



Planning Board Basics

Roles and Responsibilities



NH Office of Energy & Planning

Fall Conference

October 13, 2007

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I've often thought that if our zoning boards could be put in charge of botanists, of zoologists and geologists, and people who know about the earth, we would have much more wisdom in such planning than we have when we leave it to the engineers.

Justice William O. Douglas

Remarks at conference sponsored by the
American Histadrut Cultural Exchange
Institute, Harriman, New York, February
17-19, 1967

A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,'* which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.* If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. (citations omitted)

Village of Euclid, Ohio v. Ambler Realty Co.
272 U.S. 365, 388-389 (1926)

Interpretation: zoning is a proper exercise of the government's police power.

* *Literally, "so use yours as not to injure others."*

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Introduction

The planning board has three roles, or spheres of activity:

- I. **The planning role**, in which the board establishes a vision for the future of its community and identifies the steps necessary to achieve that vision;
- II. **The legislative role**, in which the board proposes ordinances and enacts regulations—the rules by which to achieve the vision; and
- III. **The regulatory role**, in which the board applies the ordinances and rules to specific situations in fulfillment of the vision.

The Planning Role

Master Plan (RSA 674:1 through 4)

See Chart 1

- **Duty** to prepare and amend from time to time, and a responsibility to educate the public (RSA 674:1, I). The board also has authority to recommend courses of action for the erection of public structures and the creation of programs for municipal improvements (RSA 674:1, II).
- **Master Plan Content.** As a result of a statutory amendment a few years ago, the required and suggested content of a local master plan has changed.

MINIMUM REQUIRED SECTIONS

Vision

- Directs the other sections of the plan
- Set of statements that articulate the desires of the citizens affected by the master plan, not only for their locality but also for the region and the whole state
- Set of guiding principles and priorities to implement that vision

Land use

- Basis for all other sections
 - Translate the vision statements into physical terms
 - Show existing conditions and the proposed location, extent, and intensity of future land use
-

OPTIONAL SECTIONS (but see RSA 672:1)

Transportation

- Considers all pertinent modes of transportation
- Provides a framework for both adequate local needs and for coordination with regional and state transportation plans

Community Facilities

- Identifies facilities to support the future land use pattern, meets the projected needs of the community, and coordinates with other local, state, and federal government planning

Economic Development

- Proposes actions to suit the community's economic goals, given its economic strengths and weaknesses in the region

Natural Resources

- Identifies and inventories any critical or sensitive areas or resources, not only those in the local community, but also those shared with abutting communities
- Provides a factual basis for any land development regulations that may be enacted to protect natural areas
- Identifies any conflicts between other elements of the master plan and natural resources, as well as conflicts with plans of abutting communities
- Should include a local water resources management and protection plan as specified in RSA 4-C:22 (But this involves review and approval by OEP).

Natural hazards

- Documents the physical characteristics, severity, frequency, and extent of any potential natural hazards
- Should identify those elements of the built environment at risk from natural hazards
- Should identify the extent of current and future vulnerability that may result from current zoning and development policies

Recreation

- Shows existing recreation areas and addresses future recreation needs

Utility and Public Service

- Analyzes the need for and showing the present and future general location of existing and anticipated public and private utilities

Cultural and Historic Resources

- Identifies them for rehabilitation or preservation from the impact of other land use tools such as land use regulations, housing, or transportation

Regional Concerns

- Describes the specific areas in the municipality of significant regional interest, including resources wholly contained within the municipality or bordering, or shared, or both, with neighboring municipalities

Neighborhood Plan

- Focuses on a specific geographical area that includes substantial residential development
- May be created only after the adoption of the overall municipal master plan, then becomes part of it

Community Design

- Identifies positive physical attributes in a municipality and provides for design goals and policies for planning in specific areas to guide private and public development

Housing

- Assesses local housing conditions and projects future housing needs
- Focus on residents of all levels of income and ages in the municipality and the region as identified in the regional housing needs assessment performed by the regional planning commission pursuant to RSA 36:47, II, and which integrates the availability of human services with other planning undertaken by the community

Implementation

- A long range action program of specific actions, time frames, allocation of responsibility for actions, description of land development regulations to be adopted, and procedures which the municipality may use to monitor and measure the effectiveness of each section of the plan

The Wider Purpose

Most of the “recommended” sections of a master plan may be optional for communities, but all of your efforts—whether embodied in a plan or as implemented through ordinances and regulations—have to reflect certain important underlying principles, some of which are simply based in fairness; others are specifically enumerated in statute.

Read RSA 672:1, which is the fundamental basis for local planning in New Hampshire. This law encourages certain things by limiting what you can do, either through regulations you’ve adopted or through their application and interpretation. Specifically, you may not unreasonably limit

Renewable energy ▪ Agriculture ▪ Forestry ▪ Fisheries ▪ Affordable housing

Match that against the zoning enabling statute, RSA 674:16, which says that zoning may be adopted “For the purpose of promoting the health, safety, or the general welfare of the community...” But what is “the community”? It is the region within which your municipality is situated—community doesn’t stop at the town line. Britton v. Chester, 134 N.H. 434 (1991).

Then step into the powerful realm of RSA 674:21, “Innovative Land Use Controls.” There is a laundry list of things you can do, but observe that the statute says that they “may include, but are not limited to” that list. This is an opportunity to be creative, and to think outside the box of Euclidean zoning. For help understanding and using this creative potential consult with your regional planning commission. Also visit DES’ website, which includes a handbook on innovative land use controls: www.des.state.nh.us/REPP/. Click on the “Innovative Land Use Planning Techniques Handbook.”

- **Community involvement** is essential to the success of a master plan. Don't expect the public to buy your product if you haven't involved them in the process of its development. *The community needs to own it.*
- **Adoption** is by the planning board, after holding a public hearing (RSA 674:4)
- **Timeline:** generally, master plans look forward for a period of 10 to 20 years
- **Duration:** there is no statutory requirement that a master plan should be updated on any particular schedule. But if your plan declares that it is intended to cover a certain period of time, you'll be hard pressed to argue its validity once that time has passed (But see Portsmouth Advocates, Inc. v. Portsmouth, 133 N.H. 876 (1991) (despite an intended duration of five years, the master plan's use of language describing a longer application of more general principles allowed the City Council to treat the plan's recommendations with considerable flexibility).

