

§ 5.10 Zoning Protest Petitions

Under certain circumstances, RSA 675:5 entitles landowners in a Community to file a protest petition against a proposed zoning amendment so that the proposed change will require approval by two-thirds of the local legislative body in order to become effective.⁸⁸ The purpose of requiring an extraordinary vote is to protect landowners from hastily conceived and ill-advised amendments to zoning ordinances.⁸⁹ In his treatise on zoning, Rathkopf suggests the theory that landowners have an interest in the stability and continuity of zoning requirements, especially where rezoning neighboring parcels may have an impact on the use or value of their property. Protest petitions are designed to afford a measure of protection beyond that provided by public hearings.⁹⁰

Provisions authorizing the use of protest petitions were contained in the Standard State Zoning Enabling Act and in New Hampshire's early zoning legislation.⁹¹ The legislation concerning protest petitions was amended by the New Hampshire Legislature in 1965 to substitute a two-thirds requirement for the three-fourths requirements which was contained in the Standard Act.⁹² The 1983 recodification of the zoning and planning laws rewrote some of the provisions of the protest petition in a successful attempt to clarify the provisions relating to the actual procedures for preparing and filing a protest petition. In 1985, an amendment to the protest petition section,⁹³ for reasons which are not altogether clear,⁹⁴ eliminated one of the three groups of landowners who were entitled to file protest petitions.⁹⁵ In 1989, the legislature further amended the law to provide that protest petitions apply only to amendments which alter the boundary locations separating previously defined zoning districts, or to amendments

⁸⁸ RSA 675:5, 1; *Real Estate Planners, Inc. v. Town of Newmarket*, 134 N.H. 696, 597 A.2d 78 (1991) (plaintiffs filed protest petitions against proposed 1988 zoning amendments; protest petitions were rejected by moderator on basis that they did not comply with strict requirements of RSA 675:5; plaintiffs appealed, and while case was pending in 1990, town adopted entirely new zoning ordinance, reenacting disputed provisions; court ruled action was moot, since plaintiffs did not have application for land use approval pending prior to time of reenactment; court rejected plaintiffs' argument that they were entitled to "one year window of opportunity" in which to file land use plans in event that 1988 protest petitions were found to be valid).

⁸⁹ *Disco v. Board of Selectmen of Amherst*, 115 N.H. 609, 347 A.2d 451 (1975); *Bourgeois v. Bedford*, 120 N.H. 145, 412 A.2d 1021 (1980).

⁹⁰ 3 E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, ch. 43.

⁹¹ Laws 1925, ch. 95:5. See also PL 42:52, RL 51:54, and RSA 31:64.

⁹² Laws 1965, ch. 318. Note that older ordinances which still required a three-fourths vote when a protest petition was filed effectively were amended to require only a two-thirds vote as a result of that enactment; *Cutter v. Durham*, 109 N.H. 33, 241 A.2d 216 (1968).

⁹³ Laws 1985, ch. 103:24.

⁹⁴ Testimony by the bill's sponsor, Representative Grodin of Cheshire Dist. 6, indicated that the purpose of the bill was to clarify the provisions as to who was entitled to file a protest petition. The effect of the clarification was to reduce from three to two the groups who were able to file such a petition. There were a number of people who felt that it was more equitable, even though perhaps less clear, when persons living directly across the street from the proposed zoning change constituted a separate group which was allowed to file a protest petition. The make-up of the three groups had been spelled out quite clearly in some of the zoning treatises as well as in *Towle v. Nashua*, 106 N.H. 394, 212 A.2d 204 (1965).

⁹⁵ Prior to the recodification, owners of 20% of the frontage of lots directly opposite the site of the proposed zoning amendment could petition and trigger a two-thirds vote. This separate grouping has been eliminated so that now all surrounding property owners to a depth of 100 feet constitute a single group. See *Towle v. Nashua*, 106 N.H. 394, 212 A.2d 204 (1965), for a description of the three groups which formerly existed.

which alter regulations or restrictions of an area not larger than one-third of the land area within the municipality.⁹⁶ If a zoning amendment applies to certain size parcels of land throughout the town, a protest petition signed by 20% of abutters to one affected parcel is not sufficient.⁹⁷

