

What Resources and Data are Available?

Office of Strategic Initiatives: www.nh.gov/osi

1. **Office of Strategic Initiatives [Planning Publications](#)**
 - i. Technical Bulletins
 - ii. [Planning Board Handbook](#)
 - iii. [Board of Adjustment Handbook](#)
2. **[Attorney General's Memorandum on the Right to Know Law](#)**
3. **Trainings & Workshops**
 - i. [OEP Planning & Zoning Conference](#)
 - ii. [New Hampshire Municipal Association](#) Law Lecture Series and Annual Conference
4. **Data**
 - i. [OSI State Data Center](#)
 - ii. [New Hampshire Housing Finance Authority](#)
 - iii. [NH Department of Employment Security](#)
 - iv. [NH Department of Environmental Services](#)
5. **Planning Partners**
 - i. [Regional Planning Commissions](#)
 - Provides planning assistance to municipalities
 - Member municipal officials serve on Commissions
 - Regional Plans
 - ii. New Hampshire Municipal Association
 - Legal and other services for member municipalities
 - iii. [UNH Cooperative Extension – Community Development](#)
 - Community outreach, community visioning
 - iv. [New Hampshire Housing Financing Authority](#)
 - Affordable housing/workforce housing information and guides
6. **Brief History of Planning**
 - i. [Around the Planning World in 90 Minutes](#)
7. **Documents & Studies**

[A Granite State Future – 2015](#)

What do those of us who live and work here in New Hampshire want for the future of our communities? How can we keep what we value, meet the challenges of changing demographics, and increase economic vitality and opportunity? These are the kinds of questions at the heart of A Granite State Future. This project, coordinated by the State's nine regional planning commissions, is a local and regional dialogue among businesses and non-profit organizations, governmental agencies and voters, newcomers and long-term residents to consider the critical question: how should we plan for the future?

[Broadband: The Connection to New Hampshire's Future – 2015](#)

The New Hampshire Broadband Mapping & Planning Program (NHBMPP) began a comprehensive five-year initiative, in 2010, with the goal of understanding where broadband is currently available in the state, how it can be made more widely available in the future, and how to encourage increased levels of broadband adoption and usage. The Program was an American Recovery and Reinvestment Act of 2009 (ARRA) project funded through the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce. The project had four main initiatives: mapping, planning, technical assistance/training, and capacity building/community assistance. The project ended in 2015 and NHBMPP staff, working with staff from the NHOEP, used the regional broadband plans to develop a statewide broadband report and recommendations titled "Broadband: The Connection to New Hampshire's Future."

[NH Wildlife Action Plan – 2015](#)

The 2015 Wildlife Action Plan is a guide for conservation actions, so that individuals, communities, university researchers, biologists, land trusts, and other organizations are all working towards NH's most important conservation goals. This Plan first became available in 2005, and has now been completely updated and sent to the US Fish and Wildlife Service for their approval. It is a blueprint for conserving Species of Greatest Conservation Need (SGCN) and their habitats in New Hampshire. New Hampshire's Plan identifies 169 SGCN, which represent a broad array of wildlife, and it focuses on the 27 habitats that support these species. Each SGCN and habitat has an individual profile that includes information about the population, threats, and actions needed to conserve these features in New Hampshire. The many actions listed in the Plan include activities like on-the-ground habitat work and research, land conservation, habitat management, collaborating with many conservation partners, and providing public education. It will take active participation by all "Granite Staters" to implement the actions in the Wildlife Action Plan, and the Taking Action for Wildlife program is the best place to start.

[Preparing New Hampshire for Projected Storm Surge, Sea-Level Rise, and Extreme Precipitation – 2016](#)

After three years of dedicated research, deliberation, and public input, the New Hampshire Coastal Risk and Hazards Commission released its final report today, entitled "Preparing New Hampshire for Projected Storm Surge, Sea-Level Rise, and Extreme Precipitation." This report presents the best available science, identifies assets vulnerable to coastal flooding, and lays out 35 recommendations and associated actions for municipalities, state agencies, and state legislators to use as planning guidance.

[New Hampshire Housing Finance Authority Biennial Housing Plan – 2017-2018](#)

New Hampshire Housing is required to prepare or update on a biennial basis a state housing plan to address the housing needs of low- and moderate-income individuals and families. The plan is submitted to the Governor and Executive Council, the Speaker of the House, and the President of the Senate for review and comment. Although this is by definition a two-year plan, it should be noted that housing needs analysis and housing program planning are accomplished annually by New Hampshire Housing.

[New Hampshire's Statewide Outdoor Recreation Plan \(SCORP\) – 2013-2018](#)

The primary goal of the 2013-2018 Statewide Outdoor Recreation Plan (SCORP) is to identify outdoor recreation trends, needs, and issues for New Hampshire, as well as to provide a strategic plan to help address these concerns and expectations. In addition, the SCORP must evaluate the demand for and supply of outdoor recreation resources and facilities statewide. The SCORP is not only an assessment of recreation and tourism trends in New Hampshire, it is the primary tool for determining priorities for allocating Land and Water Conservation Fund (LWCF) grants to local governments.

[2014-2019 Healthy People Healthy Places – Healthy Eating Active Living \(HEAL\) Strategic Plan](#)

The 2014-2019 Healthy People Healthy Places (HPHP) Plan for New Hampshire includes several themes that define the next phase of HEAL in a broader context, reflecting the national movement toward policy, systems, and environmental change strategies. The HPHP Plan prioritizes work that promotes improved access to healthy foods and places for physical activity in communities and populations with the greatest health disparities.

[New Hampshire's Five-Year \(Historic\) Preservation Plan – 2016-2020](#)

New Hampshire has changed a great deal since the 1960s. A few moments of reflection produce a long list of ways our lives differ from a typical day in 1966. This plan is the result of a great deal of public outreach and analysis, and it opens with an explanation of how listening sessions, conference presentations, and an online questionnaire gathered data from a wide cross-section of the state. The narrative then provides a snapshot of New Hampshire today – the heritage, traditions, people, and resources that together drive our preservation movement. The plan then assesses how a dozen major themes benefit and challenge the preservation of historic and cultural resources. Concluding the plan are goals, objectives and strategies that together create a path to 50 more years of preservation successes.

Introduction to Planning and Zoning Law

I. [New Hampshire Revised Statutes Annotated \(RSAs\)](#)

A. Topics are organized by Titles, Chapters, and Sections

B. **Title 64 (LXIV)** (comprised of **Chapters 672-678**) contains NH's planning and zoning laws, set forth in six basic categories:

1. **Chapter 672 – General Provisions and Definitions**

- i. Purpose of zoning and planning (672:1)
 - Favored uses may not be unreasonably regulated (Energy efficiency, Agriculture, Forestry, Affordable housing, Commercial and recreational fisheries)
- ii. Defines words and phrases (within Title 64)
 - Abutter (672:3)
 - Local governing body (672:6)
 - Local land use board (672:7)
 - Local legislative body (672:8)
 - Subdivision (672:14)

2. **Chapter 673 – Local Land Use Boards**

- i. How local land use boards are established
 - Planning Board (673:2)
 - Zoning Board (673:3)
 - Historic District Commission (673:4)
 - Heritage Commission (673:4-a)
- ii. Appointment, election and terms of members and alternates
 - Term: 3 years (673:5)
 - Alternates (673:6)
 - Planning Board members serving on other boards (673:7)
 - Term of chairperson and other officers (673:9)

- iii. General provisions
 - Scheduling of meetings (673:10)
 - Designation of alternates (673:11)
 - Vacancies (673:12)
 - Member disqualification and removal (673:13 and 673:14)
 - Witnesses (673:15)
 - Staffing and finances (673:16)
 - Open meetings and records (673:17)
- iv. Abolishing boards, ordinances and codes
 - Method of abolishing boards or commissions (673:18)
 - Effect of abolishing Planning Board (673:19)
 - Effect of abolishing Heritage, Historic District, Agriculture and Housing Commissions (673:20)
 - Transfer of documents upon abolition (673:21 and 673:22)

3. Chapter 674 – Local Land Use Regulatory Powers

- i. Master Plan
 - Duties of the Planning Board (674:1)
 - Master Plan Purpose (674:2)
 - Preparation (674:3)
 - Adoption and amendment (674:4)
- ii. Capital Improvements Program
 - Authorization (674:5)
 - i. Master Plan is a prerequisite
 - ii. Draft prepared by Planning Board or CIP Committee
 - iii. Authorization by legislative body
 - Purpose and description (674:6)
 - Preparation (674:7)
 - Consideration by mayor or select board and Budget Committee (674:8)
- iii. Official Map (674:9-15)

