

# **BASICS FOR THE PLANNING BOARD ORGANIZATION AND PROCEDURE**

## **1. GETTING PERSONALLY ORGANIZED**

### **1.1 Have the basic information materials**

#### For Planning Board Members

- Subdivision Regulations/Site Plan Review Regulations
- Zoning Ordinance
- Master Plan
- Board Rules of Procedure
- Capital Improvements Program
- Current Planning and Land Use Legislation Handbook
- Local Earth Excavation Regulations (Planning Board is typically considered the “Regulator” for purposes of RSA chapter 155-E – RSA 155-E:1, III.)

### **1.2 Understand your job**

#### Planning Board Responsibilities

- Master Planning (RSA 674:1)
- Compiling Capital Improvements Program
- Growth Management
- Zoning Ordinance
- Subdivision and Site Plan Regulations
- Review of Applications
- Official Map (RSA 674:10)
- Earth Excavation Permits
- Special/Conditional Use Permits

### **1.3 Get yourself organized**

- Notebook or brief case
- Calendar

## **2. ORGANIZATION OF PLANNING BOARDS**

### **2.1 Establishment of Boards (RSA 673:1)**

- By legislative body (*i.e.* vote of town meeting)
- ZBA exists only because you have a Zoning Ordinance. if you have zoning, you must have a ZBA

- Both are local options. Having planning and zoning is not mandated by statute.

## 2.2 Membership

### A. Planning Boards (RSA 673:2)

- Cities. 9 members (2/3 ex-officio, 6/7 appointed)
- Town Council Towns (7 or 9). See charter
- Other Towns (5 or 7)
- In Towns, one is ex-officio. A Selectmen or admin official appointed by the Selectmen

### C. Election vs Appointment (RSA 673:2)

- In Towns a Planning Board can be elected or appointed (appointing authority in Towns is generally either the town council or board of selectmen depending upon the form of government)
- This can switch from one to another and back again
- This vote is by official ballot for PB's Official ballot optional for ZBA

### D. Terms (RSA 673:5)

- 3 years, staggered for regular members
- Varies for ex-officio – 1 year to 4 months or full term

### E. Alternates

- As many as five are allowed for ZBA's and PB's
- If Land Use Board is appointed, alternates are appointed by appointing authority (town council or board of selectmen). Otherwise, the Board chooses them
- Terms are staggered
- When do alternates sit? (RSA 673:11)
  - Alternates replace absent members. Chair designates. They may now fill temporarily vacant positions.
  - Designation is mandatory
  - Rules of Procedure could address method of designating alternates to fill absences. Would this control over Chairs choice?
  - Only ex-officio alternate may sit for about ex-officio member
  - Participation in reviewing applications and deliberations by non-voting alternates?

F. Multiple Public Service

- PB members can be on other boards, so long as not more than 1 PB member on other board
- In cities, an appointed PB member may not hold any other municipal office except 1 each may be on ZBA, HDC, Heritage Commission, Conservation Commission, Housing Commission or Agricultural Commission
- Watch out for conflict of interest on certain ZBA appeals

G. Vacancies (RSA 673:12)

- Elected members positions filled by Land Use Board until next election. Then election for unexpired portion of term
- Appointed members positions filled by appointing body for unexpired portion of term

H. Removal (RSA 673:13)

- Applies to both regular and alternate members
- Only after a public hearing
- Requires written finding or inefficiency, neglect of duty or malfeasance (i.e. consistent failure to attend meetings)
- Removal power lies with appointing authority for appointed members, or with Selectmen for elected boards

**2.3** Officers (RSA 673:8 and RSA 673:9)

- Must have a chairperson
- Other officers are optional
- Vice-Chair and Clerk are typical
- Terms of office are for one year. No term limits
- Ex-officio member cannot be chairperson
- Usually set out in the Board's Rules of Procedure

**2.4** Meetings (RSA 673:10)

- Planning Board must have at least one regular meeting per month
- Compare with Board of Adjustment and other bodies who meet at call of chair or otherwise as board may determine
- Joint meetings are allowed (RSA 676:2 - An applicant seeking a local permit may petition 2 or more land use boards to hold a joint meeting or hearing when the subject matter of the requested permit is within the responsibilities of those land use boards).

