

## CHAPTER I: ORGANIZATION

New Hampshire state law prescribes the requirements for the creation and organization of planning boards. These laws are mandatory regarding the establishment of a planning board. This chapter is based on RSA 673, which provides the statutory framework for the workings of a planning board.

### ESTABLISHING THE BOARD

Planning boards are established by vote of the local legislative body, i.e., town meeting in towns and the city or town council in municipalities with that form of government. Board members must be residents of the municipality. Generally, the role of the planning board is to provide for the orderly growth and development of the municipality; their only mandated duty is to prepare and, from time to time, amend a master plan. All other regulatory and non-regulatory functions are conveyed to the board by the legislative body (see Chapters II and III).

### APPOINTMENT AND NUMBER OF BOARD MEMBERS

RSA 673:2 sets forth the procedures under which planning board members will be designated. These procedures differ depending on the municipality's form of government:

1. In cities with a mayor, the planning board must have 9 members comprised of the mayor or designee, an administrative official, a member of the city council selected by the council, and 6 other members appointed by the mayor or chosen in accordance with the city charter or as determined by the city council.
2. In cities with a city manager, the planning board shall have 9 members comprised of the city manager or designee, a member of the city council selected by the council, and 7 other persons appointed by the city manager, or as determined by the city charter or the city council.
3. In towns with a town council form of government, the planning board shall have 7 or 9 members. If 9, they are chosen according to the same procedure as that detailed in paragraph 1. If 7, one person must be a member of the town council or an administrative official of the town; the other 6 will be appointed by the mayor (if there is one), or as provided for by the town charter or the town council.
4. In all other towns, which represent the vast majority of the municipalities in New Hampshire, the planning board shall consist of either 5 or 7 members as determined by the local legislative body, which is the town meeting. The planning board members may be either appointed or elected, depending on the wishes of the town meeting. There shall be one selectman or administrative official of the town, selected by the other selectmen, who shall serve as ex officio on the planning board. A town that has voted to elect its planning board members may rescind that vote at town meeting and revert to an appointed board.

**"Ex Officio" means "by virtue of the office." An ex-officio member has all the same duties and responsibilities as any other member and can make motions and vote (RSA 672:5). The only distinction regarding the ex-officio member on the planning board is that he or she may not serve as chairperson of the board (RSA 673:9).**

5. In village districts, the planning board shall consist of either 5 or 7 members, as determined by the village district meeting. One district commissioner or administrative official shall be designated by the commissioners to serve as ex officio member, and the commissioners shall appoint the other 4 or 6 members.

6. In counties where there are unincorporated towns or unorganized places, the planning board shall have either 5 or 9 members. The county commissioners must recommend appointees to the planning board, and the appointees shall be approved by the county legislative delegation. The board shall consist of the chair of the board of commissioners or designee, a member of the county legislative delegation selected by the delegation (sometimes referred to as the county convention), an administrative official of the county selected by the chair of the board of commissioners, 2 or 6 persons appointed by the board of county commissioners as approved by the county convention, and 1 or 3 alternates appointed by the board of the county commissioners and approved by the county convention.

### **VACANCIES IN MEMBERSHIP**

For elected planning board members, a vacancy is filled by appointment of the remaining board members until the next regular municipal election, at which time a successor shall be elected to either fill the remainder of the unexpired term or start a new term, as the case may be. If the vacancy is on an appointed board, or is an ex-officio or alternate member, it is filled by the original appointing or designating authority for the unexpired portion of the original term of office.

RSA 673:12 states that the chair of a local land use board may temporarily designate one of the board's alternate members to fill a vacancy on the board until that vacancy is permanently filled either by appointment (by the governing body) or by election, as the case may be. If the vacancy is for an ex officio member, however, the chair may only designate someone who is the alternate for that ex officio member.

The board chair may designate an alternate board member to fill the vacancy temporarily until the vacancy is filled in the manner described above. If the vacancy is for the ex officio member, the board chair may only designate the person who has been appointed to serve as the alternate for the ex officio member.

### **TERMS OF BOARD MEMBERS**

The term for all board members, whether elected or appointed, is three years. When a board is first established, the terms shall be staggered so that no more than three appointments or elections occur in one year in the case of a 7- or nine 9-member board, and no more than two appointments or elections in the case of a 5-member board. In situations where a qualified successor is yet to be appointed at the end of the appointed member's term, the member is entitled to remain in office until the position is filled.

