

Changes to Planning & Zoning Laws in 2022: *A Guide for Municipalities*



New Hampshire Department of
**BUSINESS AND
ECONOMIC AFFAIRS**

A Joint Advisory of the New Hampshire Municipal Association and the New Hampshire Office of Planning and Development at the Department of Business and Economic Affairs

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In the fall of 2019, the Governor's Housing Task Force published a set of recommended legislative changes to address the housing shortage including additional training and tools for communities. These recommendations were incorporated into HB 1629 and HB 1632 in 2020, HB 586 in 2021, and SB 400 in 2022. After much negotiating, some provisions of SB 400, were attached to **HB 1661** and became law.

The new law will have significant effects on how municipal land use boards conduct business. In addition, a new law was passed relative to local regulation of properties used primarily for religious purposes. That bill, **HB 1021**, is also summarized below.

Summary of Changes Pursuant to HB 1661

- **Section 70: Training** – Replaces existing language on permissible training offered by the Office of Planning and Development (OPD) with new language which clarifies that any planning board or zoning board of adjustment (ZBA) member (including alternate members) may receive training from OPD or another organization, such as NHMA, which offers such training. Also requires OPD to develop specific, optional training materials and corresponding tests for planning board and ZBA members. **This change goes into effect on August 23, 2022.**
- **Section 71: Publication of Fees** – Requires that any fee which a city or town imposes on an applicant shall be published in a location accessible to the public during normal business hours or the fee shall be waived. A city or town may comply with the publication requirement by publicly posting a list of fees at the city or town hall or by publishing a list of fees on the city or town's internet website. A separate document labeled as "Notice of Land Use Board Fees under RSA 673:16, III" should be created that provides a complete listing of fees charged for land use board applicants before the planning board, zoning board of adjustment, historic district commission, building inspector, and building code board of appeals. **This change goes into effect on August 23, 2022.**

- **Section 72: *Incentives*** – Gives municipalities that offer increased density, reduced lot size, expedited approval, or other dimensional or procedural incentives to housing for older persons a one-year period (until July 1, 2023) to make any adjustments to those incentives before they automatically apply to developments of workforce housing.
- **Section 73: *Written Findings*** – Expands language requiring local land use boards (planning boards, zoning boards of adjustment, historic district commissions, building inspectors, and building code boards of appeal, agricultural commissions, and housing commissions) to provide specific written findings of fact that support an approval or disapproval. The degree in which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. If there is a level of controversy, the board should consult with their town counsel to prepare complete and legally sound findings of fact. In general, the board should be clear with identifying how the application meets their regulation and checklist requirements for the findings of fact portion of the approval. Findings of fact should not replace conditions of approval. For denials, a local land use board should consider what are the things about the application that is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations; but may also include the exercise of independent judgment, experience, and knowledge of the area by the board. The findings of fact should be complete, so that (1) a reviewing court knows all of your reasons, and (2) the applicant has instructions if they want to try a second time. The board should always enlist their town counsel to aid in the issuance of the findings of fact. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, unless other grounds exist for disapproval. **This change goes into effect on August 23, 2022.**
- **Section 74: *ZBA Timeline*** – Provides that a ZBA has 90 days to begin consideration and approve or disapprove of an application, unless the applicant agrees to an extension. If the ZBA determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may deny the application without prejudice, allowing the applicant to reapply for the same relief. **This change goes into effect on August 23, 2022.**
- **Section 75: *Planning Board Timeline*** – Continues to allow a planning board to have 30 days to determine whether an application is complete but clarifies that the statutory timeframe for acting on a completed application is 65 days.* If the planning board determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may deny the application without prejudice, allowing the applicant to reapply. If the planning board does not act on the application within the 65-day period, then the governing body is required to approve the application. Failure of the governing body to approve the application allows the applicant to appeal to the superior court, which must act within 30 days and may order the municipality to pay the applicant's reasonable costs, including attorney's fees, if it finds that the governing body's failure to act was unjustified.

