



Planning Board Basics

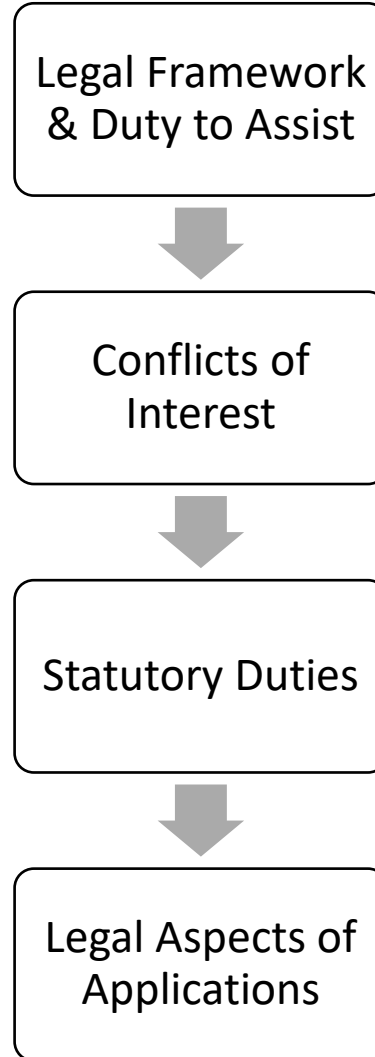
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AGENDA



Legal Framework and Duty to Assist

MUNICIPAL AUTHORITY

- Fundamental rule of municipal government in NH:
 - Towns and cities have no inherent authority to act
 - All authority comes from the legislature through statutes
 - *Girard v. Allenstown*, 121 N.H. 268 (1981)
- It is not enough to say "no statute says we can't do it"
- Authority to regulate land use, and everything about the way it is done, must be found in a statute.

AUTHORITY TO REGULATE LAND USE

- RSA 674:16 - zoning power
- Because all zoning and land use regulation authority is granted through statutes, municipalities must exercise this power in conformance with that legislation.
- *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748 (2007)
- Municipalities and their boards may not have an ordinance, rule or procedure that isn't authorized or necessarily implied by a statute.

LAND USE REGULATION AFFECTS PROPERTY RIGHTS

- Government cannot take property without just compensation
 - 5th Amendment to US Constitution
 - NH Constitution – Part I, Arts. 2 and 12
- Every applicant and abutter has property rights that will be affected by your decisions on applications and the way you handle them
- The procedural rules in the law are designed to protect property rights and give parties the required equal treatment, notice, and opportunity to be heard
- You must be reasonable *even when no one else is*

PROCESS PROTECTS PROPERTY RIGHTS

- To protect against the unfair loss of a property right, state & federal constitutions require at least:
 - Notice to affected people of a proposed action
 - Meaningful opportunity to be heard at a public hearing
 - Ability to appear and speak through counsel
 - Decision by an impartial tribunal
 - Deliberation based upon evidence and facts
 - Written decision with reasons
 - Appeal to seek correction of errors

DUTY TO ASSIST

- Planning boards have an obligation under the NH Constitution (Pt. I, Art. 1) to provide reasonable assistance to all citizens with the process of land use. *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003).
- It is not intended to be an entirely adversarial situation.
- Planning board has a duty to advise applicants and otherwise work with them as they try to work through the permitting process.
- Clarify what is required, provide feedback, discuss options

Conflicts of Interest

What Is a Conflict of Interest?

- An issue, decision, application, or matter in which a person cannot participate because they are unable to be impartial.
- A person's personal interests are in conflict with the public interest
- Can arise from another position they hold, or something else they have participated in, or a personal relationship, or a financial interest, or a personal bias
- There is nothing illegal or unethical about having a conflict of interest, so long as it is handled correctly

When Are You Disqualified?

RSA 673:14, I: No member of a...planning board...shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a **judicial capacity** if that member has **a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter** in any action at law....

RSA 673:7, I: A planning board member who also serves on a ZBA shall recuse from voting on any matter previously decided by that board in a quasi-judicial capacity in which the member participated as a voting member. (NEW as of 6/21/2026)

Juror Standard RSA 500-A:12

A person is disqualified from acting as a juror if they are “not indifferent” because they:

- Expect to gain or lose upon the disposition of the case;
- Are related to either party;
- Have advised or assisted either party;
- Have directly or indirectly given their opinion or formed an opinion;
- Are employed by or employ any party in the case;
- Are prejudiced to any degree regarding the case; or
- Employ any of the counsel appearing in the case in any action then pending in the court.

