

# Basics for the Planning Board

**22nd Annual OEP Spring Planning and Zoning Conference**

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Grappone Conference Center

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## **LOCAL PLANNING BOARDS ORGANIZATION AND PROCEDURE**

### **1. GETTING PERSONALLY ORGANIZED**

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

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

#### **1.2 Understand your job**

- Master Planning (RSA 674:1)
- Compiling Capital Improvements Program
- Growth Management
- Zoning Ordinance
- Subdivision and Site Plan Regulations
- Review of Applications
- Official Map (RSA 674:10)
- Earth Excavation Permits
- Special/Conditional Use Permits (RSA 674:21)

#### **1.3 Get yourself organized**

- Notebook

- Calendar
- Tablet/laptop

## 2. ORGANIZATION OF PLANNING BOARDS

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

- By legislative body (*i.e.* vote of town meeting)
- ZBA exists only because you have a Zoning Ordinance. if you have zoning, you must have a Planning Board
- Both are local options. Having planning and zoning is not mandated by statute.

### 2.2 Membership

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

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

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

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

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

- 3 years, staggered for regular members

- Varies for ex-officio – 1 year to 4 months or full term

D. Alternates

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

E. Multiple Public Service

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

F. Vacancies (RSA 673:12)

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

G. Removal (RSA 673:13)

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

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

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

2.4 Meetings (RSA 673:10)

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

2.5 Rules of Procedure (RSA 676:1)

- Adoption required by statute
- Must be filed with city, town, or village district clerk

The Rules of Procedure shall also include when and how an alternate may participate in meetings of a local land use board (non-voting alternates participating in deliberations)

- Content: “Methods of Conducting Business”
  - Order of business
  - Election of officers
  - Hearing procedures
  - Conflict of interest procedures
  - Record keeping responsibilities

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

- PB may hire its own consultants and employees (independent of Selectmen)
- However, employees are subject to rules for Town employees
- May contract with planners, engineers and other professionals to provide consulting services
- Can require applicants to pay for special investigative studies (RSA 676:4, I(g))

**3. ZONING ORDINANCE AMENDMENT PROCEDURE (RSA Ch. 675) (Primary Planning Board function)**

**3.1 How?**

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

### 3.2 **When?**

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

### 3.3 **Citizen Petitions**

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

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

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

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

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

### 3.6 **Protest Petitions**

- Force a 2/3 majority vote on a zoning amendment
- Apply only to zoning map changes, or where a text amendment affects not more than 1/3 of land area of town

- Submitted by owners of 20% of area of lots included in change, or owners of 20% of area within 100 feet adjacent to area included in change. Streets, government land not included in calculation
- Must be submitted not later than 7 days before the Town Meeting

#### 4. **REVIEW OF SITE PLAN AND SUBDIVISION APPLICATIONS** (RSA 676:4)

##### 4.1 The Application

- Vested rights apply when application is subject to notice under RSA 676:4, I (d). See RSA 676:12, VI.
- First public meeting is to determine whether the application can be accepted as complete. See RSA 676:4, I.
- The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval.
  - A “completed application” means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision.
- Planning Board must decide whether the application is complete at its next regular meeting or within 30 days, whichever is earlier, following the delivery of the application. RSA 676:4, I
- Once accepted, the Planning Board must decide whether to approve, conditionally approve, or deny the application on its merits.
- The Planning Board is given 65 days to make a decision, but this is subject to extension with the applicant’s approval.

##### 4.2 The Notice of Decision

- The Planning Board must issue a final written decision which either approves or disapproves of the application. See RSA 676:3, I.
  - If the Board disapproves the application, or approves with conditions, it must set forth written reasons for the decision to deny, or the conditions of approval.

- The minutes of the meeting where the Planning Board voted to approve, conditionally approve, or disapprove an application, including the written decision, must be filed with the board's office and made available for public inspection within 5 business days of the vote.

#### 4.3 The Appeal Process

- Planning Board decisions that involve a question concerning the interpretation of application of the zoning ordinance are appealed to the Zoning Board of Adjustment before Court. See RSA 676:5, III and RSA 677:15, I-a.
  - One exception to this rule is if the particular zoning ordinance provision(s) are innovative land use controls (i.e. conditional use permits) where the Planning Board is vested with the power to grant the permit. RSA 676:5, III.
- Otherwise, a decision of the Planning Board will be filed directly with the Superior Court.
  - Decisions to accept an application as complete are not considered decisions that are appealable to the Zoning Board of Adjustment or the Court. See Accurate Transport, Inc. v. Town of Derry, 123 A.3d 263 (N.H. 2015) ("By merely accepting jurisdiction of the site plan application on June 19, the Planning Board made no decision regarding zoning compliance.").

#### 4.4 Successive Applications

- The doctrine of Fisher v. Dover, 120 N.H. 87 (1980), which provides that ZBAs are not required to review successive applications if the first application was denied, has been extended to Planning Board decisions. See CBDA Development, LLC v. Town of Thornton, Docket No. 2014-0775 (decided April 7, 2016).
- Before the Planning Board can review a successive application, the applicant must demonstrate that the application differs in nature and degree from the prior application that was denied, or that there has been a change in circumstances that would affect the merits of the application such as a change in the law.