Capital Improvements Program (CIP) (RSA 674:5 through 8)

- **Schedule** of municipal capital needs for at least the next six years. RSA 674:5. The CIP must represent the level of urgency and need for a particular expenditure, and can include operational and maintenance costs, as well as sources of revenue. RSA 674:6.
- **Definition** of what belongs in a CIP is a matter of local determination—but typically includes higher cost, more durable items (e.g., a fire engine, as opposed to a box of pencils).
- **Planning board or separate committee.** Until recently, the CIP was the exclusive domain of the planning board, but a statutory amendment a few years ago now permits towns to form a separate CIP committee. Either way, the town cannot legally create a CIP without prior approval by the town's legislative body (typically, town meeting). RSA 674:5
- The statute says that the "**Sole purpose**" of the CIP is to aid the governing body and budget committee to develop the annual municipal budget. RSA 674:5. **But** a CIP is a prerequisite to the adoption of impact fee and growth management ordinances. RSA 674:21, V(a) and RSA 674:22.

Growth Management and Impact Fee Ordinances

- **Prerequisites:** properly prepared and adopted master plan and CIP are necessary before adopting growth management or impact fee ordinances.
- **Growth management ordinances** should "based upon a growth management process intended to assess and balance community development needs and consider regional

development needs.” RSA 674:22. They should be designed to be phased out when the need is no longer present.

- **Interim growth management ordinances** may be used to address “unusual circumstances requiring prompt attention and for the purpose of developing or altering a growth management process under RSA 674:22, or a master plan or capital improvement program...” RSA 674:23. They do not require either a master plan or a CIP, but they sunset after one year. NOTE: interim growth management ordinances may not be proposed by citizen petition (but regular growth management ordinances proposed under RSA 674:22 may be).

Stay tuned for possible statutory changes to RSA 674:22 and 23.

- **Impact fee ordinances**

- may be adopted to levy a fee for the off-site impact of developments upon municipal and school **capital facilities**—such as roads, water and sewer systems, recreational facilities, and school facilities.
- may not be used for operational or maintenance costs, and may not be used for the acquisition of open space.
- must be expended within 6 years from collection, or returned to the developer/owner. RSA 674:21, V. This may be tough to figure out if you haven’t specified how to address its return in your ordinance. Practically speaking, if the property has changed hands since the impact fee was collected, the initial cost borne by the developer has already been passed on to subsequent owners. It seems logical that it is to them that the unused fee should be returned.

Case Study #1: Impact Fees and Growth Management Ordinance

The applicant owns property along the Hudson River in Merrimack and seeks approval to construct a 101-unit elderly housing condominium project known as Rivertrip. It submitted a site plan application to the town's planning board for acceptance in mid-August 2000.

In the fall of 2000, the town planning board published a growth management ordinance upon which it then conducted public hearings. The first public notice was published on December 22, 2000. The revised ordinance was approved at a town meeting in March 2001.

After several public hearings, the planning board on December 20, 2000, the Board accepted the site plan application. The plaintiff appealed the planning board's rejection of its site plan application to the superior court. The applicant contends that the Rivertrip site plan is not subject to the growth management ordinance because impact fees, fees assessed by a municipality to shift the cost of capital improvements for a development from the municipality to the developer, were assessed. See RSA 674:21, V(h).

When a developer has paid an impact fee or the municipality has assessed such a fee as part of the approval for that development, a subsequently adopted growth management ordinance will not apply to the project. The operative language of RSA 674:21, V(h) provides grandfathering protection to a development from a newly-adopted growth management ordinance only if an impact fee has been paid or assessed prior to the ordinance's enactment.

MORAL: **You can't have it both ways. Either accommodate fiscal capital impacts of growth or catch a breather while trying to manage growth.**

Source: This is a more simplified version of Monahan-Fortin Properties, LLC v. Town of Hudson, 148 N.H. 769 (2002), a case that involves a much more convoluted and questionable ruling.

Case Study #2: Off-site Improvements

The plaintiffs own and operate a camp in Derry containing a private nine-hole golf course. In 1997, they sought site plan approval to add an additional nine holes and to open the course to the public. The planning board approved the plan, contingent upon payment of \$7,500 for off-site improvements necessitated by increased traffic. The plaintiffs appealed to the superior court challenging the planning board's requirement that they pay for off-site improvements. The superior court found in favor of the plaintiffs. The town then appealed to the Supreme Court, which affirmed (Simonsen v. Derry, 145 N.H. 382 (2000)).

RSA 674:21 provides in pertinent part:

. . . .
V. As used in this section "impact fee" means a fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality

. . . .
(i) Neither the adoption of an impact fee ordinance, nor the failure to adopt such an ordinance, shall be deemed to affect existing authority of a planning board over subdivision or site plan review, except to the extent expressly stated in such an ordinance.

Considering the words of the statute as a whole, the Court concluded that RSA 674:21, V(i) does not preserve the "existing authority" of a planning board under RSA 674:44 to condition the approval of a site plan upon the applicant's payment of money for off-site improvements. While the statute authorizes municipalities to impose impact fees, it comprehensively regulates the municipality's implementation of such fees. The statute's scope suggests that the legislature intended to preempt the common law rule set out in New England Brickmaster v. Salem, 133 N.H. 655 (1990).

The Court noted, however, that RSA 674:21 does preserve a planning board's authority to impose conditions on site plan or subdivision approval that require expenditures to improve some aspect of the applicant's own property.

WHAT? How do we deal with this confusion?

1. Adopt an impact fee ordinance.
2. Make a finding that the development is "Scattered and Premature". RSA 674:36: "Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services; ..."
3. Allow the developer to actually construct the required improvements.

BUT WAIT! Since Simonsen was decided, the Legislature amended the impact fee statute, RSA 674:21, V, by adding a new subparagraph (j), which clearly states that planning boards have the authority to levy exactions on developments for their off-site impacts on (1) highways, (2) water and (3) sewer systems, and (4) drainage, **even without an impact fee ordinance**. Under this statute, Simonsen would have been decided differently, because it addressed highway impacts. For anything other than the four types of improvements listed in the statute, such as schools, however, you still need an impact fee ordinance.