- iv. Zoning
 - Grant of Power (674:16)
 - Purposes (674:17)
 - Adoption (674:18)
 - Applicability (674:19)
 - Districts (674:20)
 - Innovative Land Use Controls (674:21)
 - Development Restrictions Enforceable (674:21-a)
 - Growth Management; Timing of Development (674:22)
 - Temporary Moratoria and Limitations on Permits and Approvals (674:23)
 - Emergency Temporary Zoning (674:24 - 674:30)
- v. Manufactured Housing (674:31 - 674:32)
- vi. Agricultural Uses of Land (674:32-a - 674:32-d)
- vii. Zoning Board of Adjustment (674:33)
 - Specific Powers
 - i. Appeal of administrative decision
 - ii. Variance
 - iii. Special exception
 - iv. Equitable Waiver of Dimensional Requirements
- viii. Building Code Board of Appeals (674:34)
 - Specific Powers
 - i. Appeal of building or fire official
 - ii. ZBA can assume these powers (673:3)
- ix. Subdivision Regulations (674:35 – 674:42)
- x. Site Plan Regulations (674:43 – 674:44)
- xi. Heritage Commissions (674:44-a – 674:44-d)
- xii. Agriculture Commission (674:44-e – 674:44-g)
- xiii. Housing Commission (can assume duties of historic commission) (674:44-h – 674:44-j)
- xiv. Historic District Commissions (can assume duties of heritage commission) (674:45 – 674:50)
- xv. Building Codes (674:51 – 674:51-a)
- xvi. Authority to Order Building Vacated (674:52-a)
- xvii. Land Affected by Municipal Boundaries (674:53)

- xviii. Governmental Use of Property (674:54)
- xix. Wetlands (meaning) (674:55)
- xx. Flood Hazards (674:56 – 674:57)
- xxi. Workforce Housing (674:58 – 674:61)
- xxii. Small Wind Energy Systems (674:62 – 674:66)
- xxiii. Traditional Commercial and Recreational Fishing Protection Act (674:67 – 674:70)

4. Chapter 675 – Enactment and Adoption Procedures

- i. General Requirements (675:1)
 - Master Plans, subdivision and site plan regulations, historic district regulations: adopted under RSA 675:6
 - Zoning ordinance and amendments, historic district ordinances, building codes: adopted under RSA 675:2 – 675:5
 - Enactment by petition (674:4)
 - Enactment of Emergency Temporary Zoning (675:4-a)
 - Zoning Ordinance Protest Petitions (675:5)
- ii. Notice requirements for public hearings (675:7)

5. Chapter 676 – Administration and Enforcement Procedures

- i. Administration
 - General provisions
 - i. Rules of procedure, joint meetings and hearings, issuance of decisions (676:1 – 676:3)
 - ii. Planning Board procedures on plats (676:4 - 676:4-a)
 - iii. Appeals to Zoning Board of Adjustment (676:5 676:7)
 - iv. Historic District Commissions: approvals, permits, enforcement (676:8 – 676:10)
 - v. Building Permits (676:11 – 676:13)
 - Conflicts: which local ordinance take precedence (676:14)
- ii. Enforcement: Penalties and Remedies (676:15 – 676:18)

6. Chapter 677 – Rehearing and Appeal Procedures

- i. ZBA rehearing (677:2 – 677:3)
- ii. Appeal of ZBA decision (677:4 – 677:13)
- iii. Appeal of Planning Board decisions (677:15)
- iv. Rehearing and Appeal of Historic District Commission decisions (677:17 – 677:18)
- v. Effect of Invalid Ordinances (677:19)

II. Other Land Use Statutes

- A. Right to Know Law (RSA 91-A)
- B. Sewage disposal systems (RSA 485-A:29)
- C. Alteration of terrain (AoT) permits (RSA 485-A:17)
- D. Safe Drinking Water (RSA 485)
- E. Shoreland Water Quality Protection Act (RSA 483-B)
- F. Wetlands (fill and dredge permits) (RSA 482-A)
- G. Condominiums (RSA 356-B)
- H. Land Sales Full Disclosure Act (RSA 356-A)
- I. Junkyards – RSA236:90 (236:129)
- J. Notice to Municipalities by State Agencies (RSA 541-A:22)
- K. Access to the Public Way (curb cuts) (RSA 236:13)
- L. Excavation (gravel pits): local regulation (RSA 155-E)
- M. Personal Wireless Service Facilities (cell towers) (RSA 12-K:1 – 12-K:11)
- N. Statutory Construction (RSA 21)
- O. State Building Code (RSA 155-A:1 – 155-A:13)
- P. Rivers Management and Protection (RSA 483)
- Q. Lakes Management and Protection (RSA 483-A)

III. Statutes Significant to Regional Planning

- A. Regional Planning Commissions (RSA 36:45 – 36:58)
- B. Office of Energy and Planning (RSA 4-C)
- C. Developments of Regional Impact (RSA 36:54 – 36:58)

IV. Common Law Principles

A. Duty to Assist Applicant:

A planning board has a duty to provide meaningful assistance to an applicant. The board can achieve this by directing the applicant, asking questions and raising concerns throughout the process. Silence, refusal to assist in correcting technical errors and dilatory tactics violate the board's obligation. Boards can, however, maintain a certain level of impartiality during public testimony and hearing process. It is clearly the board's job to give guidance to the applicant about what is wrong with the application. See Richmond Company v. City of Concord, 149 NH 312 (2003).

B. **Pre-emption** occurs when one level of government regulates a field at the exclusion of lower levels.

C. **Nonconforming Uses** (aka grandfathered rights)

A use that legally existed at the date the zoning ordinance was adopted. The right continues until abandoned or terminated. Determining abandonment or termination can be challenging. Zoning ordinances should regulate the disposition of nonconforming uses. A variance or special exception may be required to expand or alter an existing nonconforming use. See Town of Hampton v. Brust, 122 NH 463 (1982); New London Land Use Association v. New London Zoning Board, 130 NH 510 (1988).

How to Be A Good Land Use Board Member

You can start with *The Riggins Rules* appearing in the Winter 1994/Number 13 [Planning Commissioners Journal](#). They were written by Fred Riggins, former Chairman of the Phoenix Planning Commission in 1967 as "*Suggested Do's and Don'ts for the Conduct of Public Hearings and the Department of Members of Boards, Commissions, & Other Bodies.*" Bev Moody, a veteran of 26 years with the City of Phoenix Planning Department, notes that the *do's and don'ts* were retitled as "The Riggins Rules" in recognition of his many years of service on the Planning Commission and have been left in the original crusty, no-nonsense style of Fred Riggins himself. The rules do not follow the principles of non-sexist language that prevail today and ask readers to forgive that he was raised and wrote these in less sensitive times but that does not detract from the good advice he offers.

The rules outline proper, adequate, and accepted behavior for board members. They are sort of like a grown-up version of "*All I Really Need to Know I Learned in Kindergarten*" by Robert Fulghum (see page 7) for board members. If you set your bias and prejudice aside and really look at the rules or the lessons, they really do make sense—whether you are a strident tree-hugging environmentalist or a build anything, anywhere at any time developer or, like most board members, somewhere in between—these rules and lessons can apply to you.

What appears below is a merger of Riggins Rules and "All I really Need to Know" brought forward to the 21st century, made compatible with NH law, especially [RSA 91-A, Access to Governmental Records and Meetings](#) known widely as the Right to Know Law. We invite you to review these and adopt them as your own personal operating principles as you perform your duties as a board member. The board could consider adopting them as informal guidelines as an appendix to their Rules of Procedure.

HOW TO BE A GOOD BOARD MEMBER

Rules Every Board Member Should Live By

1. Attend every meeting possible. You volunteered to be on the board or put your hat into the ring to run for election so make the effort to attend and participate in as many meetings as possible. You are only human, and humans do get sick and have other things to do, so it is unrealistic to think that you will be at 100% attendance but if you can't attend at least 80-85% of the meetings, you should think about stepping down.
2. Create a good impression. You may have attended hundreds of meetings, but chances are there will be people attending each meeting who have never been to a board meeting before and probably never will again, so this is the first and only time they will see you in action. What you say and do and how the board acts will have a lasting and final impression on them about how their government functions. Keep them in mind.
3. Be prompt. If the meeting is scheduled to begin at 7:00, arrive well in advance to take your seat, remove your coat, organize your papers, say hello to fellow board members and be thoroughly ready to go at the exact hour. The meeting should begin just as advertised and if the board must wait for you to arrive, you've just wasted a lot of people's time.

