

CHAPTER III: REGULATORY FUNCTIONS

Drafting, reviewing and recommending ordinances, regulations and amendments.

Subdivision and Site Plan Review Regulations.

PURPOSE OF SUBDIVISION REGULATIONS (RSA 674:35)

Subdivision control guides municipal development, protects prospective residents and abutting property owners from problems associated with poorly designed areas, and advances the purposes of the municipality's police power: to protect the public health, safety, and general welfare. Subdivision controls are based on the premise that a new subdivision is not an island but an integral part of the whole community which must mesh efficiently with the municipal pattern of streets, sewers, water lines and other installations that provide essential services and vehicular access. Peter Loughlin, Volume 15, New Hampshire Practice Series, §29.02.

Regardless of whether or not a municipality has adopted a zoning ordinance, the legislative body may authorize the planning board to regulate the subdivision of land (RSA 674:35). The planning board must adopt regulations before exercising this power. See RSA 674:36 for a list of provisions that may be included in subdivision regulations.

“Subdivision” means the division of the lot, tract, or parcel of land into two or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance, or building development.

It includes re-subdivision and, when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided. (RSA 672:14, I)

PURPOSE OF SITE PLAN REVIEW REGULATIONS (RSA 674:43)

In addition to subdivision review authority, municipalities may regulate site plans for non-residential, as well as multi-family, housing development. Site plan review is one of the most useful techniques in modern land use control. It is an important device to ensure that uses that are permitted by the zoning ordinance are constructed in such a way that they fit into the area in which they are being constructed without causing drainage, traffic, lighting, or similar problems.

A site plan may be required to be submitted to the planning board prior to development of a particular tract of land. The plan must show the proposed location of the buildings, parking areas, landscaping, drainage, and other installations on the plot and their relationship to existing conditions such as roads, neighboring land uses, natural features, public facilities, ingress and egress roads, interior roads and similar features.

The authority to review site plans for non-residential and multi-family housing development, whether or not it involves the subdivision of land, may be delegated to the planning board by vote of the municipality's legislative body, but only in municipalities that have adopted a zoning ordinance and subdivision regulations (RSA 674:43). Site plan review regulations, which are adopted by the planning board, may govern adequate drainage, protection of groundwater quality, provision of “open spaces and green spaces of adequate proportions,” fire safety, and other similar issues. (RSA 674:44).

“Multi-family” is defined as any structure containing more than two dwelling units. Therefore, creation of a duplex house is exempt from site plan regulations.

Similarly, mobile home parks are not subject to site plan review because such parks are a residential use of land and there are no multi-family structures. (RSA 674:43, I)

STEPS TO ALLOW THE REGULATION OF SUBDIVISIONS AND SITE PLAN REVIEW

Before a municipality may regulate the subdivision of land or review site plans within its boundaries, it must:

- (1) Establish a planning board; and
- (2) the planning board must be granted authority by the legislative body to regulate subdivisions and site plans.

Further, the board must adopt specific subdivision and site plan review regulations. What follows is a step-by-step guide to the authorization and adoption of subdivision and site plan review regulations.

Step 1. Establish a Planning Board (RSA 673:1)

The municipal legislative body, which is a city or town council, or a town or village district meeting, must first vote to establish a planning board. The composition of a planning board is set forth in RSA 673:2. Board members may be elected or appointed, as determined by the legislative body, but each member must be a resident of the municipality. It is the duty of this newly established board to adopt rules of procedure as well as maintain accurate records of its proceedings.

Step 2. Grant Authority (Subdivisions-RSA 674:35, I; Site Plans-674:43, I)

Establishment of a planning board does not confer on it the power to approve or disapprove plans for subdivision of land and site plan review. Separate action by the legislative body is required. In a city, the city charter prescribes the correct form of the ordinance or resolution that authorizes a planning board to regulate subdivisions and site plan review. In a town, an article in the town meeting warrant is required to provide the authorization. The authorizing article may be voted on at the same town meeting that establishes the planning board, or at a later town meeting.

Upon being granted subdivision approval authority by the legislative body, the planning board has the power to regulate the proper arrangement and coordination of streets within subdivisions. However, RSA 674:35 (Power to Regulate Subdivisions) was amended in 2014 to allow municipalities that have granted the planning board subdivision approval authority to delegate to the governing body the authority to approve plans showing the extent to which and the manner in which streets within subdivisions will be graded and improved. It takes approval of a town meeting warrant article or a city council resolution to delegate this authority to the governing body.