§ 5.11 Groups Who Can File Protest Petitions

Two separate groups of landowners can now submit a protest petition which would trigger a requirement for a two-thirds vote of the legislative body on any rezoning proposal. The two groups are: (1) the owners of 20% of the area of lots included in the area of proposed change;⁹⁸ or (2) the owners of 20% of the area within 100 feet immediately adjacent to the property to be rezoned or immediately across the street from the area to be rezoned.⁹⁹

Forms

[Form 7 - Diagram of Protest Petition Areas](#)

§ 5.12 Filing Requirements for Protest Petitions

Prior to the recodification, there were continual problems in determining when¹⁰⁰ and where¹⁰¹ protest petitions were to be filed. The procedure is now much more clearly defined. In order for a protest petition to be considered, it must:

- (1) be signed by the owners of 20% of one of the land areas described above,
- (2) contain the address of the petitioners and the address of the petitioner's property which is affected,
- (3) contain the tax map and lot number or other means used by the municipality to identify real estate,¹⁰²
- (4) be submitted to the selectmen or village district commissioners (in the case of cities or towns operating under the town council form of government, the petition presumably should be submitted to the town or city council or mayor and board of aldermen as the case may be),

⁹⁶ Laws of 1989, ch. 44; RSA 675:5, I-b; *Caspersen v. Town of Lyme*, 139 N.H. 637, 661 A.2d 759 (1995) (although the Town had adopted police power ordinances to regulate a set of disparate land uses, it had never attempted to adopt a comprehensive land use regulation, and since it did not have zoning in effect, the statutory provisions concerning protest petitions for amendments to zoning did not apply to the adoption of a comprehensive zoning ordinance by the Town).

⁹⁷ *Treisman v. Bedford & Kamen*, 132 N.H. 54, 563 A.2d 786 (1989) (Zoning amendment permitted helicopter pads on all five-acre lots in town; protest petition signed by abutters to lot that was subject of lawsuit did not trigger two-thirds vote requirement for passage).

⁹⁸ RSA 675:5, I-a(a).

⁹⁹ RSA 674:5, I-a(b).

¹⁰⁰ *Towle v. Nashua*, 106 N.H. 394, 400, 212 A.2d 204, 208 (1965); *Disco v. Board of Selectmen of Amherst*, 115 N.H. 609, 347 A.2d 451 (1975).

¹⁰¹ *Towle*, 106 N.H. 394, 212 A.2d 204; *Bourgeois v. Bedford*, 120 N.H. 145, 412 A.2d 1021 (1980).

¹⁰² RSA 675:5, 11 (a).

(5) be submitted at least seven (7) days prior to the town meeting or council meeting at which the zoning amendment is to be voted upon, and

(6) be addressed to one specific proposed amendment.¹⁰³

It is not required, but is suggested, that when the amount of area owned by a landowner is relevant, it may be helpful to list the area owned by each landowner on the petition.¹⁰⁴ Under New Hampshire law, it is not necessary to state the reasons why the protest petition is being filed, nor is it necessary to have signatures acknowledged.¹⁰⁵

The persons signing the petition need not be voters in the municipality, but must be property owners and not renters. If the petition is signed by just one of two joint tenants, it may be sufficient to have their land included.¹⁰⁶ In the case of property owned by trusts, partnerships, and other entities, only signatures of authorized parties are required as opposed to signatures of all of the partners, for example.¹⁰⁷ Once a protest petition has been accepted and the vote held, a petitioner cannot withdraw his name as this would cause great uncertainty in the process of protest petitions.¹⁰⁸ Although there is no case law on point, it is suggested that individual petitioners should not be allowed to withdraw at any point after the deadline for accepting either a protest petition or a petitioned zoning article. To allow withdrawal after the deadline could allow an individual to deliberately frustrate the will of other petitioners by originally signing the petition and then withdrawing so that they would not have the required number of signatures. On the other hand, if all of the petitioners indicate in writing that they wish to withdraw a petition, then it would seem logical to allow it to be withdrawn.

Forms

[Form 8 - Zoning Protest Petition Pursuant to RSA 675:5](#)

§ 5.13 Validation of Protest Petitions

Once a protest petition has been filed in accordance with the statute, the appropriate municipal officials must verify the names and the location of property in order to determine if the petition will be

¹⁰³ RSA 675:5, II (b). In other words, a single protest petition cannot be filed in order to perfect a protest against a number of different zoning changes which are to be voted upon or are to appear on the ballot as separate articles. Rather, separate protest petitions must be filed for each proposed change.

