

OFFICE OF ENERGY AND PLANNING

ANNUAL FALL PLANNING AND ZONING CONFERENCE

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BASICS FOR PLANNING AND ZONING BOARD MEMBERS

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Part I. Basics for the Planning Board

1. Where did you come from?

(a) Establishment. “Any local legislative body [town meeting in most towns, town council in a few towns, city council or board of aldermen in cities] may establish a planning board . . .” RSA 673:1, I. Thus, in most municipalities, the planning board has been created by a vote of the town meeting.

At latest report, 233 of 234 municipalities in New Hampshire have planning boards.

(b) Abolition. You can be abolished! A municipality may abolish its planning board by vote of the town meeting in towns with that form of government; in other municipalities it may be done in a manner prescribed by the local legislative body. *See* RSA 673:18. (Abolition of the board, however, has severe consequences—all land use control activities previously performed by the planning board will cease immediately, and the zoning ordinance, if any, will terminate after two years. *See* RSA 673:19.)

Note: A municipality can have a planning board without a zoning ordinance, but it cannot have a zoning ordinance without a planning board, except in the two-year period described above. This is because a municipality may adopt a zoning ordinance only after a master plan has been adopted, *see* RSA 674:18, and it is the planning board’s job to adopt a master plan, *see* RSA 674:1.

2. How are you organized?

(a) Composition. The composition of a planning board is as follows: (i) cities—nine members; (ii) towns with town council form of government—seven or nine members; (iii) other towns—five or seven members; (iv) village districts—five or seven members; (v) counties in which there are unincorporated places—five or nine members. In cities, village districts, and counties with unincorporated places, all members are **appointed**. In towns, they may be **appointed or elected**. Every planning board has at least one *ex officio* member, usually a member of the municipality’s governing body. *See* RSA 673:2 for more details on the composition and manner of selection.

(b) Terms of office. All planning board members, other than *ex officio* members, serve three-year terms. The term of an *ex officio* member is usually coextensive with the that member’s term in the office that gives rise to his or her membership on the planning board. *See* RSA 673:5.

(c) Officers. The planning board must have a chairperson, “and may create other offices as it deems necessary.” RSA 673:8. An *ex officio* member may not serve as chairperson. RSA 673:9, II. All officers serve one-year terms, and may be re-elected. RSA 673:9, I.

The chairperson and the officio member(s) should vote on all matters!

(d) Scheduling of meetings. The planning board must hold at least one regular meeting every month. RSA 673:10, II. It may, of course, hold additional meetings.

(d) Quorum. A majority of the board constitutes the quorum necessary to transact business at any meeting. RSA 673:10, III.

(e) Alternates. For an *appointed* board, the local legislative body may provide for the appointment of up to five alternate members *by the appointing authority*. RSA 673:6, I(a). An *elected* board may appoint up to five alternates. RSA 673:6, II. Alternates serve staggered three-year terms. The alternate for a city or town council member, selectman, or village district commissioner is appointed by the respective council, board, or commission. RSA 673:6, III.

When a regular member of the board is absent or is disqualified from participating in a meeting, the chair may designate an alternate to act in place of the regular member, except that only the alternate designated for a city or town councilor, selectman, or village district commissioner may serve in place of that member. RSA 673:11.

(f) Multiple memberships. In a town, a planning board member may also serve on another municipal board or commission, so long as the multiple membership does not result in two planning board members serving on the same board or commission. RSA 673:7, I. In cities, the rule is a little more complicated—*see* RSA 673:7, II.

Simultaneous membership on a planning board and a zoning board is not prohibited, but it raises concerns, because some planning board decisions may be appealed to the ZBA. If one person serves on both boards, he would need to disqualify himself when the ZBA hears such an appeal. Further, a development project may need to go first to the ZBA for a variance or special exception, then to the planning board for subdivision or site plan review. If a planning board member has already voted to grant or deny an application when it was before the ZBA, his impartiality may be questioned when the project comes to the planning board.

(g) Vacancies. If a position on a board becomes vacant other than by expiration of the member's term, the vacancy is filled as follows: (i) for an *elected* member, by appointment by the remaining board members until the next regular municipal election, at which time a new member is elected to fill the unexpired term or to start a new term, as appropriate; (ii) for an *appointed, ex officio, or alternate* member, by the original appointing authority for the remainder of the unexpired term. RSA 673:12, I & II. If the vacancy is not filled promptly as provided above, the chairperson may designate an alternate member to fill the vacancy temporarily. RSA 673:12, III.

3. What do you do?

The following is not exhaustive, but it includes at least 95 percent of what most planning boards do:

(a) Master plan. “It shall be the duty of every planning board established under RSA 673:1 to prepare and amend from time to time a master plan to guide the development of the municipality.” RSA 674:1.

The purpose of the master plan is “to set down as clearly and practically as possible the best and most appropriate future development of the area under the jurisdiction of the planning board, to aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire, and to guide the board in the performance of its other duties in a manner that achieves the principles of smart growth, sound planning, and wise resource protection.” RSA 674:2, I.

The master plan is “a set of statements and land use and development principles for the municipality with such accompanying maps, diagrams, charts and descriptions as to give legal standing to the implementation ordinances and other measures of the planning board.” RSA 674:2, II. *It is a plan. It is not used to allow or disallow a particular land use.* The statute recommends that the plan be revised every five to ten years. *See* RSA 674:3, II.