Rules Every Board Member Should Live By

4. Look good. Pay attention to how you look. You may not necessarily need a “power suit” but at least be presentable. Probably a tee-shirt, shorts and flip-flops are not appropriate. The business of the board is important, and your attire should reflect that.
5. Limit pre-meeting mingling. It is certainly fine to say hello to people as you enter the meeting room or in the lobby outside but don’t spend too long in casual conversation. Though perfectly innocent, it may give the impression that you are somehow connected with an applicant or abutter and that something “fishy” is going on.
6. Limit ex-parte contacts. Ex-parte contacts are discussions that take place outside of the public meeting. You should avoid discussing any case with other members, applicants, abutters, neighbors, friends, or relatives (but it’s OK to talk with your dog about it) and if someone buttonholes you and gives you information regarding an application, you are obliged to reveal that information to the entire board. Never say the board is leaning one way or another and strongly encourage the person to attend the hearings to voice concerns and ask their questions there.
7. Be prepared. Do your homework and read all the materials sent to you prior to each meeting. It is grossly unfair to the applicant and the board for you to act on a matter with which you have no previous knowledge or with which you are only vaguely familiar. Never try to read your materials during the meeting – you won’t do a good job at either.
8. Remain impartial. Never say how you intend to vote during the applicant’s presentation, abutter testimony or at any time during the hearing. Once the board closes the hearing and begins to deliberate, you can start to express your positions and begin to form an opinion about whether to approve the application or not. It is quite proper to raise questions and raise issues during the hearing but don’t make pronouncements like “well then, I guess I’ll just have to vote to deny this application” based on someone’s testimony or the applicant’s presentation. Remember, you are there to help all applicants, whether you agree with them or not. Be polite to everyone and “play fair” like you learned in kindergarten.
9. Consider recusal. You must step down (recuse yourself) if you have a direct personal or pecuniary interest in the outcome of a case that differs from the interest of other citizens or where you would otherwise be disqualified as a juror. [RSA 673:14, I] The board can even take a non-binding vote as to whether you should step down, but the ultimate decision is yours and yours alone. [673:14, II]

The "Juror Standard" (RSA 500-A: 12) calls for disqualification where a board member:

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

Rules Every Board Member Should Live By

If you do recuse yourself, go for a walk, grab a coffee, read the notices on the bulletin board, etc., and just step away from the proceedings – but make sure someone calls you back in when that case is finished so you can resume your duties on the board. Of course, you can always participate in the case as a private citizen – membership on the board does not strip you of that right – just be clear that you are speaking as a citizen and not as a member of the board.

But, if you firmly believe that you do not have a conflict and can impartially judge the application, don't be bullied into stepping down just because the applicant might think you'll vote against them. It's your decision. Always consider what is best for the board as a whole.

If you should be disqualified yet participate in the board's decision, you may have tainted the entire decision of the board, and it can be invalidated. [[Winslow v. Holderness](#), 125 NH 262 (1984)]

10. Change seats. Consider sitting in a different chair at the board every few meetings. This is a good way to avoid forming little like-minded cliques or groups of members who regularly oppose other groups or oppose the chair.
11. Pay attention. Listen to what the applicant or abutters have to say whether you agree with them or not. This is likely their one time in front of the board even though it may be your 100board meeting. Don't read or shuffle papers, whisper to other board members or act disinterested in the proceedings. Again, "play fair" like kindergarten.
12. Don't interrupt. Allow presenters to speak and go through their presentations and only ask questions at the end except for very short and necessary clarifying remarks or queries. Things will probably progress faster if you allow the full presentation with questions at the end rather than peppering the presenter with questions while speaking and getting them off track.
13. Be humble. You don't know everything, even if you think you do. Be wary of trying to answer questions that might be better left for someone else to answer who really knows what they are talking about. This is another place where staff or circuit rider planner can help – rely on them. It is all too easy to answer something as your understanding, only to be corrected later, which can erode the public's overall confidence in the competency of the board.
14. Vote! There should be a roll call vote on every motion where each member's vote is clearly documented as part of the record. The board should never vote by a show of hands and only use the mass "all those in favor say aye, those opposed say nay" for things that are generally expected to be unanimous, like approving minutes or closing the meeting. Each board member should vote yes or no on every motion and rarely if ever abstain (i.e., "acquiesce to the will of the majority") from voting. Never abstain just to avoid the difficult task of voting, fearing the anger of friends and neighbors. This is the position you volunteered (or ran) for and it can come with some difficult moments. Lastly, under RSA 91-A:3, the board is required to have a roll call vote to enter a non-public session. [For more information on non-public sessions, see [Legal Q and A: The Inside Scoop on Nonpublic Sessions](#), *New Hampshire Town and City*, June 2012]

Rules Every Board Member Should Live By

15. Keep your cool. Keep your emotions in check and don't be a cheerleader for one side or the other. There really are no "winners or losers" so don't pump your fist at a denial or shout for joy at an approval. This can lead to the appearance that you have more at stake in the outcome of an application and raise doubts about your impartiality. You can certainly be glad or disappointed in a particular outcome but just don't show it.
16. Self-assess. Periodically take a step back and look at your participation on the board. How well do you know and understand local ordinances and regulations and state laws relating to your board? Have you been to any training lately? (OEP conferences, NHMA law lectures, RPC workshops, etc.) Do you make motions? Are they seconded? Do you feel like you're out in left field most of the time? Being on a local land use board just may not be your cup of tea. It's OK to recognize that and step down or complete your term and not run again or ask not to be reappointed.
17. Use a Microphone. Require the applicant, engineers, presenters and abutters to come up to a podium with a microphone to speak one at a time, or at least to stand and address the board and audience so that everyone can hear the speaker and see the plans and other documents being referenced. Not only will this will allow everyone in the room to hear what is said, it will be easier for the chair to control the meeting and keep track of who is addressing the board. And the board members should use microphones or at least speak so they can be clearly heard by all in attendance.
18. Address the Chair. ALL questions should be addressed to the chair, e.g., "Madame (or Mister) Chairman, I have a question." Once the person asks their question, the chair can then ask the applicant or appropriate person to respond. Do not allow direct back and forth discussions that can escalate out of hand. All questions must be germane to the subject and if not, the chair can so state and move to the next question.
19. Be formal. Don't use first names in addressing anyone during the hearing. This includes audience, applicants, members of your particular body, even if the person concerned is your brother or your best friend. Always use "Mr." or "Ms.", never their first name. Calling on someone by their first name conveys an air of informality or friendship which could be viewed as something other than an impartial relationship. If you just can't bring yourself to call someone Mr. or Ms., use the third person form and call him/her "the applicant," or "the person who is objecting," or "the gentleman (or lady) who is appearing here in connection with this case."
20. Be Respectful
 - a. Of the Chair. Always address the Chairman as "Madame (or Mister) Chairman," "The Chairman," or "Chairman Jones," and wait to be recognized before continuing. This will set an example for applicants and others wishing to be heard and will contribute a great deal toward orderly proceedings.
 - b. Of attorneys. Attorneys sometimes give lengthy presentations on behalf of their clients; they are not there just to make your life miserable. Avoid the temptation to make matters as difficult as possible for them and remember they are there to advocate for their client's position.
 - c. Of Everyone. Don't indulge in personalities and don't permit anyone else to do so. Be respectful of everyone no matter how you feel about their positions.