Step 3. File Authorization (RSA 674:35, II and 674:43, II)

The municipal clerk, or other official charged with such responsibility, must file a notice with the county register of deeds certifying that the planning board has been authorized to regulate subdivisions and/or site plans, and stating the date of the authorization. It is recommended that the register of deeds be notified again when the planning board has adopted subdivision and site plan review regulations since the board cannot act on applications for subdivision or site plan review before the regulations are prepared and adopted.

Step 4. Prepare Subdivision and Site Plan Review Regulations

Preparing Subdivision Regulations (RSA 674:36)

Subdivision regulations should:

- a. Provide against the scattered or premature subdivision of land where such public services as water supply, transportation, fire protection or schools are lacking, or the excessive expenditure of public funds would be required to provide them;
- b. Provide for the harmonious development of the municipality and its environs;
- c. Provide that streets be adequate to handle existing and prospective traffic and be coordinated within the subdivision and in relation to existing streets;
- d. Provide for adequate open spaces, parks, and recreation areas to serve the needs of the neighborhood;
- e. Require that lot sizes comply with zoning requirements and be sufficient to handle on-site sewage disposal, if necessary;
- f. Require that the land be suitable for building purposes;
- g. Encourage the installation of renewable energy systems such as solar and wind, and protect access to energy sources by:
 - regulating the orientation of streets, lots and buildings,
 - establishing maximum building height and minimum setback requirements,
 - limiting the type, height and placement of vegetation, and
 - encouraging the use of solar skyspace easements (RSA 477)
- h. Provide for efficient and compact subdivision development to promote retention and public usage of open space and wildlife habitat;
- i. Create conditions favorable to the health, safety, convenience or prosperity of the municipality;
- j. Require innovative land use controls when supported by the master plan;
- k. Include waiver provisions (see Chapter IV for more information on waivers); and
- l. Consider adopting the application and checklist as part of the subdivision regulations.

It is important to note that this section of the statutes is permissive. If the planning board wishes to address the issues, the subdivision regulations must specifically include each item listed.

RSA 674:36, IV prohibits municipalities from enacting subdivision regulations that require the installation of fire suppression sprinkler systems in one- or two-family residences. However, that statute was amended in 2013 to recognize that applicants may voluntarily offer to install fire suppression sprinkler systems in one- or two-bedroom residences and, if the offer is accepted by the planning board, installation of such systems shall be required and shall be enforceable as a condition of the approval. The applicant or the applicant's successor in interest may substitute another means of fire protection in lieu of the approved fire suppression sprinkler system, provided that the planning board approves the substitution.

That said, it is worth noting that it appears that a local fire chief may require sprinklers for one and two-family structures if the specific site conditions make access difficult. See [*Atkinson v. Malborn Realty Trust*](#), 164 N.H. 62 (2012) (finding in part that the local fire chief has the authority,

through the National Fire Protection Association regulations to require residential sprinklers when unique site or building conditions warrant them).

Preparing Site Plan Review Regulations (RSA 674:44)

Local site plan review regulations which must be adopted by the planning board shall include:

- a. The procedures the board must follow in reviewing site plans;
- b. A provision defining the purpose of site plan review (at a minimum, the general language provided in the statute should be incorporated);
- c. A specification of the general standards and requirements that must be met “including appropriate reference to accepted codes and standards for construction;”
- d. Provisions for guarantees of performance, including bonds or other security; and
- e. Waiver provisions (see Chapter IV for more information on waivers).

Additionally, site plan review regulations may include:

- a. Provide for the safe and attractive development or modified use of the site and protect against conditions that could pose a danger or injury to health, safety or prosperity due to:
 - inadequate drainage that may contribute to flooding,
 - inadequate protection of groundwater quality,
 - increased undesirable, yet preventable, noise, air, light, or other pollution, and
 - inadequate fire safety, prevention or control.
- b. Provide for the harmonious and aesthetically pleasing development of the municipality and its environs;
- c. Provide for adequate proportions of open spaces and green spaces;
- d. Require the proper arrangement and coordination of streets within the site in relation to other existing or planned streets or with features of the official map of the municipality;
- e. Require that streets be suitably located and sized, usually to road standards adopted by the municipality, to accommodate existing and future traffic and access to emergency vehicles and services;
- f. Require that plats depicting new streets or the resizing of existing streets be submitted to the planning board for approval;
- g. Require that land be suitable for building purposes without posing health risks;
- h. Include conditions that protect the health, safety, convenience or prosperity of the municipality;
- i. Require innovative land use controls when supported by the master plan; and
- j. Require preliminary review of site plans.
- k. The Board can consider making the application and checklist as part of the site plan regulations;

Subdivision and site plan review regulations should evolve from the overall planning process that starts with preparation of the master plan. Subdivision and site plan regulations control the design and accessibility of the subdivision and/or development itself, not the use itself or where it can be located in the community. Zoning regulations establish permitted uses and density limits for the various areas in a community based on the development patterns and types of uses i.e. residential

vs. commercial as recommended in the master plan.