(b) Capital improvements program. If the planning board has adopted a master plan, “the local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least 6 years.” RSA 674:5. Alternatively, a separate capital improvements program committee may be appointed.

(c) Zoning ordinance and amendments. In most towns, the planning board may propose the adoption of a zoning ordinance or amendments to an existing ordinance. *See* RSA 674:1, V. The board itself cannot adopt or amend the ordinance—it only makes proposals, which are voted on by the legislative body. *See* RSA 675:3. The board also must make recommendations on zoning amendments that are submitted by the selectmen (or village district commissioners) or by citizen petition. *See* RSA 675:3, VIII, 675:4. In any event, no zoning ordinance or amendment may be submitted to the legislative body until the planning board has held at least one public hearing. *See* RSA 675:3-4.

In cities and in towns with a town council, the legislative body determines the method of adoption or amendment of a zoning ordinance. *See* RSA 675:2.

(d) Regulation of subdivisions. A municipality may, “by ordinance or resolution,” authorize the planning board to regulate the subdivision of land. *See* RSA 674:35. This may be done even if the municipality has not adopted a zoning ordinance.

The board's procedure on subdivision applications is governed by RSA 676:4 and by the board's subdivision regulations.

(e) Review of site plans. *If a municipality has adopted a zoning ordinance, and if the planning board has adopted subdivision regulations, the municipality may, by ordinance or resolution, authorize the planning board to approve or disapprove site plans for nonresidential land uses and for multi-family residential uses (more than two dwelling units), regardless of whether such development includes a subdivision of the land. See RSA 674:43. The board's procedure on site plan applications is governed by RSA 676:4 and by the board's site plan review regulations.*

(f) Conditional or special use permits. *If a municipality has adopted one or more innovative land use controls under RSA 674:21 and RSA 674:16, it may provide for administration of such controls, including the granting of conditional or special use permits, by the planning board (or by another person or board).*

(g) Excavation permits. *Unless the town has assigned responsibility to the selectmen or the ZBA, the planning board is responsible for considering applications for excavation permits. See RSA 155-E.*

4. What do you need to know?

The following is a non-exclusive list of the laws, regulations, and other documents with which a planning board must be familiar:

(a) New Hampshire statutes. Frequently referred to as "the RSAs," these are the laws enacted by the New Hampshire legislature. Chapters 672 through 678 govern land use boards and contain *most* (not all) of the statutes relevant to your work. *Planning boards have only the authority granted by the statutes.*

(b) Planning board rules of procedure. Every land use board must adopt rules of procedure (some boards refer to them as by-laws) governing the conduct of its business. These are adopted at a regular meeting of the board and are kept on file with the town or city clerk. *See 676:1.*

The rules of procedure can be very simple or very detailed, but simple is usually better. Basic provisions may include a listing of officers and responsibilities; quorum requirements; meeting schedule; and rules for conduct of meetings and public hearings. The rules of procedure must include provisions for joint meetings and hearings with other land use boards. *See RSA 676:2.*

You do NOT—NOT—NOT need to follow Robert's Rules of Order. If your rules contain a statement that Robert's Rules shall govern, get rid of it. Almost no one understands Robert's Rules, and trying to apply them to a planning board meeting is insane.

(c) Master plan See paragraph 3(a) above. Adoption or amendment of the master plan must follow the procedure prescribed in RSA 675:6. Again, it should be revised every five to ten years.

(d) Zoning ordinance. As stated above, this is adopted by the municipality's legislative body, not by the planning board, but obviously the board needs to be familiar with it. The board should review it regularly with an eye toward proposing appropriate amendments to the legislative body.

(e) Subdivision regulations. Before the board may exercise its authority to regulate subdivisions (see paragraph 3(d) above), it must adopt subdivision regulations. These are governed by RSA 674:36. They are adopted or amended by the board after a public hearing, subject to the provisions of RSA 675:6.

(f) Site plan review regulations. Before the board may exercise its authority to review site plans (see paragraph 3(e) above), it must adopt site plan review regulations. These are governed by RSA 674:44. They are adopted or amended by the board after a public hearing, subject to the provisions of RSA 675:6.

(g) Excavation regulations. The board may (and should) adopt regulations to carry out its authority over excavations. *See* RSA 155-E:11.

Part II. Basics for the Zoning Boards of Adjustment

1. Where did you come from?

(a) Establishment. “Every zoning ordinance adopted by a local legislative body shall include provisions for the establishment of a zoning board of adjustment.” RSA 673:1, IV. Thus, if a municipality has a zoning ordinance, it must have a ZBA. Conversely, if it has no zoning ordinance, there is no need for a ZBA. (It is, after all, a *zoning* board of adjustment. It exists to consider applications for variances and exceptions from the zoning ordinance and appeals from interpretations of the zoning ordinance.)

(b) Abolition. Unlike planning boards, zoning boards cannot simply be abolished by vote of the legislative body. However, as stated above, if the zoning ordinance is repealed, the ZBA would no longer serve any purpose.

2. How are you organized?

(a) Composition. A zoning board of adjustment comprises five members, who may be either elected or appointed, as determined by the legislative body. *See* RSA 673:3. Unlike a planning board, it does not have any *ex officio* members.

