
The Planning Board's Roles & Decision Making Process

David R. Connell
Legal Services Counsel
Local Government Center

Duties of the Planning Board

- Master Plan
 - Capital Improvements Program
 - Recommend Zoning Ordinance & Amendments
 - Subdivision regulation
 - Site Plan regulation
 - Excavation regulation
 - Driveway regulation
-

Master Plan

- RSA 674:1-:4, revised 2002
 - Mandatory task to state “best and most appropriate future development”
 - “Principles of smart growth, sound planning, and wise resource protection”
 - Statements of land use & development principles, maps, diagrams, charts etc.
 - “Legal standing” for ordinances and regs
 - Not, itself, regulatory. *Rancourt v. Barnstead*
-

Master Plan, mandatory sections

- “Vision” (goals and objectives): statements to “articulate the desires of the citizens,” including set of “guiding principles and priorities”
 - Land use: studies of population, economic activity, resources, shows existing conditions and proposed future land uses
 - Prerequisites for zoning ordinance, RSA 674:18
-

Master Plan, optional sections

- Pre-2002, 8 optional elements:
 - Transportation
 - Community Facilities
 - Economic Development
 - Natural Resources
 - Recreation
 - Utility and Public Service
 - Cultural and Historic Resources
 - Housing
 - Language revised, 2002
-

Master Plan, optional sections

- Laws 2002, Chapter 178 added 5:
 - Natural Hazards
 - Regional Concerns
 - Neighborhood Plan
 - Community Design
 - Implementation
-

Master Plan, adoption & amendment

- One element at a time, or as a whole. RSA 674:4
 - Revisions every 5-10 years recommended
 - See OEP website for details
 - Master plan prerequisite for:
 - Zoning
 - Historic District
 - Growth Management
 - Capital Improvement Program
-

Capital Improvements Program

- Authorized by legislative body. RSA 674:5
 - Legislative body authorizes adoption by:
 - Planning board if master plan adopted, or
 - Committee appointed by governing body
 - Depts. must submit proposed projects
 - 6-year program recommended projects
 - Ranked by “urgency”
 - Estimated costs construct/acquire and O & M
-

Capital Improvements Program

- “Sole purpose and effect” to aid with budgeting decisions
 - Not a basis to deny subdivision application
Zukis v. Fitzwilliam, 135 N.H. 384 (1992)
 - Prerequisite for:
 - Impact fees
 - Growth Management
-

The Right to Know Law

- Part I, Article 8 of the NH Constitution:

Government ... 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.

- Section 1 of RSA 91-A:

Openness in the conduct of public business is essential in 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.

The Right to Know Law

- The legislature has determined that the benefits of the right to know law out-weigh the burdens of implementing it.
 - Resources: Attorney General memo at http://doj.nh.gov/publications/right_to_know.html
-

Legislative Changes in 2008

- HB 1408 – effective as of July 1, 2008
 - Adds definition of “governmental records”
 - Addresses electronic communication
-

Public Meetings

- A MEETING of a PUBLIC BODY must have PROPER NOTICE and be OPEN TO THE PUBLIC. RSA 91-A:2.
-

Public Meetings

- What is a “Public Body”?

Any legislative body, governing body, board, commission, committee, agency or authority, of any county, town, municipal corporation, school district, SAU, charter school, or other political subdivision; or

Any committee, subcommittee or subordinate body thereof, or advisory committee thereto.

Public Meetings

- What is a “Meeting”?

Convening of a quorum of the membership of a public body (majority of members),

To discuss or act upon matters within its supervision, control, jurisdiction, or advisory power

Whether in person, by telephone or electronic communication, or any other way in which all members may communicate with each other contemporaneously (NEW)

Public Meetings

- Participation other than in person (*NEW*):

RSA 91-A:2, III

Public body may allow one or more members to participate by electronic or other means

State in minutes why physical attendance is not “reasonably practical”

Except in an emergency, quorum physically present

Audible/discernable to all public in attendance

Members simultaneously hear **and** speak to each other

Public Meetings

- What is not a “Meeting”?

- Chance, social or other encounter if no decisions are made;

- Strategy or negotiations re: collective bargaining;

- Consultation with legal counsel;

- Political Caucuses; or

- Circulation of draft documents to formalize decisions previously made in a meeting*
(NEW)

Public Meetings

- Email as a Meeting?