Two Kinds of Actions

Legislative

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

Quasi-Judicial

- ✓ Affect rights of specific party or parties
- ✓ Notify and hear parties
- ✓ Weigh evidence
- ✓ Must be indifferent

What if the person with the conflict participates anyway?

- Legislative action: Court will only invalidate decision if the person with the conflict cast the deciding vote
- Quasi-judicial action: Court will automatically invalidate decision and remand back to the board with instructions to begin again without the disqualified person

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

- Application for conditional use permit before PB
- After public hearing had ended but before deliberations, two members posted in opposition to the project on a social media site created by residents opposing it
- One of those members was asked to recuse himself but he refused, and later voted to deny the application
- On appeal, superior court remanded back to board, finding that the member's failure to enter into and participate in deliberations with an open mind "threaten[ed] the integrity of the deliberative process" undermining trust in the overall functioning of the planning board

How to Address Conflicts?

- The person with the conflict must make the call
- Disclose at earliest opportunity – if no one objects, they have waived their right to object.
- Advisory vote of board members – RSA 673:14, II
- Recuse (yes) vs. Abstain (no)
- Err on the side of caution

- Avoid social media opinions on pending matters!

Statutory Duties

3 Kinds of Functions

- Planning Functions
 - Master Plan
 - Capital Improvements Program
- Legislative Functions
 - Propose Zoning Ordinance & Amendments
 - Adopt/Amend Regulations for Subdivision, Site Plan, Impact Fees, Excavations, and Driveways
 - Adopt/Amend Rules of Procedure
- Regulatory/Quasi-Judicial Functions
 - Hear and Decide Applications

Master Plan – RSA 674:1-:4

- Purpose is to “set down the best and most appropriate future development” of the area, to aid the Board in designing ordinances and performing its other duties “in a manner that achieves the principles of smart growth, sound planning, and wise resource protection.”
- It is aspirational, not regulatory or enforceable
- Mandatory sections: Vision section (guiding principles and priorities) and Land Use section (existing conditions and proposed future uses, based on data)
- 16 additional optional sections
- Prerequisite for adopting a zoning ordinance & CIP
- Procedure to adopt – RSA 675:6

Capital Improvements Program – RSA 674:5

- Sole purpose: to aid governing body and budget committee in consideration of annual budget
- Recommended program of municipal capital improvements over at least 6 years, with priorities and recommended timing, may include cost, sources of funds, operating costs, possible revenue
- Not a basis to deny a land use application. *Zukis v. Fitzwilliam*, 135 N.H. 384 (1992).
- Prerequisite for impact fees, growth management

Propose Zoning Ordinance & Amendments

- Planning Board proposes zoning and historic district ordinances for consideration and adoption by legislative body. RSA 675:3.
- Procedure – RSA 675 (public hearing)
- Amendments can also be submitted to PB by voter petition or by governing body, and PB indicates its recommendation (or not) on the warrant.
- Alternative procedure to amend – legislative body can authorize governing body, NEW RSA 674:18-a.

Subdivision & Site Plan Regs

Subdivision

- Can be authorized without zoning ordinance
- Regulations address suitability of land for subdivision, streets and access
- Utilities, infrastructure, drainage

Site Plan

- Must have zoning ordinance and subdivision regs first
- Require approval of site plans for the ***development or change or expansion of use*** for nonresidential uses or multi-family structures (more than 2)

Preliminary Review

- Subdivision/site plan regs may mandate preliminary review, if authorized by town meeting. RSA 674:35, I.
- Preliminary Conceptual Consultation, RSA 676:4, II(a): nonbinding, no abutter notice required; general discussion of type of development, relationship to the master plan, issues that will arise under local regulations/ordinances, what procedure the board will follow, site visits, possible need for expert assistance, etc.
- Design Review, RSA 676:4, II(b): still nonbinding and no public hearing, but abutter and published notice is required; identify special studies that may be required, neighborhood or environmental impacts, specific issues with rough layout of lots and roads, topo maps, soils information, etc.

Excavation Regulations

- RSA 155-E: Planning Board (or sometimes governing body) is local “regulator” for permitting.
- “Excavation” of “earth” is sand, gravel, rock, soil, or construction aggregate produced by quarrying, crushing, or other mining activity.
- New and expanded excavation requires a local permit (but not incidental to building, landscaping, highway construction)
- Statutory conditions and reclamation standards
- PB regulations may include other requirements

Impact Fee Ordinance

- Adopted the same way as zoning ordinance.
- Must have CIP in place first.
- “Impact Fee” is a fee imposed on development to help meet needs occasioned by that development for the construction or improvement of municipal capital facilities. RSA 674:21, V.
 - Water, wastewater, sewers, stormwater, drainage and control facilities
 - Roads, municipal buildings and public works
 - Schools, public safety, waste disposal