Rules Every Board Member Should Live By

21. Be courteous. There may be a temptation, especially when it is apparent that someone is being slightly devious and less than forthright in his testimony, to make someone look foolish, but don't do it. If you must "expose" someone, do it as gently and kindly as possible. Don't be a bully--- that is not part of your role as a board member.
22. Stick to the issues. The board is not there to solve all the problems of the world – you are not an equity board. If there is a neighborhood argument, don't try to referee the situation. Keep all comments and testimony focused on the application the board is reviewing and the relevant laws, ordinances and regulations.
23. Don't seek revenge or leverage. Each application to the board is unique and individual. Even if the applicant has appeared before the board on other occasions, it was for something else. Resist the temptation to "stick it" to the applicant on this application if you feel he or she "got away with something" on a previous occasion. Everyone has a right to a fair and impartial hearing on the merits of the present case, i.e., constitutional due process. Also, don't try to use their application as leverage to accomplish something else. Just because a land owner owes some parking tickets does not mean you can withhold their subdivision approval until they "pay up" – the two issues are unrelated.
24. Adhere to the ordinance and regulations. People may appear before the board in distressed situations, but you should remain objective, yet still be sympathetic to their situation. Don't try to be the hero and grant their relief by throwing the regulations or ordinance out the window. If the case comes back on appeal you may well have caused a disservice to the person, deepening their distress. If someone has become involved in bad business deals or other self-imposed difficulties, you are not necessarily there to bail them out.
25. Provide written decisions. RSA 673 is very clear that every local land use board decision to approve or disapprove an application must be in writing and made available to the applicant. If the application is denied, the board must provide the applicant with written reasons for the denial and similarly, if the application is approved with conditions, the board must include in the written decision a detailed description of all conditions necessary to obtain final approval (i.e., "conditions precedent") or all the on-going, binding conditions that the applicant must adhere to after obtaining a final approval (i.e., "conditions subsequent.") [For more on conditional approvals, see [Attaching "Conditions" to Approvals in Land Use Boards](#), *New Hampshire Town and City*, November/December 2013.]
26. Carefully consider recommendations. If the board has utilized a consultant or is lucky enough to have municipal staff assistance, their recommendations should be seriously considered. These recommendations can come before, during or after a hearing on the application and this advice from professionals with years of experience should be given careful consideration by the board. On a similar vein, you should strongly heed unrefuted expert opinions, even if they disagree with your point of view. [For more on expert opinions, see [Land Use Decisions: Expert Opinions and the Board's Personal Knowledge](#), *New Hampshire Town and City*, November/December 2009]
27. Use your staff (if you have any!) Staff can be a valuable asset and resource. Don't hesitate to use their services. They can help with research, statute review, procedural compliance, and drafting decisions just by way of example. The board should develop a good working relationship with local staff as well as [regional planning commission](#) staff. Some RPCs contract with municipalities to provide circuit riders as part-time staff to assist boards.

Rules Every Board Member Should Live By

28. Be decisive. Either grant what the applicant has applied for or deny it citing the specific reasons for denial. Don't try to appease an applicant by approving less than what they asked for to make them happy, unless of course, that is all that could possibly be approved. The board could find that a parcel of land could only support 20 house lots where the applicant applied for 25 and that can be justified if the board based its decision on the ordinance and regulations.
29. When it's over, it's over. Once the board acts on an application, move on to other business. Don't allow minority opinions or other post-decision observations or testimony. If someone really wishes to object, outline the formal appeal process and assist them with dates, deadlines and how to proceed. A board may reconsider its own decision if it is within the appeal period as outlined in [74 Cox Street LLC v. Nashua](#). [See more under *Decisions* on the [Land Use Boards and Municipal Officials](#) page.]
30. Avoid fights. Public meetings can be contentious and heated tempers may rise. Do your best to listen to what people have to say, thank them for their comments and move on to the next question or issue. Resist the temptation to engage with the speaker and argue why you're right and the speaker is wrong – that will only prolong and deepen the confrontation.
31. Make sure everyone can see what the board is looking at. If the applicant lays out plans on the table and begins to point things out and discuss the details, put the plan up on the wall so everyone can see what the applicant is pointing to. If that is not possible, allow interested parties to come up and look at the plans.
32. Have speakers introduce themselves. Ask everyone to state their name and address, the organization they represent, a summary of their concerns and any details or specifics that the board should know. As suggested previously, use a podium and microphone, if possible, and require everyone to speak and ask questions from that point. By having everyone speak from a common location (not from the audience seating), it puts all speakers on an equal footing and may lessen the chance of on-going back and forth arguments between abutters and a developer.
33. Maintain separation. Except in unusual situations, do not permit people to leave the podium and approach closer to the board table or dais unless they need to show a small exhibit or to explain some detail. This can break down into a small mumbling session at one end of the table that usually does not get recorded and cannot be heard by other board members or the audience.
34. Don't rush. There is no statutory requirement to decide on an application the same night you hold a public hearing. Especially at the end of a long night, it could be wise to continue the proceedings to a future meeting where the board can begin or continue deliberations and possibly reach a decision. The chair could assign a board member to draft a potential decision and bring it back to the next meeting for the full board to consider. Just be mindful that the planning board must act within 65 days of accepting an application unless the applicant has mutually agreed to an extension. (RSA 676:4, I (c)(1))
35. Rotate officers. RSA 673:9 limits the role of chairman and other officers to one year but they can run for reelection year after year. When considering a chair (or other officers as outlined in the board's rules) think of how well that person might be in such a role. Don't just automatically vote for a chair just because he or she has been on the board a long time or is a friend of yours - neither of which are necessarily qualifications for a good chairman. The vice-chair (if your

rules provide) might be a good training ground for someone who may become chair, especially if they occasionally run the meetings in the chair's absence. Or, heading up a sub-committee might be a good way to assess a member's potential as a future chairman.

All I Really Need to Know I Learned in Kindergarten¹

1. Share everything.
2. Play fair.
3. Don't hit people.
4. Put things back where you found them.
5. CLEAN UP YOUR OWN MESS.
6. Don't take things that aren't yours.
7. Say you're SORRY when you HURT somebody.
8. Wash your hands before you eat.
9. Flush.
10. Warm cookies and cold milk are good for you.
11. Live a balanced life - learn some and drink some and draw some and paint some and sing and dance and play and work every day some.
12. Take a nap every afternoon.
13. When you go out into the world, watch out for traffic, hold hands, and stick together.
14. Be aware of wonder. Remember the little seed in the Styrofoam cup: The roots go down and the plant goes up and nobody really knows how or why, but we are all like that.
15. Goldfish and hamster and white mice and even the little seed in the Styrofoam cup - they all die. So do we.
16. And then remember the Dick-and-Jane books and the first word you learned - the biggest word of all - LOOK.

¹ [Robert Fulghum, All I Really Need to Know I Learned in Kindergarten](#)

Master Planning in New Hampshire

Information Guide #1 – Master Plan Overview

Land is a municipality's most basic resource. The use of land determines to a large extent the character and quality of life within the community. The rate, location and type of growth, and protection of unique features affect not only the municipality's physical appearance but also its need for public services and facilities. A municipality that plans wisely for its land use will be far better equipped to anticipate and deal with future demands and problems.

What is a Master Plan?

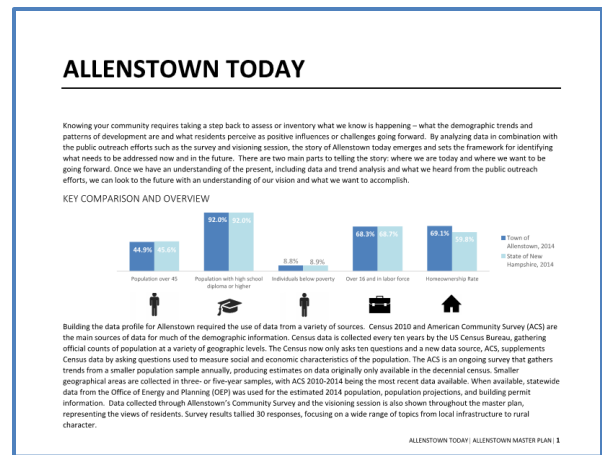
A master plan is a planning document that serves to guide the overall character, physical form and development of a community (*RSA 674:2*). It describes how, why, where and when to build or rebuild a city or town. It provides guidance to local officials making decisions on budgets, ordinances, capital improvements, zoning and subdivision matters, and other development-related issues.

While the master plan is not a legal document, it does provide the legal basis for zoning and other land use regulations. Specifically, in order to adopt a zoning ordinance (*RSA 674:18*), the planning board must have adopted a master plan with, at a minimum, vision and land use sections (*RSA 674:2*). In addition, certain types of ordinances cannot be legally adopted or certain grants may not be feasible unless an up-to-date master plan is in place.

Who is Responsible for the Master Plan?

The planning board is responsible for preparing, amending, and adopting the municipality's master plan (*RSA 674:3*). Many planning boards create committees that include non-planning board members to assist with updating the plan. The master plan can be amended and adopted one section at a time or as a whole. The planning board is required during the preparation of the master plan, to inform the general public and to solicit comments regarding the future growth of the community. The planning board is strongly encouraged to use various engagement tools to help maximize participation from residents.