No meetings conducted by email or other form that does not allow public to hear, read or discern discussion contemporaneously

RSA 91-A:2, III(c)

Shall not circumvent spirit and purpose of law

RSA 91-A:2, III(d)

Communication Outside Meetings

- RSA 91-A:2-a (*NEW*)

Public bodies may only deliberate in properly held meetings (except for things that are not “meetings”)

May not use communications outside meeting to circumvent spirit and purpose of law (sequential or otherwise)

Distribution by email (1-way communication) okay, but soliciting or receiving responses improper

Public Meetings, Access

- Minimum notice of 24 hours

Published; or posted in two prominent places

One place may be body's website (NEW)

Other statutes may require additional notice

- Exceptions:

Emergencies. State the nature of the emergency in the meeting minutes. Post notice as soon as practicable.

Recessed/continued sessions. If the date, time and place of the session was announced at the previous meeting.

Public Meetings: Minutes

- Minutes must be kept of every meeting.
 - Two deadlines: Must be made available to public (1) not more than 5 business days after the meeting, RSA 91-A:2, II; and (2) within 144 hours. RSA 676:3, II.
 - Note that review and approval of the board is not required by RTK law and is usually not possible within the deadline.
 - Minimum contents of minutes: (1) names of members present; (2) other people participating; (3) brief summary of subject discussed; and (4) any final decisions made.
 - Minutes must be more detailed for purposes of certified record for appeals to superior court.
-

Records: New Definition

- “Governmental records”: “any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum thereof, or any public agency in furtherance of its official function . . . whether in paper, electronic, or other physical form”
 - “Public agency”: “any agency, authority, department, or office . . .” of the municipality.
 - RSA 91-A:1-a, III and V
-

Governmental Records, Availability

- Access to Governmental Records:
 - Motive is irrelevant – do not even ask
 - “Public” means everyone
 - Available for inspection and copying during the regular business hours – unless:
 - A record is temporarily unavailable because it is actually being used; or
 - When a public body is busy, officials may ask the citizen to make an appointment.
-

Governmental Records, Availability

- Photocopies or tapes of a record made at the citizen's expense.
 - May charge "actual cost" of copies.
 - Staff time is unclear.
 - Must make a record available for inspection within five business days; or
 - Deny the request with reasons, or
 - Acknowledge the request with a statement of the time necessary to determine whether the request will be granted or denied.
-

Governmental Records, Availability

- Do not lend out records for copying, RSA 41:61.

- Format: maintain governmental records “in a manner that makes them available to the public.”

If you have the information in a more convenient format, then that must be made available.

No duty to compile information in any particular format in which it is not already kept or reported. RSA 91-A:4, VII
(NEW)

Public Disclosure, Exemptions

- Categories are listed in RSA 91-A:5, but most do not apply to land use files. (E.g., “invasion of privacy”)
 - Notes made for personal use that do not have an official purpose, including notes made during meetings. RSA 91-A:5, VIII.
 - Preliminary drafts, notes, memos, etc. not in final form and not disclosed, circulated or available to a quorum. RSA 91-A:5, IX.
 - Written legal advice from counsel. *Soc’y for Protection of N.H. Forests v. WSPCC*, 115 N.H. 192 (1975)
-

RSA Chapter 91-A Violations

- Removal for violation of confidentiality.

Disclosing information that is exempt from disclosure under RSA 91-A is a breach of the oath of office. Sanction is removal from office. RSA 42:1-a

- A court may invalidate action taken in a meeting held in violation of the Right to Know Law.
-

RSA Chapter 91-A Violations

- In a citizen lawsuit to compel disclosure, a municipality may be liable for any damages and attorney's fees where:
 - The lawsuit was necessary to obtain the information; and
 - The public body knew or should have known that it was violating RSA 91-A.
 - Knowingly destroying information to prevent disclosure after a request has been made under RSA 91-A is a misdemeanor.
-

Planning Board Basic Organization

- Quorum. Majority of membership. RSA 673:10, III
 - Meetings. At least one regular meeting per month. RSA 673:10, II.
 - Chairperson and other officers. Elected from non-ex officio members for one year term. RSA 673:8, 9
 - Rules of procedure. RSA 676:1 requires the board to adopt rules of procedure “concerning the method of conducting its business.”
 - Simple rules can deal with regular and special meetings, order of business, procedure at public hearings, etc.
 - RSA 676:4 controls.
-