The term of an ex officio member shall coincide with the term for that office, except: (1) when the term of an administrative official appointed by a mayor shall terminate with the term of the mayor, or (2) when the term of an administrative official appointed by a town council, the board of selectmen, or village district commissioners shall be for one year.

## **ALTERNATE MEMBERS**

Planning boards may have up to 5 alternate members, as determined by the local legislative body. The term of an alternate member is 3 years. For appointed planning boards, the alternate members are appointed by the appointing authority; in the case of elected planning boards, the board itself appoints its alternate members.

Alternate members are encouraged to attend all planning board meetings. Furthermore, RSA 673:6, V authorizes alternate members to participate in meetings of the board as non-voting members pursuant to the board's adopted rules of procedure. Regular participation best prepares alternates to be ready to serve when called upon or to fill future vacancies. Alternate members may vote only when they are specifically designated to sit in the place of a member who is either absent or has disqualified him or herself. The chair designates which alternate shall serve in the place of a regular member; however, the selectmen must designate their alternate if the selectman ex officio cannot serve. The board should review its rules of procedure to make sure they define how and when an alternate may participate in a meeting of the board.

## **PLANNING BOARD MEMBERS SERVING ON OTHER BOARDS**

The statute regulating planning board members serving on other boards or commissions, RSA 673:7, was significantly amended in 2011 to loosen the restrictions on planning board members serving in other municipal positions; however, the law continues to prohibit more than one planning board member from also serving on the conservation commission, the board of selectmen, or any other local land use board (such as the zoning board of adjustment, historic district commission, etc.) as defined in RSA 672:7. With those exceptions, any two appointed or elected planning board members may serve together on any other municipal board or commission.

In cities, appointed members of the planning board shall not hold any other municipal office, with some exceptions: (1) one appointed planning board member also may be a member of the ZBA; (2) either one appointed member or one ex officio member also may be a member of the heritage commission, the historic district commission, the agricultural commission, the housing commission, or all four if such commissions exist in the municipality.

In counties with unincorporated towns or unorganized places, the county commissioners shall determine which members of the planning board may serve on other municipal boards or commissions.

## **REMOVAL OF MEMBERS**

Regular and alternate members may be removed from the planning board only after a public hearing and only upon written findings of inefficiency, neglect of duty, or malfeasance in office. A written statement of reasons for removal must be filed with the city or town clerk, the village district clerk, or the clerk for the county commissioners, whichever is appropriate.

In the case of an appointed member, only the appointing authority may remove the member. The board of selectmen may remove an elected planning board member or alternate.

The term "inefficiency" seems like a much lesser standard than "neglect of duty" or, especially, "malfeasance." Good judgment and caution are urged if you are tempted to begin removal proceedings based on the inefficiency standard. When considering malfeasance, remember that the complete statutory phrase is "malfeasance in office." The malfeasance must relate to the performance of the land use board member's duties as a board member.

Finally, be aware that if a member is removed from office and then successfully appeals the removal to superior court, it is likely that the town will have to pay that person's attorney's fees, which could be a substantial cost. Consultation with your municipal attorney is advised before beginning removal proceedings.

### **DISQUALIFICATION OF MEMBERS**

Any member who has a direct personal or pecuniary (financial) interest in the outcome of an application that differs from the interest of other citizens, must disqualify him or herself. Although not expressly mentioned in RSA 673:14, an abutting landowner is disqualified from hearing an application. "...we hold that ownership of land abutting a proposed subdivision by a planning board member presents a conflict of interest and requires that the member be disqualified from voting thereon." [Totty v. Grantham Planning Board, 120 N.H. 388 \(1980\)](#). Further, a member must step down from hearing an application if he or she would be disqualified for any cause to act as a juror if the matter were to go to trial.

When there is a question as to whether a member should be disqualified, that member, or any other member of the board, may request the board to take a vote on the question. The request and the vote must be made prior to the public hearing. Any such vote is advisory and non-binding, and may not be requested by anyone other than a board member, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

### **ABOLITION OF PLANNING BOARD**

In towns with a town meeting form of government, a planning board may be abolished by a vote at town meeting, brought by petition signed by at least 100 voters, or 1/10 of the registered voters in town, whichever is less.

**What happens with all records if the planning board is abolished?**  
**All records are to be transferred to the city or town clerk, or the clerk of the board of district commissioners or the county commissioners.**

In cities, counties and towns with town councils, the local legislative body shall determine the manner in which the board may be abolished.