(b) Terms of office. All ZBA members serve three-year terms. *See* RSA 673:5, II.

(c) Officers. The ZBA must have a chairperson, “and may create other offices as it deems necessary.” RSA 673:8. All officers serve one-year terms, and may be re-elected. RSA 673:9, I.

The chairperson and the officio member(s) should vote on all matters!

(d) Scheduling of meetings. Meetings of the ZBA are held “at the call of the chairperson and at such other times as the board may determine.” RSA 673:10, I. It is common practice to schedule regular meetings once a month; they may be canceled if there is no business to come before the board.

(d) Quorum. A majority of the board constitutes the quorum necessary to transact business at any meeting. RSA 673:10, III.

HOWEVER—“The concurring vote of 3 members of the board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass.” RSA 674:33, III. This means that if only three ZBA members are present for a hearing, it will take a unanimous vote to grant, for example, a variance or a special exception. Many, if not most, zoning boards will grant a continuance in that situation so as to allow the applicant a fairer chance of obtaining approval.

(e) Alternates. For an *appointed* board, the local legislative body may provide for the appointment of up to five alternate members *by the appointing authority*. RSA 673:6, I(a). An *elected* board may appoint up to five alternates. RSA 673:6, II. Alternates serve staggered three-year terms.

When a regular member of the board is absent or is disqualified from participating in a meeting, the chair may designate an alternate to act in place of the regular member. RSA 673:11.

(f) Multiple memberships. ZBA members are not subject to the same limits as planning board members regarding membership on other boards. However, as stated in Part I, paragraph 2(f), simultaneous membership on the ZBA and the planning board raises some serious concerns. Simultaneous membership on the ZBA and the board of selectmen can also be a problem, because the ZBA may have occasion to hear appeals from decisions of the selectmen.

(g) Vacancies. If a position on a board becomes vacant other than by expiration of the member's term, the vacancy is filled as follows: (i) for an *elected* member, by appointment by the remaining board members until the next regular municipal election, at which time a new member is elected to fill the unexpired term or to start a new term, as appropriate; (ii) for an *appointed or alternate* member, by the original appointing authority for the remainder of the unexpired term. RSA 673:12, I & II. If the vacancy is not filled promptly as provided above, the chairperson may designate an alternate member to fill the vacancy temporarily. RSA 673:12, III.

3. What do you do?

As the name—*zoning* board of *adjustment*—suggests, a ZBA exists primarily to provide relief, in appropriate cases, from the application of the zoning ordinance or interpretation of the ordinance by other local officials. Zoning boards of adjustment are responsible for the following:

(a) Administrative appeals. Any person who claims an error in the interpretation or enforcement of the zoning ordinance by an “administrative official” may appeal the decision to the ZBA. An “administrative official” may include the building inspector, code enforcement officer, board of selectmen, or any other person or board responsible for enforcing the ordinance. *See* RSA 674:33, I(a), 676:5, I & II.

(b) Appeals from certain planning board decisions. If, in the exercise of subdivision or site plan review, the planning board makes a decision that is based on an interpretation of the zoning ordinance, and the decision would be appealable to the ZBA if it had been made by an administrative official, then the decision may be appealed to the ZBA. *See* RSA 676:5, III.

(c) Variations. The ZBA is responsible for hearing applications for variations from the requirements of the zoning ordinance. *See* RSA 674:33, I(b).

(d) Special exceptions. If the zoning ordinance so provides (most do), the ZBA may, under the conditions specified in the ordinance, grant special exceptions to the terms of the ordinance. *See* RSA 674:33, IV.

Difference between a variance and a special exception: A special exception is something that is specifically authorized by the zoning ordinance, and only under the conditions stated in the ordinance. Typically, a zoning ordinance will state that certain uses are permitted only by special exception, and then will list the conditions that must be satisfied to obtain a special exception.

A variance, in contrast, is not authorized by the ordinance; it is authorized by state law. It is an order by the ZBA that essentially allows the applicant to disregard the zoning ordinance if to do so would be in the public interest, consistent with substantial justice, consistent with the spirit of the ordinance, and essential to avoid an unnecessary hardship to the applicant, and if granting the variance would not diminish the values of surrounding properties.

(e) Equitable waivers. The ZBA may grant equitable waivers of dimensional requirements. An equitable waiver is appropriate when a lot or structure is found, after the fact, to be in violation of a physical layout or dimensional requirement as a result of a good-faith error, if certain requirements are established. *See* RSA 674:33-a.

(f) RSA 674:41 appeals. A person who is denied permission to build a structure pursuant to RSA 674: 41 (requiring all new structures to be on lots with access to a class V or better road, an approved street, or a class VI or private road subject to certain limitations) may appeal the denial to the ZBA. *See* RSA 674:41, II.

(g) Conditional use permits. *If* a municipality has adopted one or more innovative land use controls under RSA 674:21 and RSA 674:16, it may provide for administration of such controls, including the granting of conditional or special use permits, by the ZBA (although such authority is more often granted to the planning board).

4. What do you need to know?

The following is a non-exclusive list of the laws, regulations, and other documents with which a zoning board of adjustment must be familiar:

(a) New Hampshire statutes. Frequently referred to as “the RSAs,” these are the laws enacted by the New Hampshire legislature. Chapters 672 through 678 govern land use boards and contain *most* (not all) of the statutes relevant to your work. *Zoning boards have only the authority granted by the statutes.*

(b) ZBA rules of procedure. Every land use board must adopt rules of procedure (some boards refer to them as by-laws) governing the conduct of its business. These are adopted at a regular meeting of the board and are kept on file with the town or city clerk. *See* 676:1.