Subdivision/Site Plan Applications: Preliminary Review

- Since 2004, planning boards may mandate preliminary review, if authorized by legislative body. RSA 674:35, I
 - Preliminary Conceptual Consultation, RSA 676:4, II (a)
 - nonbinding, no notice required
 - general discussion of type of development, master plan, regulations, procedure
 - Design Review, RSA 676:4, II (b)
 - nonbinding, abutter and published notice required, but no public hearing
 - identify special studies that may be required, neighborhood or environmental impacts, specific issues with the parcel
 - rough layout of lots and roads, topo maps, soils information
-

Caution: “nonbinding” can be binding

- *Batakis v. Belmont*, 135 N.H. 595 (1992)
 - Developer proposed mobile home park. Staff planners submitted favorable report. During conceptual consultation board voted to review project as a site plan and to grant “preliminary approval.”
 - Board later changed mind per opinion of counsel and applied subdivision standards and denied final approval.
 - Court said board was unreasonable in changing preliminary decision even though it was pre-application review.
-

Formal Application, RSA 676:4, I

- Completed application: “sufficient information . . . to allow the board to proceed with consideration and to make an informed decision.” RSA 676:4, I (b).
 - Regulations must specify details of a completed application.
 - Carefully written checklist can specify quality as well as types of information, plans, studies, designs, etc. to minimize review and revisions.
 - Fees for administration and costs of consultants’ studies.
 - Application must be accepted by board vote at meeting, with abutter and published notice, held at least 15 days after filing of application.
-

Time Line for Decision, RSA 676:4, I

- Application filed 15 days before meeting on acceptance.
 - Board must vote on acceptance within 30 days of filing.
 - If accepted, board has 65 days to hold public hearing, with abutter and published notice, and decide to approve, approve with conditions or disapprove.
 - Board may hold public hearing at same meeting as acceptance with appropriate notice.
 - Applicant may waive 65-day deadline, or board may apply to governing body for up to 90 additional days.
-

Public Hearing Procedures

- Applicant, abutters, others with “direct interest” and others as permitted by board may testify in person or writing. RSA 676:4, I, (e).
 - Chair maintains order and makes procedural rulings.
 - Rules of procedure set order of presentation: e.g., applicant, others in favor, those opposed, rebuttal.
 - All questions through chair; no cross examination
 - Time limits are permissible.
 - Site visits: be careful to treat as part of public hearing if quorum of the board attends.
 - BUT WAIT! First there’s . . .
-

Disqualification

- Under RSA 673:14, a member is prohibited from sitting on a case “if that person 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 as a juror upon the trial of the same matter in any action at law.”
-

Juror Standard, RSA 500-A:12

- A juror is disqualified if the juror is “not indifferent” because he or she:
 - ❑ Expects to gain or lose upon the disposition of the case;
 - ❑ Is related to either party;
 - ❑ Has advised or assisted either party;
 - ❑ Has directly or indirectly given his opinion or has formed an opinion;
 - ❑ Is employed by or employs any party in the case;
 - ❑ Is prejudiced to any degree regarding the case; or
 - ❑ Employs any of the counsel appearing in the case in any action then pending in the court.
-

Judicial Decisions on Disqualification

- Typically disqualification arises in six situations:
 - Prejudgment
 - Abutters
 - Financial interest in the outcome
 - Employment
 - Family relations
 - Other relations
-

Prejudgment

- *Winslow v. Holderness*, 125 N.H. 262 (1984). A member was disqualified where, prior to joining the planning board, he had spoken, in his private capacity, in favor of the project at a public hearing on the subdivision application.
 - However, in *State v. Aubert*, 118 N.H. 739 (1978), a judge in a probation violation case was not necessarily disqualified merely because had formed an opinion prior to trial, so long as he was able to “set aside” his opinions and “decide the case on the evidence.”-- important principle.
-

Prejudgment (continued)

- *City of Dover v. Kimball*, 136 N.H. 441 (1992). A board member who predicted to applicants that their application would not be accepted was held not to have impermissibly prejudged the application because the member was responding to questions from the applicants, and his comments were reasonable and accurate.
 - “Ex parte” contacts should be avoided. They create issues of due process since a member learns information that other parties are unaware of.
-

