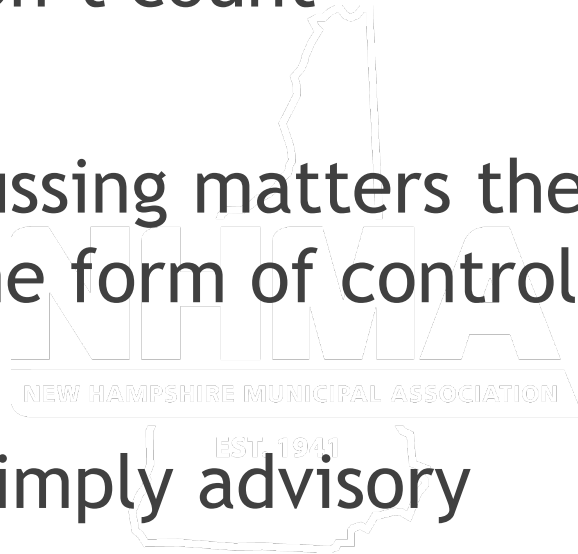


- In person gathering
- Discussions via email, text chains, reply all
- Emails and text can be considered government records
- Communications outside of a meeting shall not be sued to circumvent the spirit and intent of 91-A
- All discussions of a public body should take place at a public meeting

Discussing Board Business



- ▶ Chance encounters or social gatherings don't count
- ▶ Must be discussing matters the public body has some form of control over
- ▶ This can be simply advisory
- ▶ Multiple members of one public body serving on a different public body could get complicated



What are the requirements of a public meeting?



Public notice



Open to the public



Meeting minutes



Conflicts of Interest



It All Begins with “Ethics”

“Ethics” are hard to pin down and mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Avoiding criminal behavior, following state & local law
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety

Few Statutory Rules



- ▶ Incompatibility statutes contain clear rules, but they're not the *only* ethical rules.
- ▶ Case law does provide a number of examples not contained in statute, but even that isn't complete.
- ▶ Ethical Golden Rule:
 - ▶ If you were to read about the same scenario occurring somewhere else in a newspaper, would you feel good about everyone who participated?
 - ▶ If the answer is “no,” then take steps to correct the problem.

Land Use Specific Statute



[RSA 673:14, I](#) Disqualification of Member.

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.

Juror Disqualification

Standard: RSA 500-A:12



A juror is disqualified if the juror is “not indifferent” because he or she:

- ▶ Expects to gain or lose upon the disposition of the case;
- ▶ Is related to either party;
- ▶ Has advised or assisted either party;
- ▶ Has directly or indirectly given his opinion or has formed an opinion;
- ▶ Is employed by or employs any party in the case;
- ▶ Is prejudiced to any degree regarding the case; or
- ▶ Employs any of the counsel appearing in the case in any action then pending in the court.

Difference Between Legislative vs. Quasi-Judicial

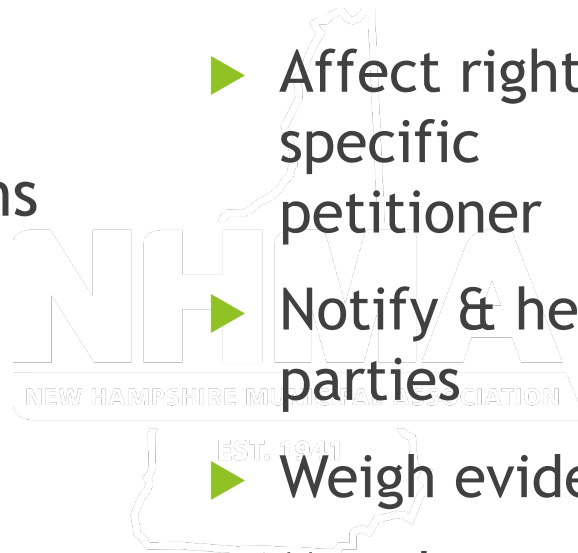


Legislative

- ▶ Widely felt
- ▶ Policy decisions
- ▶ Must act in public's interest, but don't need to be "indifferent"

Quasi-Judicial

- ▶ Affect rights of specific petitioner
- ▶ Notify & hear parties
- ▶ Weigh evidence
- ▶ Must be indifferent



What if the Official Participates Anyway?