The rules of procedure can be very simple or very detailed, but simple is usually better. Basic provisions may include a listing of officers and responsibilities; quorum requirements; meeting schedule; and rules for conduct of meetings and public hearings. The rules of procedure must include provisions for joint meetings and hearings with other land use boards. *See* RSA 676:2.

You do NOT—NOT—NOT need to follow Robert's Rules of Order. If your rules contain a statement that Robert's Rules shall govern, get rid of it. Almost no one understands Robert's Rules, and trying to apply them to a ZBA meeting is insane.

(c) Master plan See paragraph 3(a) above. Adoption or amendment of the master plan must follow the procedure prescribed in RSA 675:6. This is under the planning board's jurisdiction, but it is helpful for the zoning board to be familiar with it.

(d) Zoning ordinance. The ZBA needs to be familiar with the zoning ordinance because it will frequently be called upon to grant variances from the ordinance and to grant special exceptions pursuant to the terms of the ordinance. It may also hear appeals from administrative or planning board decisions interpreting the ordinance.

Part III. Planning Boards and ZBAs: Overlapping and Common Issues

1. Public meetings. All meetings of a planning board or a zoning board are open to the public under the Right-to-Know Law, discussed elsewhere in these materials. (Non-public sessions are permitted under very limited circumstances that rarely apply to a planning or zoning board.) The public's right to *attend* a meeting, however, does not include a right to *speak*. Except at public *hearings*, discussed below, the only right of the public is to be present and be able to hear the discussion at the meeting.

A board may, of course, choose to allow non-members to speak at meetings. If it does so, it should limit discussion very strictly to avoid a free-for-all, and should treat all members of the public equally.

2. Public hearings. Many planning and zoning board proceedings require public hearings. In fact, because of the nature of its responsibilities, it is rare that a ZBA meeting would *not* involve a public hearing.

A *zoning board* hearing must be held within 30 days after the board receives notice of the application or appeal. *See* RSA 676:7, II. The timetable for *planning board* hearings on subdivision and site plan applications is more complicated, but basically the board must, within 30 days after receipt of an application, determine whether the application is complete. If the application is found to be incomplete, the board must notify the applicant of the additional information needed to make it complete. Once an application is deemed complete, the board must act to approve, conditionally approve, or disapprove the application within 65 days, subject to extension or waiver. *See* RSA 676:4, I(b)-(c).

Unlike plain old public *meetings*, for which the only required notice is a public notice posted in two "appropriate places" (or published in a newspaper) at least 24 hours before the meeting, a public *hearing* may require notice by certified mail to the applicant, abutters, and certain others, and/or notice to the general public by publication in a newspaper. The notice requirements vary depending on the purpose of the public hearing. *See generally* RSA 675:7 (planning board hearings on proposed zoning changes); RSA 676:4, I (planning board hearings on subdivision and site plan applications); RSA 676:7 (zoning board hearings on any matter in which it exercises its appeal powers).

The conduct of public hearings should be governed by the board's regulations. At the very least, the applicant and any abutter or other person with a direct interest in the matter must be permitted to testify in person and/or in writing, either personally or by an agent or attorney. *See* RSA 676:4, I(e), 676:7, III.

After the public hearing, the board will deliberate and make its decision. It does not need to make a decision *at* the public hearing—it may do so at a subsequent meeting, so long as it complies with the statutory deadlines—but *it must deliberate and make the decision in public*.

3. Issuance of decision. Whenever the planning or zoning board approves or disapproves an application, it must issue a final written decision and make a copy of the decision available to the applicant. If the application is disapproved, the board must provide the applicant with written reasons for the disapproval. The written decision and minutes of the meeting at which it was made must be made available for public inspection within five business days after the meeting. *See* RSA 676:3.

4. Joint hearings. An applicant who requires approvals from both the planning board and the ZBA may request a joint meeting or hearing of the two boards. Alternatively, either board may request a joint meeting on its own initiative. Each board has the discretion to agree or not agree to a joint meeting. A joint meeting is chaired by the planning board chair. *See* RSA 676:2.

5. Conditional use permits. As stated earlier in these materials, if a municipality has adopted one or more innovative land use controls under RSA 674:21 and RSA 674:16, it may provide for administration of such controls, including the granting of conditional or special use permits, by the either the planning board or the ZBA (or by anyone else). That authority is more often given to the planning board.

6. Appeal of planning board decisions to ZBA. Most planning board decisions may be appealed to the superior court. However, if, in the exercise of subdivision or site plan review, the planning board makes a decision that is based on an interpretation of the zoning ordinance, and the decision would be appealable to the ZBA if it had been made by an administrative official, then the decision may be appealed to the ZBA. *See* RSA 676:5, III.

Part IV. The Right to Know Law for Planning and Zoning Boards

A. PURPOSE

Section 1 of the Right to Know Law, RSA Chapter 91-A, states as follows:

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.

There may be times when this law seems inefficient, or even contrary to what is good for the community. But the legislature has decided that the benefits of open government outweigh these inconveniences.