**RIGHT-TO-KNOW**  
**Access to Public Records and Meetings**  
(RSA Chapter 91-A)

Main purpose of this chapter is based upon theory that public knowledge of the consideration upon which government action is based and of the decisions taken is essential to the democratic process. *Carter v. City of Nashua*, 113 N.H. 407 (1973).

All power residing originally in, and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. *New Hampshire Constitution*, Part 1, Article 8.

**1. Public Proceedings**

- Transaction of any functions affecting any and all citizens by . . . [municipal]:

Boards, Agencies, Committees, Subordinate Bodies, Commissions Authorities, Subcommittees, Charter School Committees, etc.

- Applies to citizen advisory groups of local government
- Also, subcommittees of land use boards
- Public info meeting where quorum is present. AG Opinion 93-01

**2. “Meetings” (must be open to public)**

- A meeting 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 with each other contemporaneously . . . . for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power
- What's not a meeting?
  - Chance, social or other encounters (if no decisions made)
  - Collective bargaining
  - Consultation with legal counsel (no notice made and no minutes taken) (attorney must be present either physically or on the telephone with the Board in order for the gathering to be considered a consultation with counsel) (*Ettinger v. Town of Madison Planning Board*, 162 N.H. 785 (2011)).

- Circulation to finalize decisions
- Site walks are meetings

### 3. **Rules for Meetings**

- Open to public
- Public may record the proceedings in any manner (but cannot be disruptive to the meeting)
- Minutes must be kept and made available within 5 business days. *See* RSA 91-A:2, II, re content of minutes
- Must post meeting notice 24 hours in advance in 2 public places (which may include town's website) or publish in a newspaper of general circulation. Do not count Sundays or holidays
- Exception for emergency sessions

#### A **Electronic Participation** (RSA 91-A:2, III)

- Optional (apparently on a per-meeting basis)
- Attendance "not reasonably practical"
- Quorum must be physically present, except in emergency
- Audible or discernable to public (and to each participant)
- Roll call vote on everything

#### B **Sequential Communications** (RSA 91-A:2-a)

- Unless exempt, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings.
- Chain e-mails
- Other sequential communications? (telephone calls, face-to-face exchanges between less than a quorum)
- Cannot be used as a means to avoid the requirements of RSA 91-A.

**4. Non-Public Sessions (RSA 91-A:3)**

- In the municipal government context, nonpublic sessions are allowed only for six reasons. (Consult statute for the precise language). Presumption is against holding non-public sessions. Except for litigation, these rarely arise with a local land use board.
  - Hiring public employees
  - So-called “personnel matters”
  - Matters which, if discussed in public, would likely adversely affect reputation of someone, other than a member of the board
  - Acquisition of property
  - Pending claims or litigation filed or threatened in writing. (But not property tax exemption applications)
  - Preparation for and carrying out emergency functions

**5. Rules for Nonpublic Sessions**

- Motion must be made and properly seconded to go into nonpublic session
- Motion must state which of the exemptions applies (question of whether just citing statutory provision is sufficient)
- Vote must be a roll call vote
- Discussions and decisions made in nonpublic session must be confined to matters stated in motion
- Minutes and record of all actions taken must be kept and available to public within 72 hours
- However, by 2/3 vote, minutes can be sealed
  - Matters adversely affecting reputation
  - If action taken would be rendered ineffective
  - Pertain to terrorism, anti-terrorism planning, etc.

- In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. Board would meet to decide whether to unseal particular minutes.

## 6. Governmental (Public) Records

- What is a “governmental record”

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." [i.e. Board secretary receiving a site plan application for the PB]

- Citizens have a right to inspect governmental records and copy them so long as such records are within the custody, possession or control of the Board.
- Boards must maintain governmental records at town offices
- Request for records must reasonably describe the governmental record(s) sought.
- Municipality must respond immediately if record is immediately available, or within 5 business days it must
  - Make the record available, or
  - Deny the request in writing with a reason, or
  - Acknowledge request in writing and state amount of time necessary to grant the request or deny it
  - Municipality is not required to mail requested records. If volume of records is large, or there is a question concerning whether the response addresses all of the request, the Board can invite the person requesting the documents to visit the town offices to inspect the records.
- Public records requirements include electronic records (downloading files to flash drives is a typical practice)
- Not required to compile, assemble or cross-reference information into a form in which it is not already kept
- Exceptions

- Personnel records (but not retirement/severance payments)
- Confidential records: for local land use boards this is generally limited to attorney-client privilege and certain litigation-related material
- The test is a balancing of benefits to public of disclosure vs benefit to government of nondisclosure.
- 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 members of a public body.

7. **Relief for Violations** (RSA 91-A:8)

- Attorneys' fees (if lawsuit necessary and official should have known there was a violation)
- Reciprocal provision allows municipality to recover attorneys' fees if lawsuit brought in bad faith, frivolously, vexatiously, etc.
- Bad faith can result in award against individuals personally
- Invalidation of action if circumstances apply
- Misdemeanor for destroying information to prevent inspection (RSA 91-A:9)