Regional planning commissions or planning consultants may provide assistance with the preparation of subdivision and site plan review regulations appropriate for the municipality. Model subdivision and site plan review regulations, which may serve as a guide for those boards interested in updating their regulations, can be found in the Subdivision and Site Plan Review Handbook prepared by Southwest Region Planning Commission in 2001, available at: <http://www.swrpc.org/files/data/library>

Step 5. Adopt Subdivision and Site Plan Review Regulations (RSA 675:6)

The statutory procedures to be followed for the adoption of subdivision and site plan review regulations include public notice, a public hearing, and a vote by the planning board to adopt the regulations. The planning board may subsequently amend the regulations through the same basic procedures.

Process for adoption of Subdivision and Site Plan Regulations

A. Notice of Hearing

RSA 675:7 requires that the notice of a public hearing to adopt or amend subdivision or site plan review regulations be both published in a newspaper of general circulation in the municipality and posted in at least two public places within the city or town. The notice must be given at least 10 calendar days before the date of the hearing. The statutes specifically provide that the day the notice is posted and the day the hearing is held cannot be included in the 10-day period. The full text of the proposed regulations does not need to be posted or printed in the newspaper as long as the notice tells where a copy of the proposal is available for the public to read. If the regulations are extensive, it is recommended that sufficient copies be made available so residents may have copies to review at their leisure.

In 2020, this statute was amended to allow a community to post such notice on the municipality's internet website in lieu of publishing it in a newspaper of general circulation. The notice or a link to it must appear prominently on the home page, and it must remain posted on the website until the hearing. Notice must still be posted in two other public places.

B. Public Hearing

The public hearing is opened by the planning board chair who should give a brief explanation of the regulations and their purpose. Ample time should be allowed for questions, comments and suggestions by those in attendance. After the public has had the opportunity to be heard, the chair should close the public hearing. A tape recorder is useful to ensure that the proceedings of the hearing are accurate, and then used to prepare the written record.

C. Vote to Adopt

At the close of the public hearing, or at a subsequent meeting, if more appropriate, the planning board should vote on whether or not to adopt the proposed regulations. Comments made at the hearing should be discussed and changes made, as the board deems necessary, in response to such comments. If major revisions are made that were not discussed at the public hearing, it might be advisable to hold a second hearing to inform the public before final adoption.

The affirmative vote of the majority of the board members is necessary. It is strongly

recommended that the members who vote on the motion to adopt the regulations be the ones who were present at the public hearing to gain the benefit of the public discussion. A roll call vote may be held, although it is not required, so that the position of individual board members is clear. The planning board rules of procedure may establish local policy that addresses these issues.

Step 6. File Certified Copy (RSA 675:6, III; RSA 675:8; RSA 675:9)

Subdivision and site plan review regulations, and any subsequent amendments adopted by the planning board, do not have legal force and effect until copies are certified and filed with the city or town clerk. To be certified, the regulations must be signed by a majority of the planning board members.

Remember that a copy of the regulations and amendments of each master plan, zoning ordinance, historic district ordinance or regulation, capital improvement plan, building code, subdivision regulation, and site plan review regulation shall be sent to NH OPD. Note that failure to send NH OPD copies does not invalidate the regulations. See RSA 675:9.

PROCESS FOR THE AMENDMENT OF SUBDIVISION AND SITE PLAN REVIEW REGULATIONS

As a planning board gains experience in using the adopted subdivision and site plan review regulations, the need for changes to improve the effectiveness or to address additional areas of concern may become apparent. In addition, the regulations should be reviewed at the end of each state legislative session to determine if any amendments are required as a result of changes in state law.

The procedures for amending subdivision and site plan review regulations are the same as for original adoption – preparing the proposal, noticing and holding a public hearing, addressing the comments made, voting to adopt the amendments, file amended regulations with the town clerk, and send them to NH OPD.