CONSEQUENCES OF VIOLATING THE LAW

The superior court has the authority to invalidate action taken in a meeting held in violation of the Right to Know law. Also, if a citizen files a lawsuit to enforce the Right to Know law, the town or city or the official who has violated the law can become liable for that citizen's attorney fees and costs. RSA 91-A:8.

In addition, it is a misdemeanor for a person to knowingly destroy information with the purpose of preventing the information from being disclosed after a request has been made under the Right to Know law. *See* RSA 91-A:9.

B. PUBLIC MEETINGS

General Rule: A meeting of a public body must have proper notice and be open to the public.

WHAT IS A MEETING?

It is the convening of a *quorum* of a public body, "whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate contemporaneously," for the purpose of discussing or acting upon any public business. RSA 91-A:2, I.

For all land use boards, a quorum is a majority of the members. *See* RSA 673:10, III.

What is *not* a meeting? The law makes it clear that certain gatherings of public officials are *not* meetings subject to the Right to Know law (see RSA 91-A:2, I). They include:

- Chance, social, or other encounters “not convened for the purpose of discussing or acting upon . . . matters [relating to official business] if no decisions are made regarding such matters”
- Strategy or negotiations relating to collective bargaining
- Consultation with legal counsel
- Legislative party caucuses
- “Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting”

WHAT IS A PUBLIC BODY?

All “public bodies” are required to have open meetings under the law. Public bodies include all municipal legislative and governing bodies and any “board, commission, committee, agency, or authority” of any municipality. Expressly included are all subcommittees, subordinate bodies, or advisory committees of such bodies. RSA 91-A:1-a, VI. Thus, *any subcommittee of a municipal body (such as a two- or three-person subcommittee of a planning board) is a public body and must comply in all respects with the Right to Know Law.*

WHAT NOTICE IS REQUIRED?

All meetings must have at least 24-hour notice (not counting Sundays and holidays) prior to the meeting. Notice must be either published in a newspaper or posted in two public places. RSA 91-A:2, II. Local ordinances can be more strict about notice. If so, they must be complied with. If the municipality or the public body has an Internet website, it may (but is not required to) use the website as one of the two public places for posting notice.

This 24-hour notice is only a minimum under the Right-to-Know Law. Other statutes can require more notice. For example, planning board hearings require 10 days notice under RSA 676:4, I(d), and zoning board of adjustment hearings require 5 days notice under RSA 676:7.

EXCEPTIONS TO NOTICE REQUIREMENTS

Emergencies. If a public body has an urgent need for a meeting, leaving no time to give proper notice, the nature of the emergency must be stated in the minutes of the meeting. Notice must still be posted as soon as practicable, and any other means that are reasonably available must be employed to inform the public about the meeting. RSA 91-A:2, II.

Recessed (or continued) sessions. Recessed sessions do not require notice, if the date, time, and place of the session were announced at the previous, properly noticed, session of the same meeting.

OPEN TO THE PUBLIC

Anyone (not just local residents) must be permitted to attend any public meeting. They may take notes, tape record, take photos and videotape. However, “open to the public”

does not mean that the Right to Know Law grants anyone the right to *speak* at the meeting. Nobody has a right to disrupt a meeting or to speak without being invited. RSA Chapter 91-A only assures a right to attend, not a right to participate.

Clearly, public participation must be allowed at meetings which are public hearings. Note that there may be plenty of other reasons to allow public input at specifically designated portions of a meeting. For example, the constitutional due process right to be heard on regulations that may affect citizens' property rights — or even the political wisdom of being sure that voters' concerns are heard and addressed — is a strong reason to allow a “public comment” period.

MINUTES OF PUBLIC MEETINGS

Minutes must be kept of all public meetings, and must be available to the public within five business days after the close of the meeting. Minimum content of meeting minutes includes: (1) names of members present; (2) other people participating (it is not necessary to list everyone present, however); (3) a brief summary of subject matter discussed; and (4) any final decisions reached or action taken.

NONPUBLIC SESSIONS: EXCEPTIONS TO THE PUBLIC MEETING REQUIREMENT

Nonpublic sessions are meetings (or portions of meetings) that the public does *not* have the right to attend. Nonpublic sessions are allowed only for the reasons specified in RSA 91-A:3, II. A public body cannot meet in nonpublic session simply for the purpose of deliberation. All deliberations must be done in a public session unless one of the reasons for nonpublic sessions applies.

REASONS FOR NONPUBLIC MEETINGS

Most of the allowable reasons for non-public sessions will rarely, if ever, apply to a land use board. The few that might apply are as follows:

1. The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against the employee, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted. RSA 91-A:3, II(a). Unless the board has responsibility for one or more employees, such as planning staff, this provision will never apply.
2. The hiring of a public employee. RSA 91-A:3, II(b). Again, this provision will never apply unless the board has responsibility for one or more employees.
3. Matters that, if discussed in public, would adversely affect the reputation of someone *other than a member of the public body*. However, if that person requests it, the meeting must be public. RSA 91-A:3, II(c).

4. Consideration of lawsuits threatened in writing or filed against the body or one of its members. RSA 91-A:3, II(e).

HOW TO ENTER NONPUBLIC SESSION

1. The body must first meet in a properly noticed public meeting.
2. A motion to go into a nonpublic session must be made and seconded, stating which specific reason listed in RSA 91-A:3, II is relied upon as justification for a nonpublic session.
3. A roll call vote must be taken, and requires the affirmative vote of the majority of members present. Only the matters specified in the motion can be discussed in the nonpublic session.