Off-Site Exactions

- No impact fee ordinance needed to impose exactions as a condition of planning board approval
- Improvements that are necessitated by a development, located outside project boundaries
- Subject to “rational nexus” test
- Limited ONLY to highway, drainage, and sewer & water upgrades that are pertinent to that development
- Limited to the development’s proportional share
- RSA 674:21, V(j)

Driveway Regulations

- RSA 236:13 – Planning Board or governing body is authorized to regulate driveways on town roads
- Must adopt driveway regulations
- May delegate permitting to Road Agent or other official
- Must act on permit applications within 65 days
- Purpose is to regulate the connection with, and impact to, the public road – that’s it
- Continuing jurisdiction over every driveway on a town/city road, even if no permit was ever issued
- Owner can be ordered to fix driveway that is a hazard to the traveling public or threat to road integrity

Rules of Procedure, RSA 676:1

- Planning Board must adopt rules of procedure
- Adopt at a regular meeting, file with clerk
- Must address alternate participation in activities
- OPD Planning Board Handbook, Appendix C – sample rules of procedure for planning boards
- Rules must comply with relevant statutes and can fill in the gaps
- Become familiar with your rules and follow them!
- If they aren't working for you, change them!

Lot Mergers – RSA 674:39-a

- Owner may seek voluntary merger of 2 or more contiguous existing lots.
- Handled by Planning Board or its designee.
- No public hearing or notice is required.
- Must be approved unless it would violate then-current ordinances/regulations.
- If a mortgage on any lot, lender must consent.
- No new survey plat is required.
- Notice of merger endorsed by Planning Board is recorded at the registry.

Acting on Applications

- Quasi-judicial: notify parties, hold hearings, receive information/evidence/testimony, then weigh that information against the statutory, ordinance, and regulation standards, then make decision
- The procedure must be fair, respect constitutional rights of all the parties
- Procedural errors may lead to reversal, even if your substantive decision was correct.
- When you aren't sure, ASK.
- If you need legal advice, SEEK IT OUT.

Legal Aspects of Dealing with Applications

Accepting as Complete

- 1st step when application is submitted is for Board to determine whether it is “complete” – staff can assist
- Regulations must include checklist specifying what must be included for “complete” application (including paying fees)
- Application should be filed at least 21 days before meeting at which Board will consider completeness
- Consider completeness at next regular meeting (or max 30 days) after application is submitted
- Full notice to abutters and public is required
- Discussion and vote on completeness is done during public meeting but no hearing is required for this
- RSA 676:4, I.

Effect of Completeness

- If complete, Board has 65 days from that point to hold a hearing and make a decision on the application.
- If Board determines project will have regional impact under RSA 36:56, 30 days is added to review period.
- Hearings require at least 10 days' notice to applicant, public, abutters, easement holders, RSA 676:4, I(d)(1).
- Hearing can begin at same meeting as completeness vote if it has been noticed
- Applicant can waive 65-day deadline; if they refuse and Board determines it lacks sufficient information to make a decision, it may deny “without prejudice” which allows applicant to reapply in future.

Effect of Proposed Zoning Changes – RSA 676:12, VI

- Amendments to zoning or planning regulations do not apply to an application which has been the subject of legal notice of plan acceptance prior to the first legal notice of the amendment.
- Also applies to proposals submitted to a planning board for design review under RSA 676:4, II(b), so long as formal application is filed with planning board within 12 months of the end of design review.

One Bite at the Apple

- Usually, an applicant may not apply for the same project over and over if they have been denied.
- Second application must be materially different in nature and degree from the first one. *Fisher v. Dover*, 120 N.H. 187 (1980).
 - A change in applicable legal standard
 - Project is changed in some way to address the reason the first was denied
- Denial “without prejudice” doesn’t trigger this prohibition

Development of Regional Impact, RSA 36:54 - :58

- A project that “reasonably could be expected to impact a neighboring municipality”
- Address this at same meeting as completeness
- Within 5 days after vote that it is DRI, send copies of the minutes of that meeting by certified mail to your RPC and the affected municipalities, and a copy of the plans to RPC (all at applicant’s expense)
- At least 14 days before public hearing begins, notify RPC and affected municipalities of hearing and their right to testify

Public Hearing - Rules

- Should be part of the Board's rules - RSA 676:1
- Include ordinary order of who speaks when (applicant, abutters, others)
- Time limits? Be reasonable about this.
- People may speak through representatives
- Testimony must be germane to the application
- Does applicant get the last word?

- Try to follow your own rules, explain if you don't
- Board should ask questions!!!