The Legislative Role

Zoning Ordinance

AMENDMENT AND ADOPTION

- **Recommendation:** planning board does not adopt, but recommends adoption and amendment. The local governing body (e.g., board of selectmen) may also propose amendments (RSA 674:1, V). Zoning ordinances and amendments to them are adopted by the local legislative body (e.g., town meeting).
- **Drafting authority:** planning board drafts proposals for zoning amendment for the town meeting warrant.
- **Petitioned amendments** to the ordinance are reviewed by the board and considered for recommendation. They must be placed on the warrant, even if the resulting ordinance would be illegal to enforce.
- **Hearing:** All zoning amendments (including petitions) require at least one public hearing.
- **Direct relationship with the master plan:** The ordinance and amendments should support the goals and objectives of the master plan.
- **Innovative land use controls can be made mandatory:** a 2004 change to RSA 674:21, II clarifies a municipality's ability to require the use of so-called "innovative land use controls," including open space subdivisions. These are land use regulations that can only be adopted through the zoning amendment process, although the planning board's subdivision and site plan regulations can supplement them. To be required, innovative land use controls must be supported by the master plan. [But note: "inclusionary zoning" (promoting the development of affordable housing) is the only innovative land use control that is voluntary according to its statutory definition—therefore, your ordinance cannot require it.]

Subdivision Regulations (RSA 674:35 through 38)

- **Local authorization:** upon legislative body authorization, planning boards may draft, adopt, and amend subdivision regulations (RSA 674:35)
- **Relationship with master plan:** Regulations should be consistent with the goals of the master plan and spirit and intent of the zoning ordinance (but adoption of either a master plan or zoning is not a prerequisite to the adoption of subdivision regulations).
- **Relationship with zoning:** regulations cover a vast range of issues (RSA 674:36), but should not be used as a substitute for things you can't get the town to pass at town

meeting. On the other hand, your zoning ordinance can supplement your subdivision regulations—e.g., by establishing minimum lot sizes for reasons other than septic disposal

- **The basics:** regulations should address street layout, utilities, open space, lot configuration, etc.
- **Adoption process:** adoption of regulations and amendments require a public hearing. They do not go to the local legislative body for vote! (RSA 674:36, I)
- **Scope of your own definition of subdivision:**
 - Your regulations cannot be broader than the state’s definition
 - To use the full breadth of the state’s definition, you must adopt it fully

What is a subdivision? RSA 672:14 –

Subdivision' means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development. It includes resubdivision and, when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided. The division of a parcel of land held in common and subsequently divided into parts among the several owners shall be deemed a subdivision under this title.

“Subdivision” does not mean a line on a map; it means an intention to separate one portion of land from another, for the purpose of allowing another person to use the other portion of the land for some length of time.

Use a common sense approach. Whether or not two primary residences on a single lot is a subdivision is a matter of some debate. The better argument seems to be that it is a subdivision.

Site Plan Review Regulations (RSA 674:43 and 44)

- **Local authorization:** upon legislative body authorization, planning boards may draft, adopt, and amend site plan regulations, but first, the municipality must have adopted zoning, and the planning board must have properly adopted subdivision regulations (RSA 674:43, I)
- **General issues:** matters that should be addressed by site plan regulations are in RSA 674:44, II. They should include traffic, parking, building location, utilities, landscaping, signage, etc.

- **Mandatory issues:** things that must that must be included in the regulations are in RSA 674:44, III. They include
 - (a) The procedures to be used by the board in reviewing site plans;
 - (b) Definition of the purposes of site plan review;
 - (c) The general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction;
 - (d) Provisions for guarantees of performance, including bonds or other security; and
 - (e) Provision for waiver of any portion of the regulations in such cases where, in the opinion of the planning board, strict conformity would pose an *unnecessary hardship* (not the same as that considered by the ZBA in deciding on a zoning variance) to the applicant and waiver would not be contrary to the spirit and intent of the regulations.
- **Relationship with master plan and zoning:** The regulations should be consistent with the goals of the master plan and the spirit and intent of the zoning ordinance.
- **Adoption** of regulations and amendments require a public hearing.

What is a site plan? RSA 674:43 –

Unlike subdivision, there is no formal statutory definition. By implication, the definition is found in the site plan regulation enabling statute:

A municipality may “...authorize the planning board to review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses or for multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units, whether or not such development includes a subdivision or resubdivision of the site.”

So site plan review covers all non-residential uses, as well as residential structures larger than duplexes. Because of the inclusion of multi-family residential structures, there is potential for overlap between subdivision and site plan authority.

Growth Management and Impact Fee Ordinances

- See discussion above.
- **Adoption** of either a growth management ordinance or an impact fee ordinance is closely related to the planning process, but is also part of the legislative realm of the planning board.
- **You can have both**, but remember the conclusion of Case Study #1 above

The Regulatory Role

Subdivision and Site Plan Review

See Chart 2

For ***both*** Preliminary Conceptual Consultation and Design Review, mandatory preapplication review is allowed: the local legislative body may authorize the planning board to require preapplication review. Take your pick—either or both of the following.

PREAPPLICATION #1: Preliminary Conceptual Consultation (RSA 676:4, II(a))

- **Non-binding** conceptual discussions.
- **No notice required**—no public hearing necessary; but good practice suggests that it should be an item on the agenda and it should also show up in the minutes.

PREAPPLICATION #2: Design Review Phase (RSA 676:4, II(b))

- **Non-binding** discussions—but do be careful about the certainty with which you make representations.
- **More detail** is presented—how much is up to you, but don't let it turn into a dress rehearsal of the formal application. Identify special studies that you think might be required, concerns relative to the nature of the development, impact upon the environment and surrounding properties, and issues specific to the parcel itself (special natural or historic features that warrant protection/preservation). In short, take this opportunity to alert the applicant to things that will come up during the formal review process.
- **Notice to abutters is required**—no public hearing is required, but you can choose to allow for abutter input if you wish
- **DANGER, WILL ROBINSON!** The Legislature recently conferred a special vesting provision upon development proposals that are presented to planning boards under the design review phase of preapplication review. RSA 676:12 gives such proposals 12 months of protection against changes to local land use regulations, starting at the end of the design review process (this is not the “normal” vesting statute—see the discussion of RSA 674:39, below).