## 2.5 **Rules of Procedure** (RSA 676:1)

- Adoption required by statute
- Must be filed with city, town, or village district clerk  
The Rules of Procedure shall also include when and how an alternate may participate in meetings of a local land use board (non-voting alternates participating in deliberations)
- Content: “Methods of Conducting Business”
  - Order of business
  - Election of officers
  - Hearing procedures
  - Conflict of interest procedures
  - Record keeping responsibilities

## 2.6 **Staff/Finances** (RSA 673:16)

- PB may hire its own consultants and employees (independent of Selectmen)
- However, employees are subject to rules for Town employees
- 
- Can accept gifts, grants, contributions in accordance with Town policies
- Can put application fees and other fees into a special account
- May contract with planners, engineers and other professionals to provide consulting services
- Can require applicants to pay for special investigative studies (RSA 676:4, I(g))

## 3. **ZONING ORDINANCE AMENDMENT PROCEDURE** (RSA Ch. 675) (Primary PB function)

### 3.1 **How?**

- In Towns there are three ways zoning amendments may evolve:
  - From the Planning Board
  - By citizen petition of 25 or more registered voters
  - By a petition from the Selectmen
- These are ballot questions. Deliberative session does not discuss them
- In cities, charter or an ordinance will determine the method

### **3.2 When?**

- Usually at the annual Town Meeting in March
- However, Selectmen may call a Special Town Meeting to vote on a zoning amendment

### **3.3 Citizen Petitions**

- Window of Opportunity 120-90 days before Town Meeting
- PB must hold a hearing and recommend whether voters should approve or not approve the amendment. PB recommendation is printed on the ballot
- Can a petition be amended? Withdrawn?

### **3.4 Planning Board Must Hold a Public Hearing**

- 10 days posted/published notice
- Second public hearing required if amendment is substantially altered. This must be at least 14 days after first hearing
- Zoning amendment petitions and selectmen's petitions also must have a hearing
- In SB 2 towns, last day for hearings is third Tuesday of January
- Posting the notice of a hearing puts amendment in effect, pending Town vote

### **3.5 Final Amendment Filed with Town Clerk**

- By 5<sup>th</sup> Tuesday before Town Meeting in most towns, but by last Monday of January in an SB 2 town
- Voting by official ballot? Who drafts the wording of question?

### **3.6 Protest Petitions**

- Force a 2/3 majority vote on a zoning amendment
- Apply only to zoning map changes, or where a text amendment affects not more than 1/3 of land area of town
- Submitted by owners of 20% of area of lots included in change, or owners of 20% of area within 100 feet adjacent to area included in change. Streets, government land not included in calculation
- Must be submitted not later than 7 days before the Town Meeting

## CONFLICT-OF-INTEREST

### 1. RSA 673:14 is the controlling law in New Hampshire.

- It applies to all municipal land use boards.
- When board acting in "judicial" or "quasi-judicial" capacity.
  - These are applications where a persons rights are being determined, such as the right to develop or build upon one's land.
  - Board is weighing and considering evidence and arguments.
  - Does not include decisions such as planning board deliberations on zoning amendments, master plans, CIP's, subdivision regulations, etc.
- There are two standards of review:
  - 1) Direct personal or pecuniary interest different from other citizens.
  - 2) The "juror" standard. See RSA 500-A:12.
- Does not apply to "facts gained in performance of official duties."
  - What about personal knowledge and experience? OK in most cases.
  - Avoid "ex parte" discussions, conferences, phone calls. This is a good rule for those representing applicants or abutters, as well.

### 2. Conflicts in legislative or administrative capacity.

- The standard is less strict.
- Direct personal or pecuniary interest is still the test.
- Expressing an opinion on a legislative matter before its voted on is usually OK. In other words there is no such thing as "legislative prejudgment." The planning board's consideration of a zoning amendment would be an example of this.