STATUS OF PLATS AFTER ADOPTION OF SUBDIVISION AND SITE PLAN REVIEW REGULATIONS

Subdivision Regulations

When a municipality has authorized the planning board to review subdivision applications, and the board has adopted the appropriate regulations, two requirements must be met before a plat can be filed or recorded with the county register of deeds. The plat must have been:

1. Prepared and certified by a licensed land surveyor since July 1, 1981, or by a registered land surveyor between January 1, 1970 and June 30, 1981; and
2. Approved by the planning board and endorsed in writing, as specified in the board's regulations (RSA 674:37).

Site Plan Review Regulations

While subdivision plats are required by statute to be recorded at the registry of deeds after approval by the planning board, there is no such requirement for approved site plans, unless it is a condominium site plan. However, planning boards have the option of including such a requirement in the site plan review regulations (see RSA 674:39, I), which is recommended.

Check with your local registry of deeds about their policy for recording site plans. Municipalities may wish to consider recording the Notice of Decision at the registry instead of the site plan.

Special Site Plan Review Committee (Minor Site Plan Review)

Under RSA 674:43, III, the town meeting may authorize the planning board to delegate its site review powers and duties in regard to minor site plans to a committee of technically qualified administrators chosen by the planning board from the departments of public works, engineering, community development, planning, or other similar departments in the municipality.

This special site review committee may have final authority to approve or disapprove site plans reviewed by it but, if this power is granted, the decision of the committee may be appealed to the full planning board within 20 days of the committee's decision. All of the planning board's normal procedures under RSA 676:4 shall apply to the actions of the special site review committee, except that the committee shall act to approve or disapprove an application within 60 days after its submission. NH OPD recommends creating rules for the Special Site Plan/Minor Site Plan Review Committee, if one exists.

If the municipality does authorize a Special Site Review Committee, the planning board must adopt or amend its regulations to specify application, acceptance, and approval procedures, and define what size and type of site plans may be reviewed by the site

ZONING ORDINANCE

In New Hampshire, RSA 674:16 gives municipalities the authority to zone. Zoning involves regulating the size, location and use of buildings and other structures for the purpose of promoting the health, safety and general welfare of the community. Traditionally, these purposes are achieved by dividing the municipality into districts with the goal of separating what are thought of as incompatible uses. In each district, some uses are permitted as a right, some are prohibited, and others are allowed only by special exception or conditional or special use permit. More modern zoning techniques, however, encourage mixed use zoning in which residential and commercial uses are permitted in specified districts.

In addition to prescribing the districts in which a use may be located, a zoning ordinance may impose requirements on a specific use, such as size and position of signs and special setbacks or screening for junkyards.

Specifically, RSA 674:16 provides that the zoning ordinance shall be designed to regulate and restrict:

- The height, number of stories and size of buildings and other structures;
- Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;
- The density of population in the municipality; and
- The location and use of buildings, structures and land used for business, industrial, residential or other purposes.

RSA 674:17 states that a zoning ordinance must be designed for the following purposes:

- To lessen congestion in the streets;
- To secure safety from fires, panic and other dangers;
- To promote health and the general welfare;
- To provide adequate light and air;
- To prevent the overcrowding of land;
- To avoid undue concentration of population;
- To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;

- To assure proper use of natural resources and other public requirements;
- To encourage the preservation of agricultural lands and buildings; and
- To encourage the installation and use of solar, wind, or other renewable energy systems.

The grant of power to adopt a zoning ordinance includes the power to adopt innovative land use regulations (RSA 674:16, II), which are discussed in more detail later in this chapter. Innovative land use regulations include, but are not limited to those listed in RSA 674:21, I(a)-(n), including impact fees. RSA 674:21, V defines “impact fee” as a fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of certain capital facilities which are listed in the statute, owned or operated by the municipality. Before a municipality can impose impact fees, it must adopt a Capital Improvements Plan pursuant to RSA 674:5-7.

Enactment and Amendment of the Zoning Ordinance

A zoning ordinance may be enacted or amended by ballot vote of a majority of the voters present and voting at the annual or special town meeting where the matter is taken up. However, a properly filed protest petition that meets all of the requirements of RSA 675:5 may result in an increase of the required affirmative vote for enactment to two-thirds of the voters present. A zoning ordinance may be enacted or amended at either the annual town meeting or at a special town meeting, although a voter-petitioned amendment may only be presented at the annual meeting. In cities and town council towns, charter provisions provide the procedures required for enacting zoning ordinances and amendments.