The effect of abolishing a planning board is that all land use control activities performed by the board will cease upon the effective date of the abolition. Existing zoning ordinances remain in effect for no longer than two years from this date; during this two-year period, no amendment to the zoning ordinance is permitted that would require action by the former planning board.

### **SCHEDULING OF MEETINGS**

Under RSA 673:10, planning boards are required to meet at least once a month. The board may meet more often, at the call of the chair, and at any other time the board determines. If there are no applications pending before the board, it must still hold a monthly meeting, which will afford a great opportunity to discuss and debate community planning goals and the land use tools necessary to help achieve them.

In order to transact any business, a quorum of the board must be present, which is a simple majority of the board (3 members with a 5-member board, and 4 members with a 7-member board). Absent members cannot vote by proxy or by some communication to the board such as a letter or e-mail.

## ACCESS TO PUBLIC RECORDS AND MEETINGS

All meetings of the planning board are subject to New Hampshire's Right to Know Law, RSA 91-A. A "meeting" occurs whenever a quorum of board members convenes in person, by phone, e-mail or by any other electronic means to discuss or act upon a matter over which the board has supervision, control, jurisdiction, or advisory power (RSA 91-A:2). A discussion alone is enough to make a meeting; the board does not have to make a decision in order to be involved in a public meeting. But of course this does not mean, for example, that three members of a five-member board couldn't have coffee together at the local diner – they just cannot conduct planning board business.

Meetings may not be held via e-mail, online chat, or any method in which the public cannot hear, read or discern the discussion as it happens. In other words, all members must be able to hear and speak with each other, and the public must be able to hear or perceive both sides of the conversation as it occurs. Members may be allowed to participate in meetings by telephone or video conference when physical attendance is not reasonably practical, so long as a quorum is still physically present at the advertised meeting location.

All meetings require at least 24-hour notice (unless a public hearing is involved; public hearing notice requirements are addressed in Chapter IV) and all meetings and records of those meetings must be open to the public. Minutes must be kept and are to be available to the public within 5 business days after the meeting, but within 72 hours for any non-public session unless two-thirds of the members vote to seal the minutes under the provisions of RSA 91-A:3, III.

A "governmental record," as defined in RSA 91-A:1-a, III, is any information created, accepted, or obtained by or on behalf of any public body or a quorum of its membership. This includes any written communication or other information, whether in paper, electronic, or other physical form.

Be aware that all governmental records (minutes, tapes, etc.) are considered part of the public record, so the public has a right to review and inspect them. If the board tape-records its meeting,

**Is any person at a public meeting allowed to use recording devices including, but not limited to, tape recorders, cameras, and videotape equipment?**

**– YES –  
(see RSA 91-A:2 II)**

those tapes must be available for review. However, if the tapes are used to make a transcript of the meeting, (i.e., the minutes) that too is a governmental record and must be made available. RSA 91-A:4, III-a specifies the required retention period for electronic governmental records and states: "Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III."

Once the board accepts the written minutes, they become the official record of the meeting and the tape no longer needs to be kept unless the board wishes to do so, whereby it too becomes a governmental record to be retained by the board. Some boards immediately tape over the previous meeting; others save the tape until any appeal period has passed. Whichever procedure the board follows should be spelled out in the board's rules of procedure.

RSA 91-A requires minutes to include the names of members present, persons appearing before the board, a brief description of the subject matter discussed, and any final decisions made by the board. However, good practice would be to include much more in the minutes to provide a full and accurate record of the proceedings of the meeting.

The administrator should create the initial minutes including at least the minimum required by RSA 91-A, make them available to the public, and distribute them to board members within 5 business days after the meeting. During the interim before the board meets again, if the administrator

expands upon these initial minutes to include additional details and a more full record of the discussions and content of the meeting, this expanded document should be distributed to the board for the members to review, amend as needed, and vote to adopt at the next meeting.

The initial minutes and subsequent expanded document, if there is one, are both governmental records and must be made available to the public.

All governmental records should be kept at the board's regular place of business. Requests for copies of governmental records should be promptly complied with. If prompt compliance is not possible, then the records should be made available within 5 business days, or the individual should be told the reason for denial of the request or provided with a statement as to when the requested record can be made available. A person requesting governmental records may be charged copying costs, but those costs may not exceed actual costs.

## **RULES OF PROCEDURE**

The rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with the town clerk for public inspection.