¹⁰⁴ See, e.g., *Rye Development Co., Inc. v. Greenland*, 116 N.H. 520, 363 A.2d 427 (1976) (petitioners did not list acreage on protest petition, which made their position more tenuous in subsequent proceedings concerning validity of their protest petition).

¹⁰⁵ 1 P. Salkin, *Anderson's American Law of Zoning*, § 8:31 (5th ed.).

¹⁰⁶ *Disco*, 115 N.H. at 611-12, 347 A.2d at 454. Note, if the situation were reversed and someone were seeking assent for a request for a variance or consent for a zoning change, one coowner would not be able to bind a fellow coowner, *Hamblen v. Nashua*, 102 N.H. 318, 156 A.2d 134 (1959), the difference being that allowing one cotenant to protest a change in zoning which would diminish the protection the ordinance affords to their jointly owned property is consistent with the well-established duty of a joint tenant to protect the common title. It also prevents a cotenant from reducing the existing protection to the joint land by inaction on the part of the joint tenant.

¹⁰⁷ *Alton v. Fisher*, 114 N.H. 359, 320 A.2d 653 (1974).

¹⁰⁸ *Disco*, 115 N.H. 609, 347 A.2d 451.

effective.¹⁰⁹ If the petition is found to be effective, a notice of receipt of the petition must be posted at the polling place.¹¹⁰ The moderator must announce at the opening of the town meeting that a protest petition has been received.¹¹¹ Obviously, in cities or towns operating under the town council form of government, the existence of the protest petition would simply be brought to the attention of the councilor board of aldermen.

While in a perfect world calculating the statutory protest petition requirements to determine whether a protest petition is valid would occur prior to voting, this has no effect on whether voters were properly notified or whether the petition was timely submitted.¹¹² RSA 675:5 does not on its face require the validity of the protest petition to be determined prior to voting.¹¹³

In reviewing protest petitions, town officials must be aware that the standard for enacting zoning regulations is not “strict compliance,” but “substantial compliance.”¹¹⁴ In the same manner, the standard for compliance with the requirements for a protest petition is that of “substantial compliance.”¹¹⁵ Minor deviations from the statutory procedure or technical rules thereof should be excused.¹¹⁶ Citizens exercising their right to petition should not be expected to know the law as well as town officials and, therefore, should be given the benefit of the doubt if there is good faith and substantial compliance with zoning regulations.

Substantial compliance will not be sufficient, however, in meeting the 20% requirement for signatures of the owners of one of the protected areas. If only 19% of the landowners from a protected group sign the petition, the petition is invalid. If a zoning amendment affects more than one-third of the land area of the municipality, protest petitions will be of no effect. In calculating the area needed to satisfy the protest petition requirements, the petitioners are entitled to rely exclusively upon the tax maps.¹¹⁷

¹⁰⁹ RSA 675:5, II(b).

¹¹⁰ RSA 675:5, II(b).

¹¹¹ RSA 675:5, II(b). The role of the moderator in announcing the effect of the protest petition is ministerial only. If the moderator is incorrect, his determination is without legal effect. This does not prevent a later correction if it was based on a false factual assumption. *Pierce v. Langdon*, 110 N.H. 170, 262A.2d 609 (1970); *Drown v. Hudson*, 112 N.H. 386, 296 A.2d 897 (1972).

¹¹² *Handley v. Town of Hooksett*, 147 N.H. 184, 188, 785 A.2d 399, 402 (2001) (the town clerk properly posted the notice that a protest petition had been received and a two-thirds vote was required; however, the selectmen had not had an opportunity to calculate the acreage involved in the petition to determine if it was valid prior to voting).

¹¹³ *Handley v. Town of Hooksett*, 147 N.H. 184, 188, 785 A.2d 399, 402 (2001) (the town clerk properly posted the notice that a protest petition had been received and a two-thirds vote was required; however, the selectmen had not had an opportunity to calculate the acreage involved in the petition to determine if it was valid prior to voting).

¹¹⁴ *Barcomb v. Herman*, 116 N.H. 318, 320, 358 A.2d 400, 402 (1976).

¹¹⁵ *Bourgeois v. Bedford*, 120 N.H. 145, 412 A.2d 1021 (1980).

¹¹⁶ *Barcomb*, 116 N.H. at 320, 358 A.2d at 402 (substantial compliance would probably be found, for example, if some of the petitions did not include map and lot numbers, if the property could easily be identified).