Practice Pointer

If you're going to use design review, you need to specifically identify when the process ends, and this should probably be done in writing ("Dear Miss Developer: This is to inform you that at its meeting on November 1, 2007, the planning board concluded its design review of your proposal to construct a superconducting supercollider. [and so on...]"). Otherwise, it's ambiguous as to when the 12 months' vesting period begins and ends.

Of course, if you limit your preapplication review to preliminary conceptual consultations, this is not a concern.

FORMAL APPLICATION PHASE (RSA 676:4, I)

- Notice to abutters is required. Who is an abutter? See RSA 672:3.
- Is it a development with the potential for regional impact? See RSA 36:55-58. If it has the potential for regional impact, the planning board must notify the affected municipality(ies) and the regional planning commission(s), which have the right to provide testimony as abutters (but not the right to appeal, unless standing can be independently demonstrated). At the applicant's expense, a complete set of plans must be submitted to the regional planning commission for its review.
- Public hearing is necessary before the board makes a final decision (with a couple narrow exceptions; see RSA 676:4, I(e)(1)).
- Planning board must first determine the completeness of the application within 30 days of receipt. Does the board have to let the applicant speak at this point? No—an applicant does not have a right to be heard while the board is considering the completeness of an application. DHB v. Town of Pembroke, ___ N.H. ___ (2005). BUT, if the application is sufficiently complete, then the planning board must accept it and commence its formal review—you can't drag your feet, hoping to make an application be subject to a new regulatory standard that's being proposed. Rallis v. Town of Hampton, ___ N.H. ___ (2001).
- Once the application is determined sufficiently complete, the planning board has 65 days to approve, approve with conditions, or deny.
- The planning board cannot approve a subdivision or site plan that does not comply with the zoning ordinance—only the ZBA has the power to grant variances.

But the planning board (or other board) may be given flexible zoning authority under a "conditional use permit." See RSA 674:21.

- The board may grant waivers to subdivision and site plan regulations, provided there is just cause—you don't need to make findings on waivers granted, unless your own regulations require them.
- **Conditions of approval.** Recognize the difference between “conditions precedent” and “conditions subsequent.”

CONDITIONS PRECEDENT: the board might decide to approve a plan, contingent upon certain conditions being met. For example, outstanding state permits (e.g., DES alteration of terrain, subdivision approval, or shoreland protection zone permit, or DOT access permit on a state highway) might not be ready at the time of the board's approval. The board can grant approval, but withhold signature of the plans until these conditions have been met.

CONDITIONS SUBSEQUENT: this is everything that the developer is obliged to do regarding the development, such as construction of an internal roadway according to town specifications.

- **Recording of plans:** Approved *subdivision* plans must be recorded in the registry of deeds—it's better if the town takes responsibility for this, because then you'll avoid the problem of approved but unrecorded plans (the applicant should still bear the cost of recording); *site plans* need not be recorded in the registry unless locally required.
- **Notice** of the board's decision must be issued in writing within 144 hours of the decision. RSA 676:3. Reasons for a denial must be adequately stated in the board's records. RSA 676:4, I(h).

Vesting of Development Rights: The “Four-Year Exemption” and Beyond

The statute that outlines the so-called “four-year exemption” was reorganized and rewritten a couple years ago in response to AWL Power v. City of Rochester, ___ N.H. ___ (200_). The statute is now parsed into logical components, as follows:

I. **Every subdivision** plat approved by the planning board and properly recorded in the registry of deeds **and every site plan** approved by the planning board and properly recorded in the registry of deeds, if recording of site plans is required by the planning board or by local regulation, **shall be exempt from all subsequent changes** in subdivision regulations, site plan review regulations, impact fee ordinances, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, **for a period of 4 years** after the date of approval; **provided that:**

(a) **Active and substantial development or building** has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat **within 12 months** after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the

city, town, or county in which there are located unincorporated towns or unorganized places, at the time of commencement of such development;

(b) Development remains in full compliance with the public health regulations and ordinances specified in this section; and

(c) At the time of approval and recording, the subdivision plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the location of such subdivision plat or site plan.

II. Once **substantial completion** of the improvements as shown on the subdivision plat or site plan has occurred in compliance with the approved subdivision plat or site plan or the terms of said approval or unless otherwise stipulated by the planning board, **the rights of the owner or the owner's successor in interest shall vest** and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, **except impact fees adopted pursuant to RSA 674:21 and 675:2-4**, shall operate to affect such improvements.

III. The planning board may, as part of its subdivision and site plan regulations or as a condition of subdivision plat or site plan approval, specify the threshold levels of work that shall constitute the following terms, with due regard to the scope and details of a particular project:

(a) "Substantial completion of the improvements as shown on the subdivision plat or site plan," for purposes of fulfilling paragraph II; and

(b) "Active and substantial development or building," for the purposes of fulfilling paragraph I.

IV. Failure of a planning board to specify by regulation or as a condition of subdivision plat or site plan approval what shall constitute "active and substantial development or building" shall entitle the subdivision plat or site plan approved by the planning board to the 4-year exemption described in paragraph I. The planning board may, for good cause, extend the 12-month period set forth in paragraph I(a).

- ***The importance of this last paragraph should not be ignored.*** Planning boards are able to let developers know what they need to do for the purpose of gaining the protection of the statute. If a planning board chooses not to do this, then the developer is given a "free ride" for four years.

RSA 674:39: But what does it all mean?