**Must the planning board  
adopt rules of procedure?  
– YES –  
(see RSA 676:1)**

The principal statutory source of rules governing planning board procedures on subdivision plats is found in RSA 676:4, but the board's own rules of procedure should supplement and "fill in the gaps" as to those procedural questions that are not covered in the statutes. The rules govern all of the board's activities and are not limited to only subdivision review.

The rules should address internal procedures of the planning board, including, but not limited to, swearing in of members, organization of the board, time and place of the meetings, and delegation of certain tasks to a clerk such as the taking and keeping of minutes and other records of the board.

Rules of procedure not only inform the public about how business is conducted (for example, what order of business is followed), but it also helps the board stay on track when there are difficult issues to resolve. They can be used to answer certain questions the public and applicants might have about such things as site visits for applications, how minutes are recorded and made official, the places for posting public notices, and when alternate members may participate in board matters. Rules of procedure should also address the procedures to be followed during a public hearing. These procedures should provide for requests to alter the order of business; typically, the chair would make that determination without a board vote.

## **ELECTION OF OFFICERS**

Each local land use board shall elect its chair from the appointed or elected members and may create other offices it deems necessary as described in RSA 673:9. An ex officio member (city council or selectmen's representative) may not serve as chair. Officers serve for one year (RSA 673:9). The chair shall preside over meetings and is typically responsible for conduct and decorum of the meeting. The chair has the responsibility to ensure that all parties receive a full and fair hearing before the board and to ensure rules of procedure and applicable state laws are followed.

A board may want to consider electing a vice-chair who shall preside over meetings and assume the duties of the chair in his/her absence. If the vice-chair is also absent, then the secretary shall assume the chair's duties.

## PLANNING BOARD RECORDS

Keeping accurate records of the planning board's activities is extremely important. In the event of a challenge to a decision made by the board, the completeness of the records is vital to its defense.

Among the matters that should be carefully documented are:

- The time and location of notices that are posted and published;
- The list of abutters provided by applicants and the dates that notices are mailed;
- Meeting agendas that list public hearings and applications that are under discussion;
- The dates on which applications are submitted to the board;
- The dates on which applications are accepted as complete by the board and the 65-day review period begins;
- Any extensions that are granted or deadlines that are waived;
- Conditions that are placed on approvals; and
- Written decisions that must be on file within 5 business days.

### How to Run a Meeting

The board has discretion to determine its own order of business at its meetings, and should do so. As noted above, the rules of procedure are a good vehicle for making this information available to the public and new board members. Board meetings should be conducted in a business-like fashion, they should be fair, and they should always follow correct legal procedures as applicable.

Although not required by statute, it is a good idea to prepare an agenda in advance and post it in a public place. If the budget allows, posting in the local newspaper is also helpful. This informs the applicants and the public about the business before the board and the order in which applications will be heard.

The chair should open the meeting by going formally on the record, announcing the date and place of the meeting and recording the names of all regular and alternate members present for the record. If the board has a practice of concluding business at a certain time, this should be announced at this point.

The order of business is then followed, based on the board's adopted rules of procedure. It can be helpful for the chair to introduce the board members and give a brief explanation of the roles and responsibilities of the board relative to the business at hand.

**Who *MUST* be heard?**  
**The applicant or appellant, abutters, holders of interests such as conservation easements, "and all non-abutters who can demonstrate that they are affected directly by the proposal under consideration." (RSA 676:7, I(a) and RSA 676:4, I(d)).**

**Who *MAY* be heard?**  
**Anyone, at the boards' discretion.**

**It is common for parties to assume they have an absolute right to read a 10-page single-spaced letter "into the record." Wrong! Explain to them that the letter will be read by board members and is already part of the record. Give them 2 to 3 minutes to highlight important points.**

All persons speaking should address only the board. The chair should not allow cross-witness arguments or cross-examination. This is not a trial. Questions may be raised (e.g., a better question to an applicant) but the questioner should address the chair and the chair should repeat the question in a manner that is impartial and seeks the type of information the board needs to make its decision.

Keep in mind that the planning board is not at the mercy of applicants or other parties. Set some parameters in advance; ask applicants how much time they reasonably need and hold them to it. Limit others to a certain time limit (e.g., 3 or 5 minutes maximum).