MINUTES OF NONPUBLIC SESSIONS

The statute requires that minutes be kept of the proceedings and actions of nonpublic sessions. These minutes must be released to the public within 72 hours (less than half the time frame for regular meetings), unless two-thirds of the members present, in a recorded vote, decide to seal the minutes because release of the minutes would adversely affect someone's reputation (other than a board member), or public release of the minutes public would render the action just taken ineffective (*e.g.*, the property offer example given above), or the information pertains to terrorism.

Caution: Unless you take the two-thirds vote not to release the minutes of a nonpublic session, those minutes are public records and must be released. In other words, the fact that the session itself was nonpublic does not automatically make the minutes nonpublic.

REMOTE PARTICIPATION IN A PUBLIC MEETING

A public body *may*, but is *not required* to, allow one or more members to participate in a meeting by telephone or other electronic communication—but only if the member's attendance is “not reasonably practical.” *See* RSA 91-A:2, III. The statute contains very strict limitations on this practice (too lengthy to summarize here), and it is one that should be used only when absolutely essential.

COMMUNICATIONS OUTSIDE A MEETING

RSA 91-A:2-a limits the use of communications outside a public meeting held in compliance with the law.

1. *No deliberations outside a public meeting.* Public bodies may deliberate on matters of official business “only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”—*i.e.*, only in properly noticed public meetings. This does not mean that any mention of a matter of official

business outside a public meeting is illegal; however, it is illegal for the body to *deliberate* on such a matter outside a meeting—*i.e.*, to discuss the matter with a view toward making a decision. *This includes discussions by e-mail!* The intent of the law is that such matters should be deliberated in public.

Note: There is an exception for those events that are exempted from the definition of a “meeting.” These include (among others) consultations with legal counsel, strategy or negotiation sessions with respect to collective bargaining, and chance or social encounters not convened for the purpose of discussing or acting upon matters of official business.

2. *No circumvention of spirit or purpose of the law.* Communications outside a meeting, “including, but not limited to, sequential communications among members of a public body,” shall not be used “to circumvent the spirit and purpose of this chapter.” This is intended primarily to prevent public bodies from skirting the “meeting” definition by deliberating or deciding matters via a series of communications, none of which alone involves a quorum of the public body, but which in the aggregate include a quorum.

C. GOVERNMENTAL RECORDS

WHAT IS A GOVERNMENTAL RECORD?

The law defines a “governmental record” as

any *information* created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term “governmental records” includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term “governmental records” shall also include the term “public records.”

See RSA 91-A:1-a, III. The word “information,” in turn, is defined as “knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.” *See* RSA 91-A:1-a, IV.

There are several important points here:

1. *Information in physical form.* “Information” may be “written, aural, visual, [or] electronic,” but in any case must be in some *physical form*. Thus, for something to constitute a governmental record, there must be some physical manifestation of

it: for example, a paper document, a computer file, a tape recording, a CD or DVD, or a videocassette. If it exists in one of those forms *or any other physical form*, it may be a “governmental record” (if the other elements of the definition are satisfied).

2. *Created, accepted, or obtained by a public body.* Information (such as a written communication) will constitute a governmental record when it is “created, accepted, or obtained by, or on behalf of, any public body, *or a quorum or majority thereof*, . . . in furtherance of its official function.” More specifically, e-mail and other written communications constitute governmental records if they are “*received by a quorum or majority of a public body* in furtherance of its official function.” Thus, a communication—electronic or otherwise—that is created, accepted, or obtained by *less than a quorum* of a public body is *not* a governmental record and is not subject to disclosure.
3. *Created, accepted, or obtained by a public agency.* Information constitutes a governmental record if it is “created, accepted, or obtained by, or on behalf of, . . . any public agency in furtherance of its official function.”
4. “In furtherance of its official function.” A governmental record is one created, accepted, or obtained by a public body or a public agency *in furtherance of its official function*. Personal correspondence, for example, is not in furtherance of the public body’s or public agency’s official function, and is not subject to disclosure.

PUBLIC DISCLOSURE REQUIREMENT

RSA 91-A:4 governs the public disclosure and inspection of governmental records. The statute requires the following:

1. Records must be available for inspection and copying during the regular business hours of the public body or agency. If a public body or agency is not able to make a governmental record available for immediate inspection, it must do so within 5 business days, or deny the request with written reasons, or acknowledge the request with a statement of the time necessary to determine whether the request will be granted or denied.
2. Any citizen may make notes, tapes, photos, or photocopies of a governmental record. The public body or agency may charge the person requesting them the “actual cost” of copying. Whether this includes the cost of staff time to make the copies is an unresolved issue.
3. Governmental records maintained in electronic form may be disclosed by copying them to an electronic medium; however, if that is not reasonably practical, or if the person making the request asks for the records in a different format, the public

body or agency may provide a printout of the records “or may use any other means reasonably calculated to comply with the request.” RSA 91-A:4, V.