### 3. What is clearly out?

- An abutter.
- A directly affected neighbor who is not an abutter.
- Relative of applicant-- but how close? What about an abutter's relative?

### 3. What is clearly out? (continued)

- Financial interest in proposal.
- Significant business relationships with an applicant.
- Pre-formed decisions.
- Employment relationships.
- Currently using same lawyer or engineer.
- A planning board member on a ZBA administrative appeal from a PB decision.

### 4. Prejudgment.

- This is a very difficult area.
- There is a difference between preconceived points of view on issues, policies and principles of law and the prejudgment of facts about specific cases.
- Some Examples.
  - ZBA member attends planning board hearing and speaks in favor of a "big box" site plan applicant in an application proceeding that has generated substantial community opposition. Same person speaks favorably of applicant around town and wears a T-shirt around town with applicants "logo." What happens when the same application comes before ZBA for a variance?
  - In a controversial application proceeding involving a large development on an environmentally sensitive site, a community group has developed lawn signs advocating disapproval of the project. Midway through a multi-month local proceeding, such a sign pops up on a land use board member's lawn. Is the land use board member disqualified? What if the member's spouse put the sign up?
  - At the beginning of a site plan review application process, the chairman of the planning board gives a newspaper interview and is quoted as saying the application met all zoning requirements. At the next meeting of the planning board, abutters challenge the project on the grounds that it is not permitted by the zoning ordinance. They ask the chairman to recuse himself. Should he?
  - In an application proceeding that has taken several meetings, a board member comes to the last meeting with a draft Motion to Deny all typed up with copies for other board members?
- The Rule: If you are a board member, be very careful about what you say about the specific application which is before you or about to be before you.

## 5. What is fuzzy?

- ♦ Prior legal or engineering representations. Their lawyer was your lawyer.
- ♦ Prior relationships in general.
- ♦ Imputed conflicts. You work for a business that may have a conflict.
- ♦ The juror test. RSA 500-A:12 states:

### 500-A:12 Examination.

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (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 his 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.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

Some of the decisions may surprise you. For example:

- A foreman of company who had sanded defendant's driveway in a slip and fall negligence lawsuit?
- A relative of an employee of the defendant corporation?
- A former client of the defendant's attorney?
- In a criminal trial, the niece of the next door neighbor to the crime scene where an elderly couple had been robbed and then tied up?
- In a ZBA variance proceeding for a county hospital where a member of the ZBA works for the county food program?
- What about the lawyer (or surveyor or engineer) who is also a public official?

## 6. Miscellaneous Notes.

- The ultimate inquiry in any conflict scenario is whether the juror (or land use board member) is "indifferent."
- Ramifications of a conflict. The decision is voided, no matter what the vote was. *Winslow v. Holderness*, 125 N.H. 262 (1984).

This is for judicial or quasi-judicial decisions only. For a legislative decision, the decision is nullified only if the conflict determined the outcome. (i.e. a one vote margin, for example)

- Philosophical conflicts.
  - Developers and realtors?
  - Environmentalists?
  - Downright "ornery" people?
  - OK, but, if you are a board member, watch your statements!

## 7. How do you raise a conflict issue?

- When "uncertainty arises." How does uncertainty arise?
- "Upon request of that member or another member of board."
- "Vote."
- "Request made prior to the hearing."
- "May not be requested by others." (i.e. applicants or others cannot force a vote on disqualification.)
- "Except ....." (A board may adopt more stringent rules to govern conflicts.)
- A challenge must be made before the board votes.

## 6. Beware of Abuse of Office Statutes

**RSA 643:2 Misuse of Information.** A public servant ..... is guilty of a misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, he:

I. Acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such action or information; or

II. Speculates or wagers on the basis of such action or information; or

III. Knowingly aids another to do any of the foregoing.

The case of Evans v. Hall, 118 N.H. 920 (1978) establishes that criminal and civil liability can flow from this type of action by a land use board member. In Evans v. Hall, the plaintiffs (Evans) went to Ms. Hall in her capacity as both the planning board secretary and a member of the planning board and sought her assistance relative to a proposal for land they (Evans) intended to buy. Ms. Hall then approached the seller and purchased the land. In reviewing the denial of a Motion to Dismiss the Evans' lawsuit, the NH Supreme Court held that:

..... The purpose of this statute was to prevent government officials from using "inside" information for their own personal gains, and as such created a statutory conflict of interest provision enforceable either civilly or criminally.