1. All developments are exempt from changes to most local land use regulations in the first year after approval.
2. If a developer performs “active and substantial development or building” within the first year after approval, then the development is protected against most local regulatory changes (including changes to impact fees) for an additional three years (hence, the “four-year exemption”).
3. If a planning board fails to identify what is meant by “active and substantial development or building,” then the approved development automatically gets the four-year exemption.
4. If a developer performs “substantial completion of the improvements” shown on the plat at any time (even after the four-year exemption period is complete), then the development vests against any future changes to local regulations, with the exception of impact fees, which may be changed at any time (outside the four-year exemption). If the developer fails to substantially complete the development within four years, then the development will be subject to regulatory changes until it is substantially complete.
5. The planning board is not required to define these terms, but the benefit of doing so is to help avoid the problem faced by the City of Rochester in the AWL Power case.

Case Study #3: A Pair of Subdivision Decisions

SCENARIO 1—SCATTERED OR PREMATURE!

An eight-lot subdivision of 42 acres is proposed. The access to the lots is by gravel roads that are often impassible in “mud season.” On the road, there are twenty-five existing year-round residences, including some houses in a subdivision on land adjacent to the proposed subdivision. The applicant proposes to phase the development and offers \$16,000 toward the upgrading of the deficient road. The planning board unanimously denies the application on prematurity grounds, citing the inadequacy of the roads and “an excessive expenditure to the Town” for the required road improvement.

Question: may a planning board deny a subdivision application if it determines that the condition of access roads is so poor or inadequate that the safety of the present residents will be jeopardized further by the subdivision for which approval is sought?

Answer: Yes! A planning board may properly consider the present condition of access roads when ruling on a subdivision application, and if a hazard is created by the **present** level of development, it may find that future development is premature. See Zukis v. Town of Fitzwilliam, 135 N.H. 384 (1992). The board must ascertain what amount of development, in relation to what quantum of services available, will present the hazard described in the statute and regulations. **At the point where such a hazard is created**, further development becomes premature. Citing Garipay v. Town of Hanover, 116 N.H. 34 (1976). That’s the law, though it can have the sometimes unfair result that the “last one in” foots the bill.

SCENARIO 2—SCATTERED OR PREMATURE?

A twenty-three-lot subdivision is proposed in a town that has schools that are beyond capacity. The planning board hears testimony about the overcrowded condition of the schools, and the impact of further development on them. One planning board member is on the record saying “I think right now . . . this Board has to look at what the town has to get done. And I firmly believe we cannot afford to put one more child in that school, in the school district who isn't already living in this town. . . . I'd like to see us try to work with the developers There's basically not a whole lot wrong with that plan. . . . It's just simply we can't afford to handle services that go along with allowing it to get built right now. And we're not saying don't ever do it. All we're saying is just don't do it now.”

Question: Can the planning board deny an application because of concerns that do not necessarily relate to the development itself? More particularly, can the board turn down an application because there’s just too much growth happening?

Answer: No! The court said “The focus of the inquiry is upon the effect of the proposed development on the community, not the effect of further development in general on the community.” See Ettlingen Homes, Inc. v. Town of Derry, 141 N.H. 296 (1996). The adequacy of school facilities is a legitimate concern of the town; the circumstances of the school facilities, however, do not constitute a “danger . . . to health, safety, or prosperity by reason of the lack of . . . schools.” RSA 674:36, II(a).^{*} Further testimony at the planning board meeting held on the plaintiff's application makes it clear that the town was aware of the need to proceed with formal growth control regulation, including the need to formulate a comprehensive plan. The planning board's action in denying the plaintiff's proposal on the grounds of “prematurity” plainly was taken to control growth, and it exceeded the board's statutory authority under RSA 674:36, II(a).

^{*} So what does the statute mean? A single development could have an impact that the otherwise adequate facilities of the town could not absorb (back to Zukis).

Case Study #4: Pre-Application Review and the Rule of Fair Play

The developer contracted to purchase a 21-acre parcel of land to develop it as a mobile home park. Before purchasing the land, the developer met with two successive town planners several times in order to discuss the various municipal requirements applicable to his project. Both town planners were receptive to his plan and optimistic that it would be approved. The developer also met with the board during a "study session" in September 1988. Based on the favorable representations made at that meeting to discuss the plan in general and the positive indications given earlier by the two town planners, the developer purchased the property for \$290,000, filed the application and incurred other preliminary costs relating to the project.

In December 1988, the planning board held a public hearing on the application. The town planner submitted a favorable report and the board voted 5-1 to grant conditional preliminary site plan approval. The approval was made subject to twenty-eight conditions: fourteen standard conditions and fourteen conditions unique to the developer's plan. The board also agreed by a five to one vote to review the project as a "site plan" and not a "subdivision." The developer then retained an engineer to draft a detailed set of plans and went forward with efforts to satisfy the various conditions.

The town attorney subsequently recommended that the project should be reviewed as a subdivision. In mid-February, the developer received a letter sent on behalf of the board of selectmen informing him that the selectmen would advise the planning board to reconsider its decision to review the developer's proposal as a site plan. Based on the previous assurances of the planning board, and with the knowledge that the selectmen did not have authority to dictate the decision of the planning board, the developer proceeded with his efforts to meet the requirements set forth by the planning board. In April 1989, using the subdivision standards the planning board denied the application.

Batakis v. Town of Belmont, 135 N.H. 595 (1992). Selected excerpts, emphasis added.

"We agree with the town, as did the trial court, that RSA 676:4, II(c) (Supp. 1991) explicitly recognizes the need for allowing the planning board to separate non-binding consultations from the formal review of 'completed applications.' However, the town's argument that representations made by the town during preliminary discussions can never be binding ignores the broad scope of the court's review of board decisions...

"...the planning board is not bound to give final approval to a project based solely upon preliminary discussions held pursuant to RSA 676:4, II (Supp. 1991) [but] the board must act reasonably in both preliminary and formal stages of review.

Quoting the trial court: "[P]lanning boards must be ever mindful of the fact that developers who appear before them will be incurring potentially substantial out-of-pocket expenses in order to complete a project to the satisfaction of a planning board after such a project has received preliminary approval. Therefore, planning boards should not be giving projects preliminary approval arbitrarily on the grounds that they are statutorily free to reject a project for final approval at some later date."