*2021's **HB 332**, which was signed into law, extended the planning board's deadline to act by 30 days where the board determined that the development was one of regional impact. HB 1661 introduced a grammatical error into the statute. There was no intent on the part of the drafters to remove the additional 30 days for developments of regional impact, and the statute should continue to be read to *include* the additional 30 days in the case of developments of regional impact. As such, the planning board has a total of 95 days (65 + 30) in the case of developments of regional impact to act upon the application. **This change goes into effect on January 1, 2023.**

- **Section 76: 90-Day Extension Eliminated** – Eliminates the ability of the planning board to request an extension from the governing body to take final action on an application. Prior law allowed the planning board to petition the governing body to extend the time to act on an application by 90 days. Now, the law reads that for the planning board to have more than 65 days (or 95 days in the case of developments of regional impact) to act upon an application, the applicant must waive the statutorily specified time period, and the board and applicant must agree upon the time of the extension. **This change goes into effect August 23, 2022.**
- **Section 77: Fee Shifting & Bond** – Allows the superior court to require a bond from the appealing party whenever an appeal is filed and allows the court to award attorney's fees and costs to the prevailing party. However, attorney's fees and costs are not allowed against the party appealing the land use board's decision or the local land use board unless that person or body acted with gross negligence, in bad faith, or with malice in either filing the appeal or making the decision. **This change goes into effect August 23, 2022.**
- **Section 78: Acquiring Property for Workforce Housing** – Expands the definition of "public use" under the Tax Increment Finance (TIF) statute, RSA chapter 162-K, to allow any party including a municipality to acquire real property – except by eminent domain – for the purpose of constructing housing units which meet the statutory definition of workforce housing. Said construction may occur either through private development or private commercial enterprise. **This change goes into effect August 23, 2022.**

Section 79: TIF Districts for Housing – Allows municipalities to designate municipal economic development and revitalization districts (TIF districts) for the purpose of acquiring, constructing, reconstructing, improving, altering, extending, operating, maintaining, or promoting residential developments aimed at increasing the available housing stock within the municipality. **This change goes into effect August 23, 2022.**

Summary of Changes Pursuant to HB 1021

HB 1021 was modeled after [**Massachusetts's Dover Amendment**](#) which was enacted in 1950 in response to local zoning bylaws that prohibited religious schools within a town's residential neighborhoods. However, the exact wording of the two statutes differs. New Hampshire's reads, in relevant part:

"No zoning ordinance or site plan review regulation shall prohibit, regulate, or restrict the use of land or structures primarily used for religious purposes..."

The new statute, **which went into effect on July 1, 2022**, would override any municipal limitations – but is silent on state and federal regulations, meaning those would still apply – for land or structures used primarily for religious purposes. However, the new law would likely permit site plan review that is limited to controlling the heights of structures, yard sizes, lot area, setbacks and building coverage requirements provided such requirements apply equally to non-religious and religious uses and do not substantially burden religious exercise. Planning boards should be aware that other site plan review requirements, such as lighting, signs, noise, on-site and off-site drainage, erosion and sediment control, layout of streets and sidewalks, utility design and installation, open space, pervious/impervious area, landscaping, and parking/access management requirements, *etc.*, would not be applicable to qualifying religious properties. However, legally authorized enforcement of state and federal laws, such as compliance with the state building and fire codes, local driveway regulations, septic and sewer regulations, shoreland protection requirements, wetlands, *etc.*, would continue to apply to qualifying properties.

Although the new statute provides no definition for what constitutes “primarily used for religious purposes,” it is likely that “primarily” will be interpreted by the courts pursuant to its dictionary definition, *i.e.* “mostly.” In the case of a structure, presumably, more than half of the building would be used for religious purposes for more than half of the time that the building is in use.

In addition, communities should be aware that a separate statute, **RSA 72:23, III**, exists that may be helpful in interpreting the requirements of this new statute, at least in the context of property exempted from property taxation due to religious use. **RSA 72:23, III**. That statute lists the following as exempt from property taxation:

“Houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.”

Presumably, the exemption from zoning and site plan review regulations would apply to a religious use previously approved for a religious real estate tax exemption under **RSA 72:23** as both concern the particular use of the land and categorize it as a religious purpose. But it is likely that the exemption from zoning and site plan review could apply to other religious uses that have not yet qualified or might not be eligible for the real estate tax exemption.

It is recommended that any existing or proposed use of land for religious purposes claiming the protection of RSA 674:76 be required to provide an affidavit like the one attached. Complicating matters, the statute does not define “substantially burden,” either. Municipalities looking to impose the allowable local site plan regulations on qualifying religious land or structures should carefully consider whether the local regulations would impermissibly “substantially burden” the exercise of the religion. When a governmental land use regulation substantially interferes with a religious practice, that land use regulation must be necessary to achieve a compelling governmental interest. *State v. Mack*, 249 A. 3d 423 (N.H. 2020). A careful analysis of each use seeking the zoning and site

plan review exemption is warranted, and we encourage you to consult with legal counsel on these matters.

Where to Begin?

To deal with these new laws, a municipality should begin by asking a few questions. Most of this will require updates to local land use board procedures, but some may require input from other local officials.