ZONING AMENDMENT PROCEDURES

The planning board is responsible for preparing and, in towns, holding public hearings on proposals to adopt or revise the zoning ordinance. Also in towns, a zoning ordinance or revision of the ordinance must then be adopted by ballot vote at town meeting. In cities and town council towns where the municipal charter determines how a zoning ordinance is to be adopted or revised, a public hearing is still required for all zoning ordinances and amendments (RSA 675:2-3).

RSA 674:1 outlines the duties of the planning board. RSA 674:1, V states that the Planning Board “may, from time to time, recommend to the local legislative body amendments of the zoning ordinance...”

Zoning ordinance amendments may be initiated in three distinct ways:

1. The planning board may propose amendments to the zoning ordinance.
2. The governing body (board of selectmen, village district commission, city or town council) has authority to propose zoning amendments.
3. 25 or more voters of the municipality can petition for a zoning amendment.

Regardless of how the zoning amendment is initiated, it must be voted on at town meeting (RSA 675:4) or in a manner prescribed in the municipal charter.

In all three situations, the planning board must hold a public hearing with prior notice as provided in RSA 675:7. After the public hearing, the planning board must, by vote, determine the final form of the ordinance, amendment, or amendments to be presented to the voters. If, after the public hearing, the planning board makes substantive changes to the proposed zoning amendment, it must hold a second public hearing.

The planning board must provide the town clerk with final wording of the zoning question not later

than the fifth Tuesday before the annual or special meeting.

A special town meeting to adopt, amend or repeal a zoning ordinance, historic district ordinance or a building code in an official ballot referendum town (SB 2) needs only to consist of a session for voting by official ballot. A deliberative session is not required to consider a zoning change. However, this would not apply to special meetings to consider the adoption of emergency temporary zoning under RSA 675:4-a.

NOTICE REQUIREMENTS

When an amendment is proposed, the proposing body must submit the properly drafted article to the planning board. The planning board must hold at least one public hearing prior to the vote at the annual or special meeting. Notice of the planning board hearing must be posted in two places and published in a locally circulated newspaper or on the municipal website at least 10 days in advance of the hearing. When calculating the 10-day notice period, the day of posting and the day of the planning board hearing may not be included. If the planning board anticipates a second hearing on the matter, there must be 14 days between the two hearings, and the 10-day notice requirement again applies. Notice requirements for public hearings are found in RSA 675:7.

If the zoning amendment is proposed by the governing body or submitted by voter petition, the planning board may not make substantive changes to the proposal; however, a notation must appear on the ballot stating whether the planning board approves or disapproves of the proposed amendment. See RSA 675:3, VIII (governing body zoning amendment) and RSA 675:4 (petitioned zoning amendment).

RSA 675:7 also requires, in part:

1. Notice must be sent to anyone who owns property in the municipality and requests to be notified of zoning hearings. Notice shall be made at no cost to the person making the request, and can be made either electronically or by first-class mail.
2. Notice must be sent by first-class mail to the owners of each property affected by a zoning amendment that would change a boundary of a zoning district, but only if the boundary change would affect 100 or fewer properties.
3. Notice must be sent by first-class mail to the owners of each property in a zoning district if the proposed amendment would change minimum lot sizes or the permitted uses in that district and only if the zoning district includes 100 or fewer properties.

When notice is sent by first-class mail, it should be sent to the address used for mailing local property tax bills.

Prior to September 16, 2017, these notice requirements did not apply to petitioned zoning amendments. However, in 2017 the legislature amended RSA 675:7, thereby requiring petitioners submitting a petitioned zoning amendment to pay the costs of notification, subject to the following:

1. If the full cost of notice is not paid at the time the zoning amendment petition is submitted, the municipality shall inform the voter whose name appears first on the petition of the cost of notice within 5 business days, and the balance shall be paid within another 5 business days.
2. If full payment is not made and received within 5 business days, the selectmen or village district commissioners may, in their discretion, decide to accept or decline the petition for submission. Failure by the municipality to inform the responsible person of the cost of notice shall be

deemed a waiver of the payment requirement.

To assure compliance with all notice requirements, consider the following: the date of the annual or special town meeting; the fifth Tuesday before that date; time for two planning board hearings 14 days apart; 10 days of notice before each planning board hearing; publication dates of local newspapers; and that voter petitions are timely only if they are received between 120 and 90 days before the annual meeting. Local officials should be mindful of these dates and deadlines to avoid making process-related errors that may invalidate adoption of an amendment.

NH OPD, some regional planning commissions, and the NH Municipal Association offer calendars to help planning boards with important dates for town meeting.