### **Advisory Opinions**

The statutes specifically allow planning boards to hold meetings with potential applicants for “conceptual consultation” and “design review,” which are non-binding for both the board and the applicant (see RSA 676:4, II). The board should emphasize the non-binding nature of these pre-application procedures by not taking any formal votes. See Chapter III for more details on these procedures.

### **DEVELOPMENT OF REGIONAL IMPACT**

All local land use boards are required to determine whether an application before it is a “development of regional impact” (RSA 36:54). In such cases, hearing notification to neighboring municipalities and to the regional planning commission must be made 14 days in advance (not 5 days like everyone else), and representatives from neighboring municipalities and the regional planning commission have the right to testify, but not the right to appeal. Doubt concerning the potential for regional impact is required to be resolved in favor of finding such potential.

**Criteria for regional impact (RSA 36:55) include, but are not limited to, the following:**

- The relative size and number of dwelling units involved (if a subdivision);**
- The proximity of the development to a municipal boundary;**
- Impact upon transportation networks;**
- Anticipated emissions;**
- Proximity to regional aquifers or surface waters;**
- Shared facilities.**

Decisions on the potential for regional impact are formal actions of the board. When the planning board accepts an application as complete, it should also take a vote to determine if the proposed development might have regional impact or not. This would give the board enough time to properly notice adjacent municipalities and regional planning commissions before the public hearing is held on the application.

Southern New Hampshire Planning Commission has worked with its member communities to develop detailed guidelines for evaluating regional impacts of proposed developments. For additional information, visit: <http://www.snhpc.org/>

### **SITE VISITS**

Despite authority the statutes may seem to grant, planning board members have no right to trespass on private property without the permission of the property owner. Otherwise, constitutional due process violations may result, giving rise to a civil rights action against the municipality, the planning board and its members. The board should always get permission from the property owner to visit the site.

- If the permission is refused, the board normally would deny an application for failure of the applicant to allow the board to get sufficient information.
- Individual board members may visit a site (with permission) and, as long as there is no quorum of the board, the Right-to-Know law does not apply (public meeting and minutes requirements).
- If a quorum attends a site visit, it is a ‘meeting’ under the Right-to-Know law. Notice is required, as well as minutes.
- Since it is a meeting, a site visit must also provide for the public to attend and observe.
- If the applicant refuses access to the non-board public, that also may be a basis for denial (without prejudice).

## THE RIGHT-TO-KNOW LAW

**Background.** Openness in the conduct of government is an essential principle of democratic government. Although the Right-to-Know law wasn’t enacted until 1967, openness in government is not a recent notion in New Hampshire. RSA 41:61, dating back to 1885, requires that all municipal records “shall be open at all proper times for public inspection and examination.”

**Constitution.** Open and accountable government is an explicit requirement of the New Hampshire Constitution:

“All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.”

NH Constitution, article 1, pt. 8

**Preamble.** The preamble to RSA 91-A, commonly known as the Right-to-Know law, states the legislature’s intent in enacting the law:

“Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.”

**Minimum Standard.** The law establishes certain procedures to be followed by governmental bodies in the conduct of their affairs and establishes certain rights of access by members of the public to two important aspects of those bodies - their meetings and their records. The courts have generally construed very liberally the provisions of this law. The law is intended to assure that public bodies conduct their business in an open and fair manner. Provisions of the law can be complied with by planning ahead to meet notice requirements and deadlines.

The Right-to-Know statutes represent the minimum acceptable standards under the law. More stringent requirements apply in some instances, either by state statute or local ordinance. The Right-to-Know law has been amended over the years and now provides direction on how to deal with electronic communications and records that did not exist when the law was first enacted in 1967.

Board members should be especially careful about using e-mail to conduct business. One-way e-mail communication is permissible but constitutes a “governmental record” subject to disclosure (see RSA 91-A:1-a, III). However, members should not reply to e-mails because doing so would constitute an un-noticed “meeting.” The information contained in the e-mail should be disclosed and discussed, if needed, at the next physical meeting.

All governmental records must be kept at the office of the public body so any e-mail sent to all the members should also be sent to the town office. A copy should be printed and kept with the records of the public body. Board members may want to consider adding a disclaimer to all planning board e-mails to this effect: “Delivery of this e-mail creates a ‘governmental record’ and is intended to be viewed by the recipient only and not forwarded or redistributed to any additional members of the public body.”

Consult the NH Attorney General’s Right-to-Know law memorandum:  
[www.doj.nh.gov/civil/publications.htm](http://www.doj.nh.gov/civil/publications.htm)