.....

At common law we have previously held in the related area of conflict of interest that a conflict exists if an administrative official "votes on a matter in which he has a direct personal or pecuniary interest." These considerations especially apply in cases where public officials may gain personally from their inside information.

Evans v. Hall, 118 N.H. 920, 921 (1978) [citations omitted].

**RSA 643:1 Official Oppression.** A public servant ..... is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

## "CONFLICTS TO AVOID"

### **§ 95:1. Public Officials Barred From Certain Private Dealings**

No person holding a public office, as such, in state or any political subdivision governmental service shall, by contract or otherwise, except by open competitive bidding, buy real estate, sell or buy goods, commodities, or other personal property of a value in excess of \$200 at any one sale to or from the state or political subdivision under which he holds his public office.

### **§ 640:2. Bribery in Official and Political Matters**

I. A person is guilty of a class B felony if:

(a) He promises, offers, or gives any pecuniary benefit to another with the purpose of influencing the other's action, decision, opinion, recommendation, vote, nomination, or other exercise of discretion as a public servant, party official, or voter; or

(b) Being a public servant, party official, candidate for electoral office, or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in subparagraph I(a), or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of subparagraph I(a).

II. As used in this section and other sections of this chapter, the following definitions apply:

(a) "Public servant" means any officer or employee of the state or any political subdivision thereof, including judges, legislators, consultants, jurors, and persons otherwise performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position. A person is a candidate for electoral office upon his public announcement of his candidacy.

(b) "Party official" means any person holding any post in a political party whether by election, appointment or otherwise.

(c) "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

### **§ 640:3. Improper Influence**

I. A person is guilty of a class B felony if he:

(a) Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion; or

(b) Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law; or

(c) Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of subparagraph (a) or (b) hereof.

II. "Harm" means any disadvantage or injury, to person or property or pecuniary interest, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested, provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions.

**§ 640:4. Compensation for Past Action**

A person is guilty of a misdemeanor if:

- I. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or
- II. He promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph I.

**§ 640:5. Gifts to Public Servants**

A person is guilty of a misdemeanor if:

- I. Being a public servant he solicits, accepts or agrees to accept any pecuniary benefit from a person who is or is likely to become subject to or interested in any matter or action pending before or contemplated by himself or the governmental body with which he is affiliated; or
- II. He knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph I.

**§ 640:6. Compensation for Services**

A person is guilty of a misdemeanor if:

- I. Being a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit in return for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise; or
- II. He gives, offers or promises any pecuniary benefit, knowing that it is prohibited by paragraph I.

A person is guilty of a misdemeanor if he:

- I. Knowingly makes a false entry in or false alteration of any thing belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or
- II. Presents or uses any thing knowing it to be false, and with a purpose that it be taken as a genuine part of information or records referred to in paragraph I; or
- III. Purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such thing.

**§ 643:1. Official Oppression**

A public servant, as defined in RSA 640:2, II, is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

**§ 643:2. Misuse of Information**

A public servant, as defined in RSA 640:2, II, is guilty of a misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, he:

- I. Acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such action or information; or
- II. Speculates or wagers on the basis of such action or information; or
- III. Knowingly aids another to do any of the foregoing.



# TITLE LXIV PLANNING AND ZONING

## CHAPTER 673 LOCAL LAND USE BOARDS

### General Provisions

#### Section 673:14

##### **673:14 Disqualification of Member. –**

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairperson shall designate an alternate to act in the member's place, as provided in RSA 673:11.

**Source.** 1983, 447:1. 1988, 26:1. 1992, 64:9. 1996, 42:11. 2007, 266:6, eff. Aug. 28, 2007. 2008, 391:6, eff. Sept. 15, 2008.