Alternate Participation

- Rules must address “when and how an alternate may participate in meetings...” RSA 676:1
- Alternates should be permitted to ask questions during the public hearing
- Once public hearing is closed and Board is going to begin deliberation, alternates should only participate if they are formally seated in place of a recused or absent regular member. If not, their participation ends.

Who Speaks at Hearing?

- At the hearing on an application, any applicant, abutter, holder of conservation, preservation, or agricultural preservation restriction, or any person with a direct interest in the matter may testify in person or in writing.
- Other people may testify as permitted by the subdivision regulations or the Board at each hearing. RSA 676:4, I(e).
- For purposes of receiving testimony only (and not notification), “abutter” includes anyone who can demonstrate their land will be directly affected by the proposal. RSA 672:3.

Continuing, Closing Hearing

- No additional notice required IF time, date and place of next session are announced before the end of the current one.
RSA 676:7, V.
- No contact between parties and board members about case in the interim – run everything through staff.
- Don't close the hearing too soon – has everyone been heard? Has the board asked all of its questions of the parties?
- Once hearing is CLOSED, no more information is submitted by any party, no more testimony, no more questions.

Getting Legal Advice

- Consultation with legal counsel is not a “meeting” under RSA 91-A.
 - No posting notice, no minutes, no public access
 - Attorney must be actively participating
- Reviewing legal advice provided by attorney is not “consultation with legal counsel” so it must occur either in public (thus waiving attorney-client privilege) or in a nonpublic session under RSA 91-A:3, II (I) (lower-case L)
- If you need legal advice before making a decision **YOU SHOULD SEEK IT OUT**

Deliberating

- Can deliberate immediately after closing hearing, or later.
- Always, only, at a meeting and in public. RSA 673:17.
- Deliberation only among board members
- All members should participate and talk!
- Board can rely on personal knowledge of the area, doesn't have to accept conclusions of experts, BUT only if based on competing evidence and explained in the written decision.
- Can't ignore uncontradicted expert testimony unless you can adequately explain why in written decision.
- Can't supplant specific regulations and standards with personal feelings and opinions

Written Notice of Decision

- Written decision is required – RSA 676:3
 - If a denial, must include reasons for denial
 - If approval with conditions, must include all conditions
 - Whether approved or denied, must include findings of fact
 - Which facts did board think were important? Which made a difference and supported the decision?
- Decision and meeting minutes must be on file for public inspection within 5 business days after the vote.
- Make written decision available to applicant at same time
- A tie vote is not a decision – it means no action occurred.

Conditional Approval

- Representations by applicant are not binding unless clearly made a condition of approval.
- Conditions must reasonably relate to ensuring compliance with relevant criteria of ordinance/regulations.
- Standard conditions – approval limited to project as described in application, shown on plans.
- Conditions precedent – must be fulfilled before proposal is final (other permits, build/bond for improvements)
- Conditions subsequent – apply going forward (hours of operation, maintenance of drainage, etc.)
- Compliance hearing required where board must exercise discretion to decide if condition has been met.

Performance Bond RSA 674:36

- Applicant must be given the option to post a bond to secure completion of infrastructure improvements
- Release portions of bond as work is completed and approved
- Bond release inspections within 30 business days of written request, with notice to applicant of any incomplete or non-compliant work within 15 business days of inspection
- Inspect “fixed” incomplete or non-compliant work within 15 business days of notice of completion, release bond 90 days from final signoff
- Cost escalation only up to 15%/year, no cost increases for engineering, administration, or other non-construction reasons
- Board must allow road and utility construction to start without a bond, but it must be in place before any lots in a subdivision are sold or residential building permits issued

Vesting – RSA 674:39

- Automatic protection for approved application from changes to zoning ordinances and land use regulations.
- Undertake “active and substantial development or building” within three years after final approval, and
- Achieve “substantial completion of the improvements” as shown on the plan within seven years after approval
- These time periods were extended in 2025
- Planning Board regulations or written approval may define what “active and substantial development” and “substantial completion” mean, but if not, everyone gets 7 year protection automatically regardless of progress.

Appeals

- Applicant, a butter, “any person aggrieved” by a decision of the planning board concerning an application, may appeal within 30 days after the PB vote.
 - Appeals to ZBA – aspects of PB decision based upon the planning board’s construction, interpretation, or application of a term of the zoning ordinance. RSA 676:5.
 - Appeals to Superior Court – all other aspects of PB decision (procedural, based on regulations, constitutional, involving innovative land use control). RSA 677:15.
 - Appeals to Housing Appeals Board – decisions involving “questions of housing or housing development.” RSA 679:5.

QUESTIONS?
Thank you for
attending!

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