The planning board also has the responsibility for promoting interest in and understanding of the master plan (*RSA 674:1*). Planning board members should be familiar with the master plan and frequently refer to it while performing their duties and proposing ordinance amendments.



Allenstown Master Plan 2016



Master Planning in New Hampshire

Information Guide #2 – Implementation

The implementation section of a master plan is one of the most important sections but yet it is most likely to be overlooked or not included. The purpose of the implementation section is to identify realistic and achievable actions that may be taken to further the community's plan as outlined in the vision chapter.

Although it is an optional section in New Hampshire, outcomes occur only when plans are implemented. Without implementation, the master plan has no value; therefore, the success of a master plan in shaping future growth patterns and influencing public policy decisions is dependent upon the degree to which the plan is actually carried out by those responsible for its implementation.



What is an Implementation Section?

The implementation section of the plan is a long-range action program of specific actions, time frames, allocation of responsibility for actions, description of land development regulations to be adopted, and procedures that the municipality may use to monitor and measure the effectiveness of each section of the plan (*RSA 674:2*).

It should consist of recommendations for the codes, ordinances, regulations, or amendments to existing codes and ordinances that are considered necessary to assure that the plan is carried out or implemented. Such proposals or recommendations may include a zoning ordinance, subdivision regulations, site plan review, capital improvements program, and capital budget. If the regulations do not assist with the implementation of the vision in the Master Plan, that vision is not likely to be achieved.

However, codes and ordinances are not the only means available to implement a plan. Land acquisition, construction of roads, schools, and other public buildings, controlling highway access, and construction of public water and sewer service, to name a few, all play a part in bringing about the community envisioned in the master plan. Public education related to these topics and the vision of the community as a whole is a key component of implementation.



The implementation or action items for all elements (functional areas) of the plan can be contained in a matrix at the end of the master plan. The implementation matrix can be used as an administrative document for planning boards and other decision makers in the community. Additionally, the development of an implementation table provides an opportunity to coordinate regional plan elements with other regional and state projects and processes.

The implementation matrix should serve the following three functions:

- ✓ A framework for working on priorities and identifying partners.
- ✓ A tracking mechanism to record progress or revise priorities.
- ✓ A planning tool to help the community and other partners choose specific strategies or action items to pursue in reasonable timeframes to help focus efforts and achieve results.

And lastly, when implementation items are completed, community officials should take the opportunity to recognize the accomplishment and those involved and publicize it.

ACTION	TIMEFRAME (COMPLETION DATE)	BUDGET ALLOWANCE	LEAD PARTY	OTHER PARTNERS	FUNDING SOURCE
TOWN-WIDE RECOMMENDATIONS					
Include new rules and standards that prohibit development in the 500-yr floodplain.	Near Term (2016)	See Budget Allowance	Planning Board	Community Development Department	N/A
Include tree preservation and buffer standards for protecting mature tree stands throughout the study area.	Near Term (2016)	See Budget Allowance	Planning Board	Open Space Task Force, Community Development Department	N/A
Include new rules and standards that incorporate open space as a meaningful component of new development. Open space could be used for tree preservation, stormwater retention, recreation, animal habitat protection, or preserving scenic views.	Near Term (2016)	See Budget Allowance	Planning Board	Conservation Commission, Open Space Task Force, Community Development Department	N/A
Include new rules and standards that reduces the amount of impervious surface for a development. This is a very cost-effective and environmentally-sensitive method for reducing stormwater runoff.	Near Term (2016)	See Budget Allowance	Planning Board	Community Development Department, Public Works Department	N/A
Fund a purchase of development rights program that allows landowners the opportunity to voluntarily sell their development rights on a parcel for permanent conservation.	Near Term (2016)	\$100,000 - \$200,000 (Annual, Demand-Driven)	Town Council	Conservation Commission, Open Space Task Force, Community Development Department	General Fund
Adopt a form-based code for the study area that consolidates, simplifies, and updates zoning and subdivision language to implement the vision and supporting recommendations from the comprehensive master plan.	Near Term (2016)	\$200,000 - \$250,000	Planning Board	Planning Board, Zoning Board of Adjustment, Community Development Department	General Fund
Provide incentives for preserving historic buildings in the study area, which take advantage of the uniqueness of these sites and buildings for creating cool spaces.	Near Term (2016)	In-House Resources (Policy) / \$10,000 - \$20,000 (Matching Grant)	Town Council	Heritage/Historic District Commission, Community Development Department	General Fund, Grant Opportunities
Permit accessory dwelling units in growth sectors (G1 - G4) depicted on the Conservation & Growth Map. These units encourage greater housing choice for young adults, new families, and elderly residents in the study area.	Concurrent Action (2013)	In-House Resources	Planning Board	Housing Task Force, Community Development Department	N/A
Include new standards in a form-based code that promotes neighborhood diversity and greater housing choice to meet the needs of young adults, new families, and elderly residents.	Near Term (2016)	See Budget Allowance for Form-Based Code	Planning Board	Housing Task Force, Community Development Department	N/A

Implementation Table Matrix Example from Town of Londonderry's 2013 Comprehensive Master Plan

More Master Planning in New Hampshire Information Guides and Resources can be found at:
www.nh.gov/oep/planning/resources/master-planning.htm

Zoning Ordinances and the Board of Adjustment

What is a zoning ordinance?

Written regulations and laws that define how property in specific geographic zones can be used. Zoning ordinances specify whether zones can be used for residential or commercial purposes, and may also regulate lot size, placement, bulk (or density) and the height of structures. Zoning ordinances are lengthy documents describing not only the acceptable use for specified areas of land, but also the procedures for handling infractions (including any penalties), granting variances and hearing appeals.¹

Modern day zoning has evolved over the past 100 years from what is considered the beginning of comprehensive municipal land use regulation, the 1916 ordinance adopted by the City of New York. Early zoning was designed to separate uses as a way to mitigate negative impacts using maps to determine the height, area, setback, and use restrictions on land. The town of Euclid, Ohio used this type of format and their ordinance was tested and upheld in the first case of zoning in the United States Supreme Court² and has become known as “Euclidian Zoning.”

Are there different types of zoning ordinances?

Form-based or Use-based

Some zoning ordinances, known as form-based or character-based zoning, focus on regulating building form and the relation of buildings to the street while others focus on separating land uses as a use-based ordinance. This is the most common in NH and is based on the enabling statutes of RSA 674:16-20.

A Form-Based Code (FBC) is a means of regulating land development to achieve a specific urban form. Form-Based Codes foster predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle, with a lesser focus on land use, through municipal regulations. A FBC is a regulation, not a mere guideline, adopted into city, town, or county law and offers a powerful alternative to conventional zoning regulation.³

"Permissive" v. "Prohibitory" Zoning Ordinances

Most zoning ordinances in New Hampshire are of the so-called 'permissive' variety. That is, in the absence of a variance or special exception, such an ordinance functions generally to prohibit uses of land unless they are expressly permitted as primary uses or can be found to be accessory to a permitted use. The rule of accessory use is in response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Even under a permissive ordinance, a given use may be allowed even if it is not explicitly allowed. Those types of uses are said to be accessory to the use that is

¹ <http://www.investopedia.com/terms/z/zoning-ordinance.asp>

² [Village of Euclid v. Ambler Realty Co., 272 US 365 - Supreme Court 1926](#)

³ <http://formbasedcodes.org/definition/>

expressly permitted. Most ordinances expressly provide for some accessory uses, although the common law provides for them when the ordinance is silent on the matter.⁴

NH Statutes

Where can I find the laws?

NH state laws are available on-line and in the bound statute books. All of Title LXIV and many other laws commonly referred to by land use boards are contained in the annual NH Planning and Land Use Regulation Handbook. Links to the on-line statutes, administrative rules, a topical index of laws, and a handy primer on the organization of the statutes are all available on the OEP Planning, Land Use and Energy Laws⁵ page.

What are the zoning enabling laws?

Generally, the zoning enabling laws are in Title LXIV, Chapter 674:

- Section 16 Grant of Power;
- Section 17 Purposes of Zoning Ordinances;
- Section 18 Adoption of Zoning Ordinance;
- Section 19 Applicability of Zoning Ordinance; and
- Section 20 Districts.

Why should a community have a zoning ordinance?