4. The motives of the person requesting the information are not relevant, and should not even be asked about.
5. Materials (tapes, notes, etc.) used to compile official meeting minutes are governmental records, too. These materials may be destroyed after the official minutes are prepared, but they are subject to disclosure until destroyed. It is a good idea to adopt a formal policy stating how long drafts or original tapes are kept after transcription. It is also important that you designate who is taking the official minutes. Notes or tapes made by a board member for *personal* use are not subject to disclosure under the Right to Know law. RSA 91-A:5, VIII.
6. The government must maintain governmental records in a manner that makes them accessible to the public. Records maintained in electronic form must remain accessible for the same periods as their paper counterparts. RSA 91-A:4, III-a. Retention periods for all records are prescribed in a separate statute, RSA chapter 33-A.

A record in electronic form is no longer subject to disclosure once it has been “initially and legally deleted.” RSA 91-A:4, III-b. A record cannot be “legally” deleted until the expiration of any statutory retention periods (generally governed by RSA chapter 33-A). An electronic record is deemed to have been “deleted” only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a “deleted items” folder or similar location on a computer does not constitute deletion.

EXEMPTIONS TO PUBLIC DISCLOSURE

RSA 91-A:5 exempts certain records from public disclosure. Only a few of these would ever be relevant to a land use board:

1. Confidential, commercial or financial information and other records whose disclosure would be an invasion of privacy. *See* RSA 91-A:5, IV.
2. Notes or other materials made for personal use that do not have an official purpose. RSA 91-A:5, VIII.
3. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the public body to which they relate. RSA 91-A:5, IX.

Part V. Conflicts and Disqualification^{*}

1. Conflicts Distinguished from Incompatibility

The “conflict of interest” issue -- whether an official is disqualified to make a particular decision -- is often confused with the issue of whether a person is disqualified from holding office at all. For example, someone might say, “I don’t think it’s proper for a real estate broker to be on the planning board.” If a realtor represents a developer, he obviously can’t vote on that developer’s application. But she certainly is *not* ineligible to be on the board at all. The *conflict* question focuses on specific decisions, whereas the *incompatibility* question focuses on the office a person holds. The only incompatibility rules applying to land use boards are the multiple membership rules discussed elsewhere in these materials.

2. Legislative Versus Judicial Function

Not all decisions made by land use board members are subject to challenge because of a conflict of interest. Courts from many states have said that even blatant bias or prejudice does not constitute grounds for disqualification when an official is acting in a *legislative* capacity (e.g. a planning board member recommending zoning amendments). In those states, for example, a city council member would not be disqualified from voting on an ordinance which affected an entire city, even if he himself had a direct financial interest.

New Hampshire Law. N.H. cases have not gone quite so far. But they have recognized a difference between legislative and quasi-judicial decisions. In *Michael v. City of Rochester*, 119 N.H. 734 (1979) the N.H. Supreme Court refused to invalidate a city council decision despite one member’s conflict of interest because “no judicial function was involved.” And in *Appeal of Cheney*, 130 N.H. 589, 594 (1988), Justice Souter said that the rule for legislative functions is that a conflict invalidates a vote “*only if the vote improperly cast determined the outcome,*” i.e. if it’s the deciding vote.

The Quinlan Case - Legislators Can Prejudge: In *Quinlan v. City of Dover*, 136 N.H. 226 (1992), the Court held that in a *legislative* context, the mere fact that a city councilor has spoken out on one side of an issue in advance (“prejudgment”) does *not* disqualify him/her from voting on that issue *at all*. The Court repeated its statement from the *Michael* case, however, that a *financial* conflict-of-interest would void the vote if it determined the outcome.

3. How To Tell The Difference

Whether a decision is legislative or judicial depends not on who makes the decision, but on its subject matter. The Court has said that a municipal body is acting judicially when it decides matters which affect the rights of a specific petitioner with respect to a specific parcel of land. *Ehrenberg v. City of Concord*, 120 N.H. 656 (1980). Also:

^{*} These materials were developed by Attorney Bernard Waugh of Gardner, Fulton & Waugh in Lebanon, New Hampshire for use at previous OEP Planning and Zoning Conferences. I have made only minor changes.

“If (the municipal officials) are bound to notify and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial.” *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984).

4. N.H. Cases Involving Quasi-judicial Decisions

The Standard Of Impartiality. Part I Article 35 of the N.H. Constitution says that “*it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.*” The courts have applied this rule to all judicial or quasi-judicial decisions. ***This includes all land use board decisions on specific applications.***

a. Prejudgment.

(i) A man who had voted in favor of a project as a member of the planning board was ***not disqualified*** from voting on the same project as a member of the city council. His participation as a planning board member “does not prove that he had an interest in the project other than that of any other citizen.” *Atherton v. Concord* (supra). Thus a ZBA member, say, who voted on a variance request would ***not*** be disqualified from acting on a motion for rehearing. That’s just process, not bias.

(ii) A man who had spoken in favor of a project at a public hearing before the planning board ***was disqualified*** from voting on the same project when he later became a board member because he had “prejudged the ***facts*** of the case before joining the board.” *Winslow* (supra).

(iii) A board chairman who had testified before the N.H. Bank Commission in favor of a bank in his town was ***not disqualified*** from sitting on an application for a variance which was necessary to build a bank building. The Court said the issue of the desirability of a bank in town was different from the issue of a variance to put the bank on a particular location.