Abutters

- Owners of property abutting the applicant's property are disqualified from sitting on the application. *Totty v. Grantham*, 120 N.H. 390 (1980).
-

Financial Interest in the Outcome

- A public officer is disqualified if he or she has “a direct personal and pecuniary interest” in the decision. 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*, 109 N.H. 264 (1968).
-

Employment

- *Sherman v. Brentwood*, 112 N.H. 122 (1972). A ZBA member employed by Rockingham County in a food surplus program was not disqualified from hearing a case where the county was an applicant for a nursing home expansion.
 - *Appeal of City of Keene*, 141 N.H. 797 (1996). A county commissioner deciding on the public necessity for eminent domain for airport purposes was disqualified because his partner had represented a party to the case.
-

Employment (continued)

- *Taylor v. Wakefield*, 158 N.H. 35 (2008)
ZBA member, who was former employee of former owner of subject property, was not disqualified to hear application by current owner for equitable waiver, where it was the former owner who had created the zoning violation in question.
-

Family Relations

- *Webster v. Candia*, 146 N.H. 430 (2001). A planning board member was not disqualified when his spouse was a leading opponent of the project in an earlier phase.
 - *Blaisdell v. Rochester*, 135 N.H. 589 (1992). A judge could be asked to recuse himself when his uncle, whom he hadn't seen in 20 years, was a partner of a lawyer in the case.
-

Business Relationship

- *McLaughlin v. Union-Leader Corp.*, 99 N.H. 492 (1955).
A person who had regularly run an ad in the Union-Leader was not disqualified from sitting as a juror on a case in which the newspaper was a party.
-

Disqualification Procedure

- Under RSA 673:14, any member on the board may ask for an advisory vote on whether a member should step down in a case, but the decision is for the member to make.
 - Any interested party has a right to object to a member's participation on grounds of disqualification.
 - In fact, if the party knows the facts, the party must make a timely objection, or the issue is waived. *Bayson Props. v. Lebanon*, 150 N.H. 167 (2003).
 - Advice: disclose the facts and explain decision to step down or not to step down. Be cautious, not intimidated.
-

Alternates

- When a member is disqualified or otherwise absent the chair shall select an alternate to sit on the case. RSA 673:11. (Curiously, statute does not apply to vacancies.)
 - One view: Alternates should not sit with the board and participate in questioning and discussion unless they are actually sitting for a regular member on the case. Risk of unnecessary error creating issue for appeal.
 - Other view: Alternates should gain experience and maintain interest by participating in cases even when they are not voting.
-

The Problem of Lengthy Hearings

- If a public hearing extends for several meetings and a board member misses an evening, the member may still participate in deliberations and vote if the member has studied the record well enough to be familiar with the evidence. *Auger v. Strafford*, 156 N.H. 64 (2007).
 - Member can review minutes, recordings and exhibits.
 - Personal attendance is necessary only when the issue of witness credibility is critical; rare in the case of expert testimony, which can be evaluated from written record. *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708 (1984)
-

Deliberation

- Board should be certain it has all available necessary information before closing public hearing; reopening requires new public notice.
 - Board may wish to deliberate and vote at later meeting. After public hearing is closed, a draft proposed decision is permitted. *Webster v. Candia*, 146 N.H. 430 (2001)
 - Avoid ex parte contacts with parties or deliberation among members outside meeting.
-

Weighing the Evidence

- Problem of balancing conflicting expert testimony and Board's personal knowledge.
 - Board may rely on personal knowledge of the area; and not bound to accept conclusions of experts, *Vannah v. Bedford*, 111 N.H. 105 (1971), only if some evidence and explained in written decision. *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007)
 - But not in the face of uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989).
-

Weighing the Evidence (continued)

- Board has considerable discretions to choose between competing expert opinions. *Richmond Co. v. Concord*, 149 N.H. 312 (2003)
 - Doubt about reliance on general studies, articles, etc. to contradict expert opinion:
 - Yes: articles and reports about hazards of shooting ranges. *Star Vector Corp. v. Windham*, 146 N.H. 490 (2001)
 - No: Audubon fact sheet re: vernal pools. *Continental Paving, Inc. v. Litchfield* (No. 2008-370, April 9, 2009)
-

Weighing the Evidence (continued)

- Board cannot deny application based on concern about adequacy of on-site septic system where:
 - Applicant had State septic approval
 - Board had no stricter regulation