A zoning ordinance is the best and most effective way to regulate the use of private property. The ordinance is the local law that puts in place the policies set by the local master plan. While the master plan establishes the general goals and direction for development in the municipality, it is not an ordinance so has no force of law for implementation. The zoning ordinance on the other hand does.

How many communities have a zoning ordinance?

By our count, 215 of the 234 towns and cities in NH have a zoning ordinance as well as 9 village districts. 19 municipalities in the state do not have a traditional, comprehensive zoning ordinance yet several of these communities have adopted “single purpose” land use regulations in the same manner as a zoning ordinance to regulate telecommunications or floodplain development.

How do you write one?

A zoning ordinance can be drafted by the planning board, a committee of the planning board, a consultant or with help from the regional planning commission. Many ordinances are drafted based on what other municipalities have adopted so it is not uncommon to see very similar if not the exact same language from one municipality to the next. This is not necessarily bad but communities are cautioned not to just copy someone else’s ordinance but to craft an ordinance that specifically addressed the needs of the municipality as identified in the master plan.

⁴ <http://www.nh.gov/oep/resource-library/zoning/documents/permissive-v-prohibitory-loughlin.pdf>

⁵ <http://www.nh.gov/oep/resource-library/laws/index.htm>

How do you adopt it?

The adoption process is quite straight forward and outlined in RSA 675:2-5. 675:2 contains the process for cities and towns operating under the town council form of government. 675:3 is for all other towns. An ordinance is adopted by the ***local legislative body***, not to be confused with the ***local governing body***. The local legislative body is town meeting, the town council or the mayor and city council or board of aldermen while the local governing body is the board of selectmen, or (again) town council or the mayor and city council or board of aldermen.

In those municipalities without a zoning ordinance, the first one must be proposed by the planning board. In all other municipalities that already have an ordinance, any amendment may be proposed by the planning board or board of selectmen⁶ or by citizen petition⁷. Petitions must be signed by 25 or more voters and received between 90 and 120 days prior to town meeting. Petitioned zoning amendments can only be considered at the annual town meeting, not at a special town meeting.⁸ However, a planning board or selectmen generated zoning amendment can be considered at a special town meeting.

The petition is submitted to the board of selectmen who must verify signatures and then forward it to the planning board in a timely manner. The planning board at its first regular meeting following the petition period shall set the date of the public hearing for each petitioned amendment which is received and shall hold a public hearing on each petitioned amendment.⁹ Following the close of the public hearing, the planning board must vote to approve or disapprove of the petitioned amendment which must be noted on the ballot.¹⁰

Before there can be any vote on the disposition of a zoning amendment, there must be at least one public hearing. The process is clearly laid out in the statute¹¹ and dates are noted on the OEP zoning amendment calendars¹² and the calendars provided by the NHMA¹³. The board must vote on the final form of the amendment following the close of the public hearing and if it is significantly altered, there must be an additional public hearing. Therefore, it is important to begin holding your zoning amendment public hearings early in anticipation of the need for a second (or third) hearing. The statute only requires the minimum of one hearing but the planning board could hold additional public hearings at their own discretion to help further inform and educate the voters. Once the final form has been determined by the board, it must be made available to the public and given to the town clerk no later than the fifth Tuesday prior to town meeting¹⁴.

⁶ 675:3, I

⁷ 675:4

⁸ 675:4

⁹ 675:4, II

¹⁰ 675:4, III

¹¹ 675:3, 675:7

¹² http://www.nh.gov/oep/resource-library/zoning/index.htm#zoning_calendars

¹³ <https://www.nhmunicipal.org/Resources#ImportantDateCalendars>

¹⁴ 675:3, V

Warrant Article Wording

For the first zoning ordinance for a town the warrant article could read "Are you in favor of the adoption of the zoning ordinance as proposed by the planning board?"

For an amendment to the ordinance the warrant article could read "Are you in favor of the adoption of the amendment to the existing town zoning ordinance as proposed by the planning board?"

For a petitioned amendment, the warrant article could read "Are you in favor of the adoption of the amendment to the existing town zoning ordinance as proposed by petition? [The Planning board approves/disapproves this petitioned amendment.]"

In the event that there shall be more than a single proposed amendment to be submitted to the voters at any given meeting, the issue as to the several amendments shall be put in the following manner: "Are you in favor of the adoption of Amendment No. ___ as proposed by the planning board for the zoning ordinance as follows: (insert topical description of substance of amendment)?"

The ballot need not include the entire text of the amendment word-for-word but can contain a brief description of the amendment sufficient such that the voters will know what they are voting on. A copy of the full text of any amendments must be available at each polling place in the municipality.¹⁵

Adoption of Emergency Temporary Zoning and Planning Ordinance

There is a provision for a town without a planning board, or a town with a planning board but without a zoning ordinance to adopt an emergency temporary zoning and planning ordinance¹⁶.

Protest Petitions

A petition protesting the adoption of a zoning amendment can be submitted by voters requiring a 2/3 majority vote for an amendment to be approved¹⁷.

Notice

Notice for a public hearing for a zoning amendment must be given at least 10 calendar days before the hearing. These are 10 "clear" days meaning they do not count the day the notice was posted or the day of the public hearing. Notice of each public hearing shall be published in a newspaper of general circulation in the municipality and shall be posted in at least 2 public places.¹⁸

Caution is advised when considering notice requirements. The statute was significantly altered in 2014 to allow for any person owning property in the municipality to request notice of all public hearings on proposed amendments to the zoning ordinance is sent to them electronically or by first class mail. Also, the municipality is **required** to send notice to the owners of each affected property if a proposed amendment would change a boundary of a zoning district and the change would affect 100 or fewer properties or if the amendment would change the minimum lot sizes or the permitted uses in a zoning

¹⁵ 675:3, V

¹⁶ 675:4-a, 674:24-29

¹⁷ 675:5

¹⁸ 675:7

district that includes 100 or fewer properties. Petitioned amendments are not subject to notification by mail requirements.¹⁹

What is the status of an amendment before it is voted on?

A zoning amendment can be proposed by the planning board or the board of selectmen at any time during the year. However, if there is a development application with the period of 120 days prior to town meeting, no action can be taken on that application if it would be denied had the proposed zoning amendment been approved.²⁰ Essentially this statute is meant to preserve the status quo and prevent someone from jumping the gun to get their development application started prior to an ordinance change that might otherwise prevent it. Again, caution is urged such that municipalities consider not formally proposing (i.e., posting a notice of a public hearing) any zoning amendments before the start of this 120 day time period.

Who enforces the ordinance?

The ZBA does not enforce the ordinance nor does the planning board. Enforcement is generally the responsibility of the selectmen or the staff they may employ to do so – building inspector, zoning administrator, planner, code enforcement officer, etc.²¹ The zoning ordinance itself should clearly specify who is responsible for enforcement. The enforcement statutes generally are 676:15, 676:17, 676:17-a and 676:17-b. Enforcement has been the subject of several law lectures sponsored by the NH Municipal Association in recent years.

Can a town repeal it?

Yes. The process is the same as adopting or amending the ordinance except that the ballot question shall use the word "repeal" in place of the words "adoption" or "amendment."²²

What is a zoning board of adjustment?

The zoning board of adjustment (ZBA) is a quasi-judicial board who acts as the “constitutional safety valve” for the zoning ordinance. The ZBA provides the necessary flexibility to ensure that the ordinance was applied equitably to all property.²³

Every zoning ordinance must include provisions for the establishment of a zoning board of adjustment, either elected or appointed.²⁴ The board consists of 5 members and there can be up to 5 alternate members.²⁵

¹⁹ 675:7

²⁰ 676:12

²¹ 15 New Hampshire Practice: Land Use Planning and Zoning, Third Edition, Atty. Peter Loughlin, Ch. 7 Enforcement, § 7.04 Enforcement Officer

²² 675:3, IX

²³ Introduction (page xvii), The Board of Adjustment in New Hampshire: A Handbook for Local Officials, NHOEP, November 2015

²⁴ 673:1, IV

²⁵ 673:6

The ZBA is a local land use board²⁶ and must adopt **Rules of Procedure**.²⁷ This is an important administrative function that is sometimes missed or ignored by the board which can result in significant problems. The law does not specify the content of the rules but perhaps the most important one is the time period to be established for appeals of administrative decisions under RSA 676:5, I.