"The evidence shows that the town planners made repeated assurances to the plaintiff that his project would comply with the applicable regulations. Certainly, such evidence alone would not

oblige the board to grant final approval. But, the evidence shows that the board did more. ***Perhaps the board's most unreasonable act was to inform the plaintiff that his project would be reviewed under site plan standards and then to abruptly change its decision and apply subdivision standards in its decision denying final approval.*** No evidence shows that an unknown or intervening circumstance arose to justify the board's recantation. Indeed, the plaintiff presented to the board a detailed plan of the project; a plan which the plaintiff consistently adhered to during all phases of the process.”

Lessons from this case:

- Pre-application review vs. conditional approval: the court appeared to muddy the distinction between pre-application review (RSA 676:4,II) and conditional approval. This confusion might be attributable to the planning board's use of the term “preliminary approval,” rather than the more appropriate “conditional approval.” Even so, the court was clear in its views that even statements made during the pre-application review can have an impact upon how an application proceeds—“non-binding” doesn't necessarily mean “non-binding.”
- Be fair. The court has consistently stated that it is the ***Constitutional obligation*** of the board to work with the applicant and others, and to assist them as they make their way through the process. This doesn't mean you have to say yes to everything, only that you do have to make your expectations clear at the outset.

Case Study #5: Application Review and the Rule of Fair Play
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A developer wanted to build a 180,000 square-foot shopping complex in an area that is zoned for such uses. It filed its site plan application with the planning board, which held several public hearings on the matter. Many members of the public came out and voiced their opposition to the proposal, and openly questioned the application's compliance with the zoning ordinance's development standards and special design criteria that were applicable to the zoning district. The planning board allowed the applicant to submit rebuttal testimony. The board reviewed the conclusions of the municipality's architectural design review committee, which found that the project was suitable for the location. Other testimony was submitted by the municipality's heritage commission, among others, observing that existing buildings on the site—which would be demolished if the project were to proceed—were eligible for listing on the national register of historic places.

After closing the public hearing, the planning board entered its deliberation phase, at the conclusion of which it unanimously denied the application for its failure to satisfy the zoning ordinance's development standards and special design criteria, specifically finding that

- 1) the project would not generate either a short term or long term expansion of the municipality's economic base;
- 2) the applicant's economic impact statement did not adequately address the fiscal costs and net fiscal impacts to the municipality for municipal services;
- 3) the application failed to address certain ancillary employee benefits;
- 4) the project was incompatible with the existing architectural and historic character of the area; and
- 5) the project was not specific to the site and the design did not enhance the scenic and/or recreational uses of the area.

On appeal, the superior court reversed and remanded, finding both that the planning board had failed to share any of its concerns regarding the project's compliance with the ordinance, thereby depriving the applicant of the opportunity to address and remedy any problems, and also that there was insufficient evidence on the record to support the board's decision. The Supreme Court reversed, upholding the planning board's denial.

In reviewing the alleged failure of the Board to provide meaningful assistance to the applicant by communicating its concerns about the proposal's compliance with the zoning standards, the Supreme Court looked at Batakis v. Belmont (see Case Study #4, above), among other cases. The Court distinguished between the preapplication review phase that was the concern of Batakis, and the formal application phase here. During the public hearing process, the Court said that "the board must maintain a certain level of impartiality." The Court took note of the high level of public input that was specifically directed at the issues that ultimately formed the basis for the Board's denial, as well as the opportunity the applicant had to rebut that input. The Court concluded "[t]hat the board did not comment on the suitability of the project in response to [the applicant's] inquiries prior to its deliberative session and vote is neither inappropriate nor unusual since the purpose of the board's deliberative session is to decide the issues."

Looking at the sufficiency of the evidence to support the Board's decision, the Court observed that "[t]he board is entitled to rely, in part, upon its own judgment and experience when reviewing applications for various land uses. ... The board's decision, however, must be based upon more than the mere personal opinions of its members." In upholding the Planning Board's judgment on this matter, the Court only looked at one of the reasons for denial: the project's incompatibility with the existing architectural and historic character of the area. The Court found that, even though the municipality's own architectural design review committee had approved of the project, the Planning Board was nonetheless justified in finding that the project as a whole did not fit within the overall historic nature of the area, and that there was ample support on the record to substantiate that view.

Richmond Company v. City of Concord, ___ N.H. ___ (decided April 11, 2003).

Lessons from this case

"What we've got here is a failure to communicate." In this situation, the Concord Planning Board probably stuck to a more rigid hearing/deliberation division than is practiced by many other planning boards. A certain level of informality can promote the kind of give-and-take dialog that the applicant was looking for here, and can improve the ultimate product presented to the board. But this doesn't mean that the board should abandon formality in its process, and as the Court pointed out, the members of the Board are obliged to maintain their impartiality through the hearing process. The bottom line here is that it's OK to say during the hearing "I have some concerns about the project's compliance with the historic character of the surrounding area," but it's not OK to say "Forget the hearing, I'm ready to vote!"

"Trust your feelings, Luke." Remember that you can exercise independent judgment as a Board member—that's what you're there for. But remember that you should openly state your reasons for going in a particular direction. If you keep your reasons to yourself, they won't get into the record, and the judge will never know what you were thinking.

Case Study #6: Can the Planning Board Ask for More?

A developer wanted to build a new 56,000 square-foot supermarket in a zoning district for commercial uses, and filed a site plan for review by the planning board. Abutting the site was a nursing home. Over a period of eight months, the planning board held seven public hearings, most of which were over three hours long, and the board conducted a site walk. The board denied the application with a 4-3 vote, based on the failure of the applicant to provide adequate screening to protect the neighboring residential uses from the impacts of the site.

The board's site plan regulations addressed perimeter landscaping requirements for the purpose of mitigating the impact of a development upon surrounding properties, including specifically addressing such things as dumpsters, loading docks, driveways and parking areas, noise and air pollution, and the need for privacy. The regulations also allowed the board to ask for additional buffers:

The Planning Board may require wider buffers when required by overlay districts or when required by special circumstances associated with the parcel, such as roadways of special character or those designated by the City as scenic roadways, commercial development abutting residential development; and proximity to natural resources and historic landmarks.