¹¹⁷ *Smagula v. Town of Hooksett*, 149 N.H. 784, 834 A.2d 333 (2003) (trial court acted improperly when it used private surveys and other material instead of the town's tax maps in calculating the lot area necessary to trigger a 2/3 majority vote on a zoning amendment).

The theory behind a protest petition is to preserve the stability of a zoning classification. Since the protest petition statute refers to zoning regulations being “amended or repealed,”¹¹⁸ the provisions of RSA 675:5 do not apply to the first enactment of a zoning ordinance in a municipality which is currently without zoning.

Forms

[Form 9 - Notice of Receipt of Zoning Protest Petition](#)

§ 5.14 Inclusion of Governmentally Owned Land in Protest Area

In computing the amount of land necessary to comprise 20% of an affected area, Anderson indicates that land owned by a municipality is not excluded.¹¹⁹ For years, there were no cases or statutory guidelines in New Hampshire concerning whether land of municipalities, school districts, the state, university system, or the federal government (such as the White Mountain National Forest) should be included in calculating the 20% requirement for a protest petition. On one hand, governmental entities are generally exempt from zoning regulations as long as they are carrying out governmental functions. In many instances it would be impossible to get public land included in a petition. All of the property within the boundaries of a municipality, however, is generally zoned and some governmental entities, such as school districts, can and do file protest petitions to prevent abutting property from being rezoned in a way incompatible with the governmental property.

The more equitable position was thought to be that the land of governmental entities was not included in making up the 20% necessary for either of the groups in a protest petition. While school boards may occasionally participate in or prepare protest petitions, most governmental entities other than municipalities will probably not become involved in a protest petition simply because they would be reluctant to take any stand that might indicate that they are subject to zoning regulations.¹²⁰ In the case of towns operating under the town meeting form of government, the selectmen may not be authorized to sign a protest petition. Even if they did sign a protest petition, it would be reasonable to assume that they had been overruled if the town meeting passed the proposed zoning change by a simple majority. In addition, it would probably be more equitable to attempt to eliminate the area included in public roadways in determining the 20% requirement.

In support of the interpretation suggested here, one could cite by way of analogy, *Blais v. Goffstown*¹²¹ in which the court stated:

It is a rule of statutory construction “that the general words of a statute do not include the government or affect its rights unless the construction is clear and indisputable upon the text of the act.” This rule is of particular applicability where the inclusion of the governmental unit

¹¹⁸ RSA 675:5, I.

¹¹⁹ 1 P. Salkin, *Anderson's American Law of Zoning*, § 8:32 (5th ed.).

¹²⁰ See, e.g., *Shennan v. Brentwood*, 112 N.H. 122, 290 A.2d 47 (1972).

¹²¹ 119 N.H. 613, 406 A.2d 295 (1979).

“would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal, or the driver of a fire engine responding to an alarm.”¹²²

While the inclusion of governmental land in determining the amount of land necessary for a protest petition may not be as absurd as the application of a speed law to a policeman, it is hard to believe that the legislature would have intended that White Mountain National Forest land would have to be included in the calculation of many northern communities so that, in effect, it would be difficult to ever get a 20% protest petition.

The legislature ended the guesswork concerning governmental land in 1989 when it specifically provided that the area of streets, commons, or land owned by governmental entities should not be included in the calculation of the 20% requirement for protest petitions.¹²³

§ 5.15 Inclusion of Land in Abutting Municipalities

In calculating whether a sufficient number of landowners within 100 feet of a proposed change have executed a protest petition, landowners in abutting communities must be considered if the area to be rezoned is on the municipal boundary.¹²⁴ The statute does not contain a requirement for residency in the town where the protest petition is being filed and, in fact, the owners of property in an adjacent town may be seriously impacted by a proposed rezoning.¹²⁵

¹²² *Blais*, 119 N.H. at 617, 406 A.2d at 298.

¹²³ Laws 1989, ch. 44; RSA 675:5, I-c.

¹²⁴ *Smagula v. Town of Hooksett*, 149 N.H. 784, 834 A.2d 333 (2003) (exclusion of land in Allenstown abutting the land to be rezoned in Hooksett found to be invalid in the process of calculating the minimum requirements).

¹²⁵ *Smagula*, 149 N.H. at 789, 834 A.2d at 337.