Rules must be adopted by the board at a regular meeting and placed on file with the city, town or village district clerk for public review. The rules of procedure help to organize the work of the board and lets applicants and abutters know what to expect and how the hearing process will be conducted. (See *Appendix A - Suggested Rules of Procedure for Local Boards of Adjustment* in [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015.)

*A New Hampshire municipality cannot have a zoning ordinance in place without having a board of adjustment. The board exercises broad powers granted to it by the Enabling Act and failure of an ordinance to contain a provision for the appointment of a board will cause the ordinance to fail since the board is a vital cog in the zoning scheme. Despite the importance of the zoning board of adjustment (ZBA), its role is greatly misunderstood, and appeals from decisions of boards of adjustment continue to be the single largest source of litigation involving New Hampshire municipalities.*²⁸

What does the ZBA do?

*The powers and duties of zoning boards of adjustment are defined by statute and are discussed in detail later in succeeding chapters. In a nutshell, the ZBA exists to assist in the administration of the zoning ordinance. It hears administrative appeals from interpretations of the zoning ordinance and because it is impossible to draft a zoning ordinance which affects all properties in a municipality in the same way, zoning boards of adjustment hear the requests for variances and special exceptions to the zoning ordinance that are necessary in order to allow the amelioration of the strict letter of the ordinance in individual cases. Variances are designed to afford protection in cases of hardship, to provide relief against unnecessary invasions of private property, to avoid unconstitutional takings, and all in all to provide a relief valve to allow the zoning ordinance to work.*²⁹

*The board of adjustment is designed to interpret, to perfect, and to insure the validity of zoning. It does this by deciding the hard cases, by articulating concepts and adding an administrative gloss to the zoning ordinance.*³⁰

How is the ZBA different from the planning board?

*It is sometimes helpful to remember that the full title of the board we are talking about is the "zoning board of adjustment." If the word zoning is kept in mind it will be clear that the board of adjustment has nothing to do with site review, subdivision, or appeals from interpretations of the building code.*³¹

²⁶ 672:7

²⁷ 676:1

²⁸ 15 New Hampshire Practice: Land Use Planning and Zoning, Third Edition, Atty. Peter Loughlin, Ch. 19 Introduction, § 19.01 Generally

²⁹ 15 New Hampshire Practice: Land Use Planning and Zoning, Third Edition, Atty. Peter Loughlin, Ch. 19 Introduction, § 19.02 Purpose

³⁰ *ibid*

*The planning board has exclusive jurisdiction in the area of site review and subdivision review. Appeals from decisions of the planning board are ordinarily to the superior court and not to the board of adjustment. However, the exception to this rule arises when the planning board makes a decision or determination that is based upon the terms of the zoning ordinance, or any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by an administrative officer. This type of decision may be appealed to the board of adjustment.*³²

*If the municipality has a building code and a building code board of appeals, appeals of decisions relating to interpretation of the provisions of the building code are exclusively within the jurisdiction of the building code board of appeals.*³³

*In municipalities that have historic districts and historic district commissions, the historic district commission is responsible for administering the ordinance and regulations within the district; however, an appeal of a decision of the historic district commission is taken in the form of administrative appeals to the zoning board of adjustment.*³⁴

*The authority of the zoning board of adjustment is exclusive and cannot be usurped by other boards such as the board of selectmen. While the legislative body of the municipality can amend provisions of the ordinance or even abolish zoning, as long as a zoning ordinance is in effect, relief from the terms of that ordinance can only be obtained from the zoning board of adjustment and the powers of that board cannot be delegated to any other entity.*³⁵

The planning board has the authority to propose amendments to the zoning ordinance and can amend subdivision and site plan review regulations themselves (following a public hearing) but the ZBA has no such "legislative" authority. Its role is quasi-judicial in that it generally reviews decisions made by another municipal agent or body or evaluates whether an applicant merits a particular waiver, exception or variance from the ordinary application of the zoning ordinance.³⁶

What are the powers of the ZBA?

The express powers of the ZBA are set forth in RSA 674:33 and 674:33-a:

- hear administrative appeals;
- grant variances;
- approve special exceptions, and;
- grant equitable waivers of dimensional requirements.

³¹ 15 New Hampshire Practice: Land Use Planning and Zoning, Third Edition, Atty. Peter Loughlin, Ch. 19 Introduction, § 19.03 Distinction From Other Boards

³² *ibid*

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ [The Zoning Board of Adjustment in New Hampshire](#), Christopher L. Boldt, Esq., Donahue, Tucker, & Ciandella, PLLC, OEP Planning and Zoning Conference, June 2016

What is an administrative appeal?

The zoning board of adjustment may hear and decide appeals of alleged errors in orders, requirements, decisions, or determinations made by an administrative official in the enforcement of the zoning ordinance.³⁷

In exercising these powers, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.³⁸

The board of adjustment does not have authority over decisions of the board of selectmen or enforcement official on whether or not to enforce the ordinance. The board does have the authority to hear administrative appeals if it is alleged that there was an error in any order, requirement, decision or determination made by the official. The board of adjustment also has the authority to hear administrative appeals of decisions made by the planning board, which are based on their interpretation of the zoning ordinance. Don't confuse the role of the zoning board with that of the planning board. The ZBA may not interfere with the planning board's authority over subdivision and site plan review and can only review those matters which pertain to the zoning ordinance.

(For a complete discussion on this topic see "Administrative Decisions in Planning and Zoning: How They're Made, How They're Appealed," NHMA Law Lecture #3, Fall 2010.)

What is a variance?

Simply put, a variance is the waiver or relaxation of any term or provision of the zoning ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate the ordinance. A variance can only be granted if five statutory criteria are met:

1. The variance will not be contrary to the **public interest**;
2. The **spirit** of the ordinance is observed;
3. Substantial **justice** is done;
4. The values of surrounding properties are not **diminished**; and
5. Literal enforcement of the provisions of the ordinance would result in an **unnecessary hardship**.
 - a. For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - ii. The proposed use is a reasonable one.
 - b. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used

³⁷ 674:33, I

³⁸ 674:33, II

in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.³⁹

There is no longer a distinction between “use” variances and “area” variances established by [Michael Boccia v. City of Portsmouth](#), 151 N.H. 85, 104 [2004]. In 2009, RSA 674:33 was amended to codify the five variance criteria, including diminution of property values (which had previously never been included in the statute but was part of common law) and, more importantly, overrule the separate criteria for “use” and “area” variances established by that landmark decision.

Can a variance be moved to another property?

No. A variance runs with the land and is not granted to a specific person or owner. The only exception to this is a variance granted to a property for someone with a recognized physical disability. The variance shall be in harmony with the general purpose and intent of the zoning ordinance and the board may provide that the variance survive only so long as the particular person has a continuing need to use the premises.⁴⁰

Any variance granted is only for the specific relief sought not some blanket waiver of general provisions and it cannot be transferred or moved to another property. The variance will remain in perpetuity as long as the use developed remains in compliance the terms and conditions of approval.

Where can I learn more about the five variance criteria?

Start by reviewing the **Variances** section of Chapter II in [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015, and **15 New Hampshire Practice: Land Use Planning and Zoning**, Third Edition, Atty. Peter Loughlin, Chapter 24 – *Variances*.

In addition, we now have a decision of the New Hampshire Supreme Court describing in detail the tests to be used by a ZBA to evaluate each of the five criteria for a variance under the new 2010 recodification of the statute – [Harborside Associates, L.P. v. Parade Residence Hotel, LLC](#) 34 A.3d 584 (2011). Each ZBA should carefully review this case, as well as the cases cited with approval by the Court, as the most current statement of the law of variances in New Hampshire.⁴¹ (Also see [Case Review – Harborside Associates, L.P. v. Parade Residence Hotel](#) by Tim Corwin, Esq., from [The Granite State Planner](#), Fall 2011.)

What is a special exception?

A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the

³⁹ 674:33, I (b)

⁴⁰ 674:33, V

⁴¹ [First Supreme Court Variance Decision Since Recodification of RSA 674:33](#), NHMA Court Update, November/December 2011

zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.⁴²

A special exception is a use of land or buildings that are permitted when clearly defined criteria and conditions contained in the ordinance are met. The key distinction between a special exception and a variance is that a special exception seeks permission to do something that the zoning ordinance permits only under certain special circumstances while a variance seeks permission to do something that the ordinance does not permit.