Although the developer was prepared to provide a 25-foot wide landscaped buffer, the planning board determined that more would be necessary, especially to protect the abutting nursing home from the noise of traffic—particularly trucks that would make deliveries to the site. The developer had offered to limit the deliveries to between 5 a.m. and 9 p.m., but the planning board felt that most of the nursing home patients would likely be asleep during at least part of that time.

The trial court found that "in light of these problems with the plaintiffs' voluntary restrictions, any one of which would be enough to support a finding of reasonableness on the Board's part, . . . the Board's finding, that the restrictions would not fully remediate potential noise concerns, thus justifying the imposition of additional buffers, was reasonable." The NH Supreme Court agreed.

Bayson Properties, Inc. v. City of Lebanon, ___ N.H. ___ (2003).

Lessons:

- In your regulations, give yourself the flexibility to ask for more. Numeric standards are good, but they can't capture the inevitable unforeseen circumstances of specific cases.
- When you are denying an application, whether for site plans or subdivisions, give every legitimate reason you can think of, provided it is substantiated by testimony or other evidence on the record—something is bound to stick, and the court only needs to agree with one of your reasons to uphold your decision.
- Even though the applicant may offer something, you're not required to accept it if you think it's not enough.
- If a proposal is wrong for a site, then it's wrong for a site (and must go elsewhere or be changed to make it right).

- Recognize that planning is far more than merely ensuring that checklists are completed. As members of the board, you have discretion and must exercise independent judgment to arrive at a reasonable decision. If things were otherwise, there would be no need for a planning board. ***You are important, both as individual members and as a group!***

Excavation Permitting (RSA 155-E)

- **Strict statutory regulation** of earth excavations and reclamation. But note the statute's definition of "earth material": it does not include quarrying of dimensional stone, which is regulated by the State pursuant to RSA 12-E.
- **Local "regulator"** may adopt regulations for permitting excavations (the planning board is the regulator, unless local adoption indicates otherwise).
- **Like site plan review** in its procedural structure and considerations.
- **Zoning:** the zoning ordinance should specify where excavations are permitted—failure of the zoning ordinance to address excavations means that they're allowed in any district.
- **Stricter than the state:** local excavation regulations can be stricter than RSA 155-E, but they shall not supersede the standards under RSA 155-E:2, I-III (dealing with grandfathering of certain excavations and stationary manufacturing plants)

Other Issues

Appeals of Planning Board Decisions

- **Subdivisions and site plans:** If a decision on an application is based upon a requirement of a subdivision or site plan regulations, the appeal is made to superior court within 30 days of the board's decision. (RSA 677:15)
- **Zoning interpretation:** If any portion of the decision is based upon the planning board's interpretation of the zoning ordinance, the appeal is to the zoning board of adjustment as an administrative appeal—but the scope of ZBA is limited to reviewing that particular zoning interpretation. (RSA 676:5, III)

But note the possible necessity of concurrent appeals! The wise appellant will file with the ZBA and the superior court at the same time.

- **Innovative land use controls:** When a planning board's decision is based upon the administration of an innovative land use control adopted pursuant to RSA 674:21, then appeal is to superior court, not to the ZBA. (RSA 676:5, III)

Preemption of Local Authority

- **NO HOME RULE!** Despite the State's motto and the rhapsodic claims of many politicians, New Hampshire is not a home rule state. We follow what is known as Dillon's Rule, which means that municipalities can only exercise such authority as is specifically delegated to them by the State Legislature.
- **Local land use regulation:** Planning, land use ordinances and regulations, and growth management are all specific delegations of authority to municipalities.
- **Exceptions = Preemption:** even in the face of these grants of authority, however, the State may also carve areas out of the local regulatory scheme and vest that power elsewhere—typically with a State agency. But the court does not look generously on arguments in favor of preempting local planning authority, so statutes must be specific to demonstrate an intention to preempt. Such intention might be demonstrated through the creation of a comprehensive statewide regulatory framework.

PREEMPTION—Compare these cases:

- Stablex Corp. v. Hooksett, 122, N.H. 1091 (1982). Local hazardous waste regulation completely preempted by state law, except that

Any local regulations relating to such matters as traffic and roads, landscaping and building specifications, snow, garbage, and sewage removal, signs, and other related subjects, to which any industrial facility would be subjected and which are administered in good faith and without exclusionary effect, may validly be applied to a facility approved by the State bureau. *Id.* At 1104.

- North Country Environmental Services v. Bethlehem, __ N.H. __ (2004-057) (decided March 1, 2004) (local regulation of solid waste facilities not fully preempted, despite the existence of a comprehensive regulatory scheme).

RSA chapter 149-M constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it.

...

RSA 149-M:9, VII provides:

The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

...