Derry Senior Dev. LLC v. Derry, 157 N.H. 441 (2008)
 - In any case, strong written decision is key where factual issues must be resolved, especially where expert opinions involved.
-

Decision: Findings of Fact

- Detailed findings of fact can aid court review.
 - Lack of findings not, itself, reversible error.
Thomas v. Hooksett, 153 N.H. 717 (2006).
 - However, court can remand case if the decision is “unclear.” *Kalil v. Dummer*, 155 N.H. 307 (2007).
-

Decision: Written Notice

- Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
 - PB: RSA 676:4, I (c) (1) requires decision to approve, approve with conditions or disapprove.
 - Decision and meeting minutes must be on file for public inspection within 144 hours of vote. RSA 676:3, II.
 - Important to communicate exactly what was granted or denied and why.
-

Decision

- RSA 676:4, I (c) (1) requires a decision to approve, conditionally approve or disapprove an application.
 - RSA 676:3, I requires a written decision and written reasons in the event of disapproval.
 - A tie vote is not a decision (unlike a ZBA, where 3 yes votes are required to approve).
 - Board should be certain it has all available necessary information before closing public hearing; reopening requires new public notice.
 - Board may wish to deliberate and vote at later meeting. After public hearing is closed, a draft proposed decision is permitted. *Webster v. Candia*, 146 N.H. 430 (2001)
-

Conditional Approval

- Representations by applicant are not binding unless clearly made a condition of approval. *N. Country Env'tl. Servs. v. Bethlehem*, 146 N.H. 348 (2001).
 - Conditions must reasonably relate to ensuring compliance with relevant criteria. *Nestor v. Meredith*, 138 N.H. 632 (1994).
-

Conditional Approval (continued)

- Standard condition: approval limited to project as described in application, shown on plans and subject to other conditions of approval set forth below.
 - Conditions precedent: must be fulfilled before approval is final; e.g., other permits; build or bond improvements.
 - Conditions subsequent: restrict use of property after occupancy; e.g., hours of operation; maintenance of drainage swale.
-

Conditional Approval (continued)

- Compliance hearing: Public hearing is required where board must exercise discretion to determine if a condition precedent has been met. RSA 676:4, I (i); *Sklar v. Merrimack*, 125 N.H. 321 (1984).
 - No hearing is required for minor plan changes or administrative conditions such as approval of a performance bond or receipt of another permit.
-

Conditional Approval (continued)

- Time limits: Regulations or particular decisions should set time limits for compliance with conditions precedent, subject to extension for good cause by vote of the board.
 - Failure to meet a deadline results in lapse of the conditional approval.
 - Without deadlines the conditional approval can remain in an uncertain legal status for years because of . . .
-

“Grandfather Rights”

- Under RSA 676:12, VI, an application is exempt from any change in zoning ordinance, building code, site plan, or subdivision regulation if the notice of the application under RSA 676:4, I (d) precedes the notice of the proposed change in ordinance or regulation.
 - The exemption applies to applications at the “design review” stage, also, provided a formal application is filed within 12 months after the end of design review process.
 - 2008: RSA 676:4, II (b) amended to allow board to determine design review process has ended.
-

“Grandfather Rights” (continued)

- Under RSA 674:39, the “four-year exemption,” approved applications are exempt from changes in land use ordinances and regulations
 - For one year in any case
 - For four years if “active and substantial development or building” within the first year
 - Permanently if “substantial completion of improvements as shown on the subdivision plat or site plan” within 4 years (or afterwards if regs haven’t changed yet)
-

“Grandfather Rights” (continued)

- Regulations may define “substantial completion of improvements etc.” and “active and substantial development etc.” RSA 674:39, III.
 - Failure to define “active and substantial development” awards 4-year exemption automatically.
 - Exception: After 4 years, the project is subject to changes in impact fees. RSA 674:39, II.
 - Gap between end of RSA 676:12 “grandfathering” and beginning of RSA 674:39 “grandfathering”: importance of limiting duration of conditional approval.
-

Detailed Information

- State of New Hampshire Office of Energy and Planning has many helpful publications on planning and zoning issues at its website: www.nh.gov.oep.
 - The annual Municipal Law Lecture Series sponsored by the New Hampshire Local Government Center in the fall of every year typically concentrates on land use legal issues.
-