Special exception uses must be clearly listed in the ordinance and may be different in different zones or districts. The ordinance must also clearly list the criteria by which the ZBA will judge a special exception application and these criteria, too, may be different depending on the specific special exception use. The board's only function concerning special exceptions is to decide if the required conditions are met. The board does not have the authority to create a special exception or to determine what threshold conditions must be met in order to grant a special exception. These are legislative functions beyond the authority of the ZBA.

The board of adjustment cannot legally approve a special exception for a prohibited use if the ordinance does not identify that use as being allowed by special exception or if the stipulated conditions do not exist or cannot be met. On the other hand, if the special exception is listed in the ordinance and the conditions are met, the board cannot legally refuse to grant the special exception even though it may feel that the standards are not adequate to protect the neighborhood.

Three questions must be answered to decide whether or not a special exception can be legally granted:

1. Is the use one that is ordinarily prohibited in the district?
2. Is the use specifically allowed as a special exception under the terms of the ordinance?
3. Are the conditions specified in the ordinance for granting the exception met in the particular case?

What is an equitable waiver?

When a lot or structure is discovered to be in violation of a physical layout or dimensional requirement, the zoning board of adjustment may grant a waiver only if each of the four findings as outlined in the statute are made:

- a) lack of discovery;
- b) good faith error in measurement or calculation;
- c) no diminution in value of surrounding property; and
- d) the cost of correcting the mistake outweighs any public benefit.⁴³

This provision was approved by the legislature to address the situations where a good faith error was made in the siting of a building or other dimensional layout issue. In the past, when it was discovered

⁴² 674:33, IV

⁴³ 674:33-a

that a building had been improperly sited and slightly encroached into the setback area, the only relief available was to seek a variance. Often, these variances were granted because there was no reasonable alternative for the landowner and no particular harm was being done. But in most cases, there would be a serious question as to whether the requirements for a variance could be met.

In lieu of the zoning board of adjustment finding that the violation was not discovered in a timely manner and that the mistake was made in good faith, the owner can meet the first two parts of the four-part test by demonstrating that the violation has existed for ten or more years and that no enforcement action was commenced against the violation during that time by the municipality or by any person directly affected.

Equitable waivers may be granted only from physical layout, mathematical, or dimensional requirements and may not be granted from use restrictions. Once a waiver is granted, the property is not considered to be a nonconforming use and the waiver does not exempt future use, construction, reconstruction or additions on the property from full compliance with the ordinance.

Forms

Suggested application forms for administrative decision appeals, variances, special exceptions, and equitable waivers can be found in *Appendix C - Suggested Forms* in [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015, and in **15 New Hampshire Practice: Land Use Planning and Zoning**, Third Edition, Atty. Peter Loughlin, *Appendix of Forms*.

Other Duties of the ZBA

The ZBA has numerous other duties that are less commonly exercised though none-the-less important. They are covered in more detail in Chapter II of [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015:

- Acting as the Building Code Board of Appeals;
- Developments of Regional Impact;
- Earth Excavation;
- Junkyard Licensing;
- Airport Zoning;
- "Official Map";
- Building on Class VI and Unapproved Private Roads;
- Historic District Commission Appeals;
- Appeals of Decisions of the Governing Body Relating to the Restoration of Involuntarily Merged Lots and;
- Waivers for Agricultural Uses of Land.

What the ZBA Should Not Do

The board should never issue advisory opinions or render informal advice regarding any particular development proposal. The board only acts when there is a formal application for a variance, special exception, appeal of an administrative decision or application for an equitable waiver, or if being asked

to act on any other statutory responsibility. In contrast to the planning board, there is no preliminary review process as outlined in RSA 676:4, II for the zoning board of adjustment.

How does the ZBA make a decision?

Before the ZBA can decide on any application, they must hold a public hearing within 30 days of receiving the application. Notice of the hearing must be given to the applicant and every abutter and holders of conservation, preservation, or agricultural preservation restrictions and be placed in a newspaper of general circulation in the municipality not less than 5 days before the hearing.

At the hearing, the board should take testimony from the applicant, all noticed parties and the general public in attendance, and then review the application and all plans, documents, photographs and evidence provided in order to reach an informed decision. Prior to reaching a decision, the board must deliberate and weigh the evidence to determine how they will act.

Following the conclusion of testimony and questioning by the board, OEP recommends that the board keep the public hearing open while they begin to deliberate so that any additional questions may be addressed or any additional clarifying testimony from the applicant or others can be received. Once the board is sure they have received all the relevant information, they should close the public hearing and begin to deliberate whether or not to grant the request including establishing the facts of the case.

Everything the board does is in open session in full view of the public who has the right to attend and record the proceedings so long as it does not interfere with the functioning of the board. Deliberations are never “closed” to the public and it is rare if ever that the board would need to enter into a non-public session as outlined by RSA 91-A:3, the Right to Know Law.

The concurring vote of 3 members of the board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass.⁴⁴ Problems sometimes arise if there are less than 5 members present. A quorum of the board is 3 so they can operate legally with just 4 or 3 members present but they still must have the concurring vote of 3 members to decide an application. A board will often give the applicant the option of proceeding or not if there are less than 5 members present with the expectation that there will be 5 members at the resumption of the hearing at a later date.

The process of reaching a decision is covered in great detail in a number of materials including:

- Chapter III of [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015;
- [The Zoning Board of Adjustment Procedures and Decision Making Process](#), Atty. Daniel D. Crean, OEP Planning and Zoning Conference, June 2016;
- [ZBA Decision Making Process](#), Atty. Stephen C. Buckley, NHMA Legal Services Counsel, OEP Planning and Zoning Conference, May 2015; and

⁴⁴ 674:33, III

- NHMA Law Lecture #2 *Conflict of Interest, Disqualification and the Local Land Use Board Decision-Making Process*, Atty, David R. Connell and Atty. Kimberly A. Hallquist, Fall 2010.

Appeals and Rehearings of ZBA Decisions

Every decision of the ZBA is subject to appeal. The first step that MUST be taken is for the aggrieved party (the party who disagrees with the decision and is seeking to appeal) to file a Motion for Rehearing outlining all the reasons why the board's decision was incorrect and should be reconsidered.⁴⁵ The motion should be carefully crafted to contain every possible reason the board's decision was wrong since if the motion is denied and there is a further appeal to superior court, generally, the court will only allow the plaintiff to raise the issues contained in the motion, not bring in new reasons.

The motion must be submitted to the board within 30 days of the decision and the board then has 30 days within which to decide whether or not they will grant the motion and rehear the case.⁴⁶ This decision must be made at a meeting of the board which might deviate from their "regular" monthly meeting schedule requiring them to have an extra meeting. This is a **public meeting** (as are all meetings of the board) and thus is open to the public. It is not, however, a **public hearing** and thus, the public does not necessarily have the right to speak or make comments. Boards are strongly urged NOT to hold a public hearing when considering whether to grant the motion or not since it is too easy to slip into arguments about the facts of the case and the reasons for the decision when the sole purpose of the meeting is just to decide whether to grant the new hearing or not – merely a simple yes or no decision.

The board need not give reason as to why they decide to grant or deny the motion, just a simple motion to either grant the rehearing or deny the rehearing. If they deny the motion, the aggrieved party now has a new 30 days to appeal that denial to the superior court.⁴⁷ If the board grants the motion, they must then set a date for the new public hearing to reconsider the original application and provide proper notice.

Rehearings and Appeals are covered in great detail in Chapter IV of [The Board of Adjustment in New Hampshire: A Handbook for Local Officials](#), NHOEP, November 2015

The New Use It or Lose It Clause

In 2013, RSA 674:33 was amended ([Ch. 93, SB50](#)) to add the provisions that a variance or special exception shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance or special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

This is a relatively new addition to the statute that some towns had previously included in their own zoning ordinances or, automatically added to each decision as a condition of approval.

⁴⁵ 677:2

⁴⁶ 677:3, II

⁴⁷ 677:4

Christopher L. Northrop
Principal Planner
NH Office of Energy and Planning
107 Pleasant Street
Concord, NH 03301
Phone: 603.271.2155
Fax: 603.271.2615
Email: chris.northrop@nh.gov
Follow us on Twitter @NHOEP

All information provided by the New Hampshire Office of Energy and Planning (OEP) is made available for the convenience of interested persons. While OEP makes every effort to provide information that is reliable, human or mechanical error remain a possibility. Therefore, OEP makes no guarantee as to the accuracy, completeness or currency of the information. Neither OEP nor any of the sources of the information shall be responsible for any errors or omissions, or for the use or result obtained from the use of this information.

September 23, 2016