Whether an official is disqualified, and what the consequences of a disqualified member's participation are depends on whether the decision was legislative or quasi-judicial.

“Legislative” decisions

- Court will only invalidate the action if the person with the conflict cast the deciding vote.

“Quasi-Judicial” decisions

- Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.



Courts resolve “conflict of interest” disputes by examining the type of action taken + the facts.

Recusal vs. Abstaining



Recuse: Immediately remove from discussion and voting



Abstain: does not vote



Recusing is the remedy for avoiding conflict, not abstaining

Avoiding Conflicts



Advisory Vote - RSA 673:14, II.

Recuse (yes) vs. Abstain (no)

Avoid Social Media Opinions on Pending Matters

Disclose and Remove Yourself

Err on the Side of Caution!

Case Study: Winslow v. Holderness Planning Board (1984)



- ▶ Abutter appeal of a PB subdivision approval (with waivers granted)
- ▶ Resident (at the time) spoke in favor of the application and subsequently became a member of the board who voted in favor of the proposal (6-1 vote)
- ▶ Superior Court reversed PB decision & applicant appealed
- ▶ Supreme Court affirmed the lower court:
 - Proper to disqualify PB member as evidence showed he was not indifferent
 - Mere participation by a single DQ'd member can invalidate a board's decision
- ▶ Quasi-judicial vs. administrative / legislative discussion

Case Study: Z-1 Express v. Manchester (2019)



- ▶ CUP application before planning board.
- ▶ After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ One of the members who voiced opposition on social media was asked to recuse himself, he refused and he later voted to deny the application.
- ▶ Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind "threaten[ed] the integrity of the deliberative process" undermining public trust in the overall function of the planning board.



Questions?

The Academy of Good Governance



Free Certificate Program

Academy for Good Governance



Build Your Leadership Skills.

WHO CAN ATTEND

- Select board members
- Town councilors
- School board members
- City councilors
- Board of Aldermen
- Village districts commissioners

TENTATIVE TOPICS

- Governance & Governing Body Authority
- Budget & Finance
- Employment Liability/Assessment
- Contracts and General Risk Management
- Health Care and Affordable Care Act
- Effective Public Meetings

QUESTIONS

Call 603.224.7447
or email us at NHMAregistrations@nhmunicipal.org

CREATE NEW CONNECTIONS

The Academy for Good Governance is a series of six courses created by NHMA and Primex, exclusively for elected governing body members (select board, town council, city council, board of aldermen, school board, and village district commissioners). Courses are taught by experienced attorneys and staff from NHMA, Primex, HealthTrust, and the New Hampshire School Boards Association (NHSBA). Attendees will receive education and training intended to make them more knowledgeable and effective in their governing body roles.

Attendance at the Academy is free and open to governing body members from municipalities and school districts that are members of NHMA, Primex and NHSBA. Space is limited, and registration will open on the NHMA website this summer. Attendees must attend all six courses to receive a Certificate of Completion. All classes run 5:00 pm – 7:00 pm, with classes in September and October.

HealthTrust

NHSBA
NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION

NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION

Primex
PUBLIC UTILITY & MANAGEMENT CONSULTING

If interested, please contact
NHMA's Ashley Methot at
amethot@nhmunicipal.org.

nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

THANK YOU for attending our webinar TODAY!



The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

25 Triangle Park Drive, Concord, NH 03301

www.nhmunicipal.org or legalinquiries@nhmunicipal.org

603.224.7447 or NH Toll Free: 800.852.3358

nhmainfo@nhmunicipal.org / 800.852.3358 /

www.nhmunicipal.org