Does your municipality already have a listing of land use fees and post those either on your website or some other publicly available location?

August 23 is the deadline for having those fees posted in accordance with the law. As such, all municipalities should review what, if any, land use fees are posted on their websites or in any other publicly available location. Municipalities without such postings are encouraged to create one, centralized list that may be posted either in one dedicated section of its website, municipal bulletin board, or other location available to the public during business hours in order to comply with the law. That listing of fees should include fees for the planning board, zoning board of adjustment, historic district commission, building inspector, and building code board of appeals. (Effective August 23, 2022)

Do the relevant boards and officials know what your municipality's incentives are for housing for older persons and does the town wish those incentives to go into effect for workforce housing?

Town meeting will soon be upon us. Any proposed changes to local zoning ordinances must be posted and hearings held in accordance with RSA 675:3 and RSA 675:7, which, for most municipalities, will be in early January. Town officials will need time to publicize and explain the proposed changes, so the earlier that boards can meet, review, and agree upon proposed changes, the better the odds the changes will be enacted at town meeting next year. Failure to enact changes will cause those incentives to *automatically* apply to proposals for workforce housing beginning July 1 of next year.

Have your municipality's planning and zoning boards met to discuss and incorporate into their procedures the statutory changes to their respective timelines for action?

Planning and zoning boards are statutorily required to have written procedures, and these often incorporate definite timelines for board action that reflect current statutory timelines. With the statutory changes to the ZBA timeline going into effect on August 23, 2022, and the statutory changes to the planning board deadline going into effect on January 1, 2023, boards need to review their local procedures to ensure that they reflect these statutory changes. Boards should also consider what, if any, internal and external processes and timelines need to be adjusted to ensure that they comply with the new statutory timelines. Under RSA 676:1, land use board rules of procedure can be adopted at a regular meeting of the board or body and shall be placed on file with the city, town or village district clerk for public inspection.

Does your municipality want to get involved in acquiring or (further) incentivizing workforce housing or residential development generally?

The new law provides several options for how municipalities *may* either want to acquire or otherwise further incentivize development of workforce housing or other residential development. These include the optional expansion of incentives for older persons housing prior to the July 1, 2023 deadline, which would then *also* be applicable to workforce housing, the acquisition of property – except via eminent domain – for the purpose of building workforce housing, and the designation of municipal economic development and revitalization districts for the purpose of increasing the available housing stock. All of these options require approval by the municipal legislative body – town meeting for most municipalities – and the latter are options that may be adopted by city councils as soon as August 23.

Is your municipality aware of what lots may already qualify for the “primarily religious use” exemption?

When applications come in for properties “primarily used for religious purposes,” local planning and zoning boards need to be aware that such properties may only be subject to objective and definite regulations concerning the height of structures, yard sizes, lot area, setbacks, open space, and building coverage requirements as long as said requirements are applicable regardless of the religious or non-religious nature of the use of the property and do not substantially burden religious exercise. It is likely that some properties in your municipality already qualify for such an exemption based on their existing religious use and may continue to qualify if the use continues to be primarily religious.

Time to Get Started

Most of the provisions of HB 1661 go into effect on August 23 of this year, but the provisions specific to planning board timelines go into effect January 1, 2023, and some incentives for workforce housing become mandatory on July 1, 2023. That gives municipalities a little time to evaluate their existing local regulations, processes, and procedures, and determine what, if any, changes need to or should be made in advance of the law going into effect. HB 1021 is already in effect as of July 1, 2022.

Please understand that this article is only an overview of the changes to these laws. Many of the issues outlined here will require careful review of existing local ordinances and regulations, and municipalities are strongly encouraged to consult with their legal counsel or professional planning staff as they consider how to comply with the new law. NHMA’s legal staff and OPD staff also is available to answer questions about the law, although we do not have the resources to assist with reviewing and drafting ordinances or local regulations. However, we have drafted a sample affidavit to assist municipalities in complying with HB 1021. That sample affidavit follows this guidance.

AFFIDAVIT OF RELIGIOUS USE OF LAND OR STRUCTURES
RSA 674:76

The undersigned swears or affirms that the use of land or structures at (insert street address and tax map and lot #) located in the (insert name of town or city) is or will be used at least 51% of time, and that 51% of the area of the lot and/or structures, will be used for religious purposes, including but not limited to the following religious purposes: houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.

Printed Name

Signature

Name of Religious Organization

State of _____
(County) of _____

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as a duly authorized representative of (name of religious organization party on behalf of whom instrument was executed).

(Signature of notarial officer)
(Seal, if any)