EARTH EXCAVATIONS

Since 1971, when RSA 155-E was enacted, New Hampshire municipalities have had authority to develop regulations governing land excavations. The purpose was to protect the health, safety and general welfare of the public, to protect the environment, and to recognize safety hazards involved with open excavations. RSA 155-E regulates the permitting process, allowable excavations, and the rules of procedure for reviewing land excavation applications.

Land Excavation Permits

No landowner shall permit excavation of earth on his/her property without first obtaining a permit. (There are, however, exceptions to the permitting process, which are explained in detail below.) The excavation permit must be obtained from the regulator, which in most municipalities is the planning board. However, towns may, by town meeting vote, designate the board of selectmen or zoning board of adjustment as the regulator. If there is no planning board, then the board of selectmen is the regulator (RSA 155-E:1). For the purposes of this handbook, the planning board is considered to be the regulator.

Existing Excavations (RSA 155-E:2, I)

A permit is not required of the owner of an excavation that was in existence before August 24, 1979 where sufficient volume of material had been removed during the two-year period prior to August 24, 1979. The excavation site is exempt from local zoning and other ordinances as long as it was in compliance at the time the excavation first began. The excavation area can only be expanded to contiguous property and property in common ownership with the excavation site as of August 24, 1979 and has been appraised and inventoried for tax purposes as part of the same tract as the excavation site.

In order for existing operations (as defined above) to be grandfathered, the owners and operators were required to file a report with the planning board within one year after receiving notice of this requirement and no later than two years from August 4, 1989. The report should have included:

- The location of the excavation and the date the excavation first began;
- A description of any expansions applied to the site that are permissible under RSA 155-E:2, I(b);
- An estimate of the area that had been excavated at the time of the report; and
- An estimate of the amount of commercially viable earth materials still available on the parcel.

Stationary Manufacturing Plants (RSA 155-E:2, III)

A permit is not required from an excavation site that on August 4, 1989, was contiguous to, or contiguous to land in common ownership with, a stationary manufacturing plant in operation as of August 24, 1979.

Highway Excavations (RSA 155-E:2, IV)

A permit is not required for an excavation performed for lawful construction, reconstruction, or maintenance of a class I, II, III, IV, or V highway by a unit of government having jurisdiction for the highway or a consultant for the government with a contractual agreement for construction, reconstruction or maintenance. A copy of the pit agreement executed by the owner and the governmental unit shall be filed with the planning board prior to the start of the excavation.

Highway excavations are not exempt from local zoning or other applicable regulations, and the governmental unit shall certify the following to the planning board before beginning such excavation:

- The excavation shall comply with the operational and reclamation standards of RSA 155-E:4-a, RSA 155-E:5, and RSA 155-E:5-a.
- The excavation shall not be within 50 feet of the boundary of a disapproving abutter or within 10 feet of the boundary of an approving abutter, unless requested by the approving abutter.
- The excavation shall not be unduly hazardous or injurious to the public welfare.
- Existing visual barriers in the areas specified under RSA 155-E:3, III shall not be removed, except to provide access to the site.
- The excavation will not damage a known aquifer as mapped by the United States Geological Survey (USGS).
- All required permits have been obtained by state and federal agencies.

Incidental Excavations – RSA 155-E:2-a

No permit is required for the following types of incidental excavations:

- Excavations that are incidental to the construction or alteration of a building or structure or a parking lot, including a driveway, on a portion of the premises where the removal occurs. No excavation is allowed until all state and local permits required for construction have been obtained.
- Excavation that is incidental to agricultural or silvicultural activities, normal landscaping, or minor topographical adjustment.
- Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA 12-E.

An abutter of a site taken by eminent domain or other governmental taking where construction is taking place may stockpile earth taken from the construction site and may remove the earth at a later date after written notification has been sent to the appropriate local official.

Operational and Reclamation Standards (RSA 155-E:4-A)

All excavation operations, regardless of the need for a permit, must follow certain standards for both operating and reclaiming the site. The law refers to these standards as “minimum” and “express,” which means that if an excavation needs a permit, the standards spelled out in RSA 155-E are considered to be the bare minimum, although the planning board may require additional standards. If the excavation does not need a permit, then the standards of RSA 155-E:4-a and 5 are considered

to be the only ones the board can expressly require.

In addition to meeting the standards listed in RSA-E:4-a, all state environmental standards and required permits should be met and obtained.

Reclamation Standards

Within 12 months of completion of the excavation, or upon expiration of the permit issued for excavation, the owner of the land shall have completed the reclamation of the areas affected by the excavation and meet the following standards, as provided in RSA 155-E:5.