The issue is ***not*** whether you have ***publicly*** voiced an opinion on the case. The issue is whether you have prejudged the case—regardless of whether you have publicly expressed your opinion. You cannot avoid disqualification by keeping your opinions to yourself.

b. Abutters. Anyone owning land abutting a piece of property which is the subject of some type of application is ***disqualified*** from acting on that application. *Totty v. Grantham Planning Board*, 120 N.H. 390 (1980).

c. Financial interest in the outcome. A public officer is disqualified if he has “a direct personal and pecuniary interest” *Preston v. Gillam*, 104 N.H. 261. However the interest must be “immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it.” *Atherton v. Concord*, (supra).

d. Employment. An employment relationship with an interested party ***may*** be a ground for disqualification, but the following cases indicate that the rule has exceptions, and that it is

possible for an employment relationship to be so remote that the employee in reality has no interest different from that of the general public.

(i) An attorney who had formerly been employed by the Concord Housing Authority, but who had been paid for those services, was no longer employed, and who stated, without anyone giving contradicting evidence, that he had no bias, was **not disqualified** from voting on an application by the Housing Authority. *Atherton*, (supra).

(ii) An employee of a Rockingham County food surplus program was **not disqualified** from sitting on the Board of Adjustment in a case in which the County was applicant for a nursing home expansion. He had testified that he was free of bias, and the court found he had no pecuniary interest in the outcome. *Sherman v. Town of Brentwood*, 112 N.H. 122 (1972).

(iii) A county commissioner, deciding on the necessity of taking land for an airport purposes was **disqualified** when it was discovered that his law partner had represented a party to the dispute in question. *Appeal of City of Keene*, 141 N.H. 797 (1996). The court held the entire decision void, because it was impossible to estimate the influence of the disqualified person.

e. Family relationships. There are no New Hampshire court cases on the extent to which a family relationship can constitute a conflict of interest on municipal boards. In other states this factor can be disqualifying, depending (once again) on the facts, and the degree of relationship. A person almost always has a direct interest in his or her spouse's affairs (See *Sokolinski v. Municipal Council of Township of Woodbridge*, 469 A.2d 96 (New Jersey 1983).

There is a New Hampshire case on **judges**, however. In *City of Rochester v. Blaisdell* (May, 1992), a taxpayer was in a dispute with the city. It turned out that one of the partners in the city's law firm (who hadn't actually participated in the case at all) was an uncle of the judge hearing the case, although they hadn't seen each other in 20 years. The Supreme Court held, based on the N.H Code of Judicial Conduct, that the judge at least had a duty to inform the parties, so that they could request him to step down.

5. Land Use Boards - The Statute

Since 1988 all local land use boards have been subject to RSA 673:14 which prevents a member from sitting on a case:

“if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.”

Note that under RSA 500-A:12, a juror **may** be disqualified for any of the following reasons, namely that he or she:

- (a) *Expects to gain or lose upon the disposition of the case;*
- (b) *Is related to either party;*
- (c) *Has advised or assisted either party;*

- (d) *Has directly or indirectly given his opinion or has formed an opinion;*
- (e) *Is employed by or employs any party in the case;*
- (f) *Is prejudiced to any degree regarding the case; or*
- (g) *Employs any of the counsel appearing in the case in any action then pending in the court.*

Equally important in RSA 673:14 is the **procedure** it sets up. Any person on the board (but not people in the audience) can ask for a vote on whether that member **or any other member** is disqualified in a case. The vote must be taken prior to the public hearing in the case. The statute says the vote is non-binding, but it would be difficult to justify refusing to step down when the rest of the board has voted that the member should do so.

- In *Bayson Props., Inc. v. City of Lebanon*, 150 N.H. 167 (2003) it was held that, even though only board members can ask for a **vote** on disqualification under RSA 673:14, nevertheless **any** party can **object** to a particular member, based on a conflict of interest.
- **IMPORTANT:** In fact, not only **may** a party object – the party **must** object at the earliest possible opportunity; otherwise the right to object is lost. (In *Bayson*, the planning board gave parties an explicit opportunity to object at the beginning of the hearing. Only 4 months and 11 hours’ worth of hearings later did the applicant object (based on facts they’d known all along). The Court said that was too late.
- See also *Fox v. Town of Greenland*, 151 N.H. 600 (2004) – the issue was whether a ZBA member who’d missed 2 out of 4 hearing was disqualified from voting. The Court said the objection was raised too late: “*Had the petitioners raised their objections to Wilbur’s participation at either of these meetings, the board could have corrected the problem by disqualifying Wilbur from voting or taking steps to ensure that he had familiarized himself with the record.*”

6. Recommendations on Disqualification.

Officials exercising judicial or quasi-judicial authority, such as planning and zoning boards, must be impartial. Yet, though the above cases provide some guidance, there are very few black-and-white rules. What should you do when the answer is unclear?

- **Reveal the potential conflict to the parties.** That at least gets the issue out on the table, so nobody can claim surprise. Under *Bayson*, if nobody objects at that time, the parties have waived their right to object later.
- **When in doubt (especially if challenged), step down.** Under the rule of the *Winslow* case, a court will overturn a board’s decision if a disqualified person participated, whether or not he influenced the outcome. It’s silly for a board to risk being overturned because of a conflict of interest.
- Furthermore you **can** step down if you don’t feel right about sitting on the case, **even if** your “conflict” doesn’t fit any of the court-created rules.