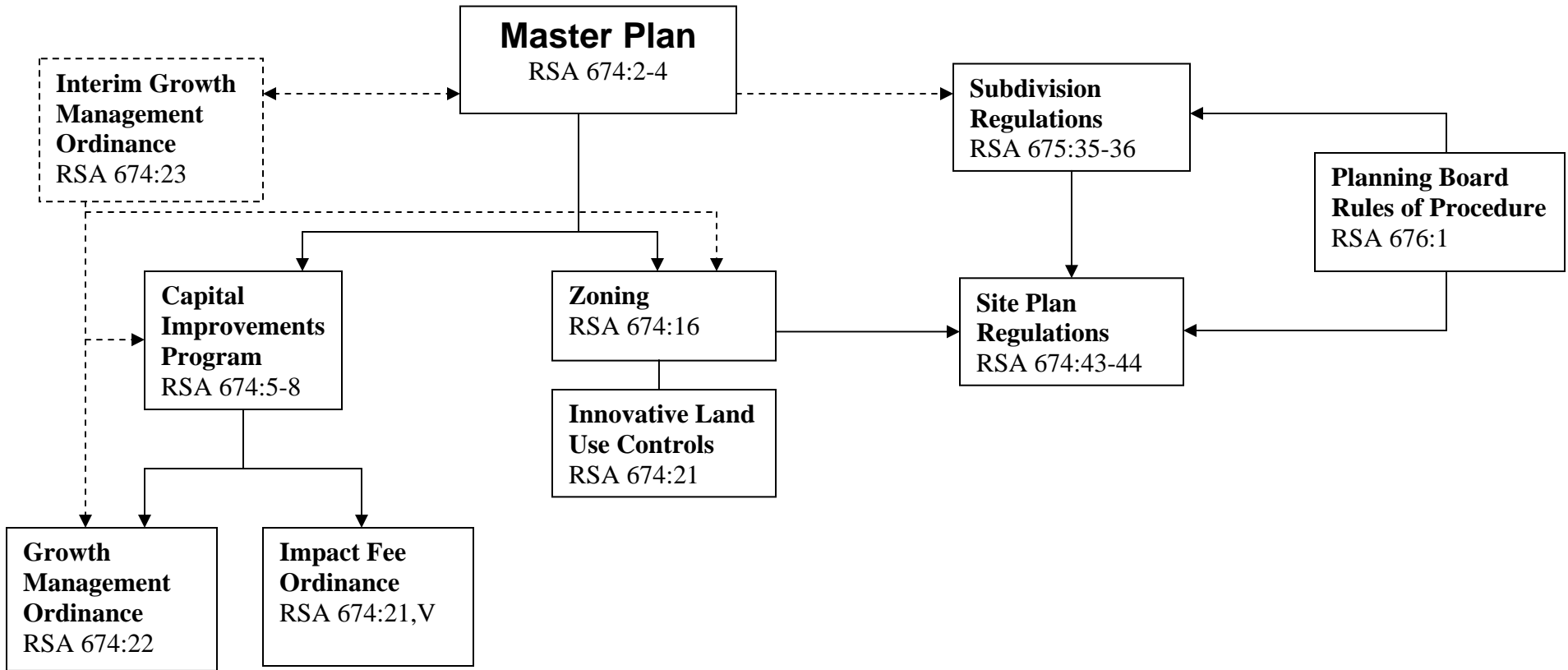
As required by the spirit and objectives of RSA chapter 149-M, State law preemption of local regulation of solid waste management facilities must be the norm, not the exception. Accordingly, when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located.

- Lyndeborough v. Boisvert Properties, LLC., __ N.H. __ (2004-057) (decided April 21, 2004). Local regulation of OHRVs on private land not preempted by State.

Given that the statutory scheme provides a host of safeguards for the establishment of OHRV trails on State-owned land, while affording no corresponding safeguards for trails on private land, we cannot conclude that the statute sets forth a detailed and comprehensive statutory scheme governing OHRV trails on private land, nor can we conclude that the legislature intended to preempt the town's ability to subject OHRV trails on private land to site plan review.

BUT, the State giveth, and the State taketh away. Chapter 210, Laws of 2005 now preempts local regulation of OHRVs statewide.

Municipal Land Use Regulation



Other Regulatory and Non-Regulatory Issues	
<p style="text-align: center;"><i>Regulatory</i></p> <ul style="list-style-type: none"> ▪ Zoning Board—yes, you have to have one! ▪ Building Code—proposed and adopted like a zoning ordinance ▪ Historic District—proposed and adopted like a zoning ordinance ▪ Selectmen or Council—they are the enforcers, not you! ▪ Excavation Regulations—if you are the regulator ▪ Developments of Regional Impact—take this seriously! 	<p style="text-align: center;"><i>Non-Regulatory</i></p> <ul style="list-style-type: none"> ▪ Conservation Commission, Heritage Commission, Agriculture Commission—advisory, but can have important roles in the planning process. NOTE: your zoning ordinance can give them a regulatory role through RSA 674:21. ▪ Regional planning commission—seek their advice, participate in their activities, use them as a resource (if you’re reviewing a development application that has the potential for regional impact, the RPC (and other affected municipalities) must be notified.

PLANNING BOARD'S PROCEDURES – RSA 676:4

	<i>Optional* pre-application review</i>		<i>Required review</i>
	Preliminary Conceptual Consultation (RSA 676:4, II(a))	Design Review (RSA 676:4, II(b))	Formal Application (RSA 676:4, I)
PUBLIC INPUT	<ul style="list-style-type: none"> • Abutter notice not required • No public hearing • Formal meeting¹ 	<ul style="list-style-type: none"> • Notice to abutters and others required • No public hearing • Formal meeting¹ 	<ul style="list-style-type: none"> • Notice to abutters and others required (even if notice was already given for preapplication design review) • Formal meeting¹ • Public hearing required (<i>minimum 10 days prior</i>)²
APPLICANT	Basic concept—"napkin sketch"	Specific design and engineering details	Submits completed application and all required material at least 15 days prior to meeting <ul style="list-style-type: none"> • Abutters and others required by RSA 676:4, I(d)—accurate to no more than 5 days before filing application with planning board (RSA 676:4, I(b))
PLANNING BOARD	Provides informal, non-binding feedback <ul style="list-style-type: none"> • Compliance with regulations • Layout/use of land • Potential identification of special studies that may be required • Preliminary conceptual consultation to be limited as identified by regulations <p>* The local legislative body (e.g., town meeting) may authorize the planning board to require preapplication review.</p>		Next regular meeting or within 30 days : <ul style="list-style-type: none"> • Board must mail notice to abutters and others as required no less than 10 days prior to the meeting (RSA 676:4, I(d)) • Determine if application is "sufficiently complete" • If incomplete, vote to reject as incomplete without prejudice; notice in writing to applicant (RSA 676:3) • If complete, vote to accept as complete; initiate review • 65 days to finish review and to approve or deny; 90 day extension may be granted by Selectmen (RSA 676:4, I(f)); indefinite extension may be granted by applicant Public hearing—separate notice to abutters and others, unless notice of submittal also includes hearing notice (RSA 676:4, I(d)) <p>Submittal, acceptance, public hearing, and approval can be done in the same meeting</p> Written decision is to be filed in the Board's office within 144 hours of the vote to deny or approve (RSA 676:3); also, minutes are to be filed within 144 hours of the meeting (RSA 91-A:2)

¹ At least 24 hours in advance of any meeting, notice to be publicly posted in 2 appropriate places or published in a newspaper of general circulation (RSA 91-A:2)

² Not required for minor lot line adjustments or boundary agreements that do not create additional buildable lots; also not required if the Board determines the application is incomplete (RSA 676:4, I(e))