Exceptions Made by the Regulator (RSA 155-E:5-b)

The planning board may grant an exception to the minimum and express operational and reclamation standards after a public hearing, for good cause shown. The board's written decision shall state the specific standards that have been relaxed and any additional conditions or standards that must be met by the applicant.

Application for the Permit (RSA 155-E:3)

Unless one of the exceptions discussed above applies, prior to excavation the property owner must apply to the planning board for a permit, with a copy to the conservation commission, if one has been established by the municipality. If the proposed excavation site is located in an unincorporated area, application is made to the county commissioners.

If the applicant changes the scope of the project by altering the size or location of the excavation, the rate of removal, or the plan for reclamation, the owner shall submit an application for amendment of the excavation permit to the planning board. The application for amendment will be subject to the same approval process as the original permit (RSA 155-E:6).

Be aware that the public hearing notification process for earth excavations is different from other public hearing notifications for planning board applications or zoning amendments.

Also, be aware the time frame to file a motion for a rehearing is 10 days after the original decision is made.

Public Hearing (RSA 155-E:7)

The planning board shall conduct a public hearing within 30 days of receiving a permit application or an amended excavation permit application. Notice shall be sent to all abutters 10 days prior to the public hearing, not including the day of posting or the day of the hearing. Notice shall include the grounds for the hearing as well as the date, time and place of the hearing. Notice shall be posted in at least three public places and published in a local newspaper. Within 20 days of the hearing, the board shall render a decision approving or disapproving the application, giving reasons for disapproval.

Issuance of Permit (RSA 155-E:8)

The planning board may issue a permit if the excavation meets all statutory standards, is not a prohibited excavation as listed in RSA 155-E:4, and the applicant has paid the excavation fee determined by the board, which may not exceed \$50. A copy of the permit shall be promptly displayed at the excavation site. The permit shall state the date it expires and it may contain any conditions set

forth by the board during the review process.

Appeal (RSA 155-E:9)

Any interested person affected by the approval or disapproval of an excavation application can appeal to the planning board for a rehearing on the decision. The motion for rehearing shall state the grounds for appeal and shall be filed within 10 days of the date of the original decision. Within 10 days, the board shall grant or deny the request for rehearing and if the request is granted, a rehearing shall be scheduled within 30 days.

Enforcement (RSA 155-E:10)

The board may revoke or suspend the permit of any person who is in violation of the provisions of the permit, or any conditions listed in RSA 155-E. Such suspension or revocation shall be subject to rehearing and appeal in accordance with RSA 155-E:9. Fines, penalties, and remedies for violations shall be the same as for violations of the planning and zoning statutes (see RSA 676:15, 676:17, 676:17-a, and 676:17-b). In addition, the planning board, or any person directly affected, may seek a superior court order requiring the excavator to cease and desist from violating any provision of the permit. If the superior court issues an order, attorney fees and other fees incurred in seeking the order may be awarded to the board. To ensure compliance with the order, the board or duly appointed agent may enter upon any land on which there is reason to believe an excavation is being conducted or has been conducted since August 24, 1979.

Earth Excavation Regulations (RSA 155-E:11)

The planning board may adopt regulations to carry out the provisions of RSA 155-E, including adopting a permit fee schedule. Whenever the locally adopted regulations differ from the provisions of RSA 155-E, the greater restriction or higher standard shall be controlling, except that the local regulations cannot supersede the sole applicability of express standards for operation and reclamation under RSA 155-E:2, I, III and IV.

Locally adopted regulations may include provisions for protection of water resources consistent with the municipality's water resource management and protection plan. If the regulation prohibits excavations below a stated height above the water table, the regulations shall also contain a procedure for an exception to the rule if the applicant demonstrates that the excavation will not adversely affect water quality. The board may also impose fees to cover public hearing costs and its administrative expenses, insurance policies, escrow funds for site stabilization or reclamation, third party professional assistance for review of documents, and other matters that may be required.

The Southwest Regional Planning Commission has an earth excavation handbook that includes a model ordinance, available here:

http://www.swrpc.org/files/data/library/local_planning/Excavation%20Handbook.pdf

DRIVEWAY REGULATIONS (RSA 236:13)

RSA 236:13 gives power to municipalities to control how private roads and driveways are connected to local highways (within the limits of the right-of-way). Pursuant to this statute, a planning board that has been granted the

The statute provides that a planning board may delegate the day-to-day administration of driveway regulations, including driveway applications, to a highway agent, Department of Public Works Director, or code officer. In many smaller towns, this authority is often delegated to the board of selectmen.

power to regulate the subdivision of land shall enact driveway regulations using the same procedure as for subdivision regulations (adoption by the planning board following notice and a public hearing). Driveway regulations may address a number of subjects such as width, angles, slopes and grades of connection, curbs, ditching, culvert standards to prevent erosion and preserve highway drainage, adequate lines of sight to prevent safety hazards, and limiting the number of access points per parcel.

The Property Owner's Duties and Rights

Under RSA 236:13, VI, all private driveway connections, including structures like culverts, remain the continuing responsibility of the landowner, even if located within the highway right-of-way and even if the driveway connection pre-dates the town's permit system. If any driveway connection threatens the integrity of the highway due to plugged culverts, erosion, siltation, etc., the planning board or its designee can require the owner to repair it. If the owner fails to make the repairs, the town may perform the work and assess the costs to the owner.

An owner's right of access can be limited by regulation, but it can't be denied altogether without paying compensation. A landowner's vested right of access consists only of reasonable access to the public highway system in general, not of a particular site.

The State's Role

The New Hampshire Department of Transportation (NH DOT) issues driveway permits for all proposals for access to the state highway system. To improve the coordination of local and state planning along the state's road system, the NH DOT has instituted a process to better involve local officials in the permitting process. The NH DOT has developed a Memorandum of Understanding (MOU), which is an agreement between the NH DOT and the municipality to coordinate the review and issuance of driveway permits to access state roads. The MOU contains a number of requirements for the municipality and the NH DOT:

- The municipality must develop, adopt and enforce access management standards for state highways that comply with best management practices for access management.
- The municipality can develop site- or parcel-specific access management plans for highway corridors or segments.
- The municipality must notify the NH DOT District Engineer when it receives a development proposal that would require a state driveway permit and solicit input on the design.
- The municipality shall require that all access points comply with its adopted access management standards and any applicable site-specific access plans.
- The municipality must inform the NH DOT of any waivers or variances from the access management standards or plans prior to local approval, and provide appropriate notice for comments.
- The NH DOT will provide information and technical assistance to the municipality in developing access management standards and site/parcel-specific plans.
- The NH DOT will not approve driveway permits that do not conform to the local access management standards or plans, except with the consent of the municipality.
- The NH DOT district engineer shall notify the municipality and transmit copies of all driveway access permit applications to the planning board.
- The NH DOT will withhold final action on any driveway access permit until the planning board has formally approved the access plan for the development.
- The NH DOT must notify the municipality if it intends to issue a driveway access permit that is

not in conformance with the adopted access management standards or parcel-specific plan.

- All corridor or site-specific access management regulations or plans must be filed with the NH DOT.

It is highly recommended that all municipalities in the region consider entering into an MOU with the NH DOT. In addition, municipalities should develop a permitting process for driveways accessing local roads. Such permits can assist with the implementation of access management techniques.

For high-volume commercial connections, NH DOT may require the applicant to install turn lanes or signals on the public highway itself. In towns and cities, these issues are more commonly handled through subdivision and site plan review, off-site improvement provisions, or through the impact fees enacted by a zoning ordinance. See RSA 674:21.

STATE MINIMUM DRIVEWAY STANDARDS

RSA 236:13 contains a few standards that apply regardless of what local regulations may require, or whether there are local driveway regulations. This statute applies to local as well as state highways.

In 2023 RSA 153:5, the fire code statute, was amended. RSA 153:3 states in part “the provisions of the state fire code and associated rules shall not supersede the authority of local land use boards under planning and zoning provisions of Title LXIV of the RSA to regulate and permit driveway access, when not governed by RSA 236:13, for detached one or two-family dwelling units in a structure used only for residential purposes, and provided that minimum driveway width shall not be less than 12 feet for driveways over 150 feet in length.”

The intent of the legislature was to avoid situations where the planning board approves a plan, construction starts, and then an issue arises with the fire code.

RSA 153:3 continues, “Before issuing the approval, the local land use boards shall give due consideration to any written recommendations of the municipal fire chief regarding fire department access, to include width, vertical clearance, grade, suitability of road surface, bridges, dead-ends, and the ability to pass and turn around once in the driveway.”

In communities that have a Technical Review Committee (TRC), the consideration of written recommendations of the municipal fire chief can be satisfied through the TRC process. In communities that don’t have a TRC, these written recommendations can be brought forward for due consideration during the public hearing (if required) and/or included in the staff report to a Planning Board about an application.