



### **Afternoon of the Living Cases:**

Older Supreme Court Decision Still Haunting Planning Boards.

#### **674:35 Power to Regulate Subdivisions. –**

I. A municipality may by ordinance or resolution authorize the planning board to require preliminary review of subdivisions, and to approve or disapprove, in its discretion, plats, and to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved and to which streets water, sewer, and other utility mains, piping, connections, or facilities within subdivisions shall be installed. A municipality may by ordinance or resolution transfer authority to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved from the planning board to the governing body.

II. The planning board of a municipality shall have the authority to regulate the subdivision of land under the enactment procedures of RSA 675:6. The ordinance or resolution which authorizes the planning board to regulate the subdivision of land shall make it the duty of the city clerk, town clerk, clerk of district commissioners or other appropriate recording official to file with the register of deeds of the county in which the municipality is located a certificate of notice showing that the planning board has been so authorized, giving the date of such authorization.

III. The planning board shall not limit the number of building permits that may be issued except in accordance with an innovative land use control ordinance addressing timing incentives and phased development under RSA 674:21 and adopted under RSA 674:16; or an ordinance to regulate and control the timing of development, adopted under RSA 674:22; or an ordinance establishing a temporary moratorium or limitation on the issuance of building permits, adopted under RSA 674:23. This paragraph shall not be construed to limit the planning board's authority to deny a subdivision application on the basis that it is scattered or premature.

## **674:43 Power to Review Site Plans.**

I. A municipality, having adopted a zoning ordinance as provided in RSA 674:16, and where the planning board has adopted subdivision regulations as provided in RSA 674:36, may by ordinance or resolution further authorize the planning board to require preliminary review of site plans and to review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses or for multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units, whether or not such development includes a subdivision or resubdivision of the site.

II. The ordinance or resolution which authorizes the planning board to review site plans shall make it the duty of the city clerk, town clerk, village district clerk or other appropriate recording official to file with the register of deeds of the county in which the municipality is situated a certificate of notice showing that the planning board has been so authorized, giving the date of such authorization.

III. The local legislative body of a municipality may by ordinance or resolution authorize the planning board to delegate its site review powers and duties in regard to minor site plans to a committee of technically qualified administrators chosen by the planning board from the departments of public works, engineering, community development, planning, or other similar departments in the municipality. The local legislative body may further stipulate that the committee members be residents of the municipality. This special site review committee may have final authority to approve or disapprove site plans reviewed by it, unless the local legislative body deems that final approval shall rest with the planning board, provided that the decision of the committee may be appealed to the full planning board so long as notice of appeal is filed within 20 days of the committee's decision. All provisions of RSA 676:4 shall apply to actions of the special site review committee, except that such a committee shall act to approve or disapprove within 60 days after submissions of applications, subject to extension or waiver as provided in RSA 676:4, I(f). If a municipality authorizes a site review committee in accordance with this paragraph, the planning board shall adopt or amend its regulations specifying application, acceptance and approval procedures and defining what size and kind of site plans may be reviewed by the site review committee prior to authorizing the committee.

IV. The local legislative body of a municipality may by ordinance or resolution establish thresholds based on the size of a project or a tract below which site plan review shall not be required. If a municipality establishes a size limit below which site plan review shall not be required, the planning board shall adopt or amend its regulations to clearly reflect that threshold. Nothing in this paragraph shall preclude the planning board from establishing such thresholds in the absence of action by the legislative body.

V. Site plan review shall not be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.



**Garripay v. Town of Hanover,**  
116 N.H. 34 (1976)

- The case: The planning board legally denied a subdivision application because the access road connecting the proposed subdivision to the main network of town roads would be inadequate to handle the increased traffic created by the 49 proposed new homes.
- The haunt: Subdivisions may be denied if they are “scattered and premature,” meaning that they pose a danger to the public through insufficiency of services.



**Winslow v. Town of Holderness Planning Board,**  
125 N.H. 262 (1984)

The case: A planning board member who, prior to his membership, spoke in favor of a proposed subdivision and who, upon joining the board was instrumental in drafting the conditions of approval for the project, should have recused himself from acting on the application. Because he did not, the entire decision was deemed void, and the case was remanded to the planning board for a new hearing.

The haunt: Mere participation by one disqualified member is sufficient to invalidate the board's decision because it is impossible to estimate the influence on member might have on her associates.



**Rancourt v. Town of Barnstead,**  
129 N.H. 45 (1986)

The case: The planning board denied a proposed subdivision because of:  
1) the impact the subdivision would have on the town's growth rate;  
2) its impact on the schools; and 3) a concern for natural resources.  
Because the town's growth control rates were set forth in the master plan, and the town had not enacted ordinances providing for growth management or a capital improvement plan, that denial was illegal.

The haunt: 1) Planning boards may not deny applications based on language found in the Master Plan, which, in New Hampshire, function as a guide in the land use planning process.

2) When a planning board purports to apply its limited growth recommendations on an ad hoc basis in place of limited growth legislation, it circumvents the legislative process.



**Condos East Corp. v. Town of Conway,**  
132 N.H. 431 (1989)

The case: Planning board illegally denied a subdivision based on its conclusion that the proposed access was insufficient and inadequate absent a second access, and that the development was unsuitable due to exceptional damage to health and peril from fire due to the excessive slope of the access road, despite the fact that three experts testified that the access road would not create a hazard either to the public safety or to the road itself.

The haunt: Even though board members may rely upon their personal knowledge and experience when reviewing plans, the board may not blatantly ignore this expert advice, which was completely uncontradicted.



**Lemm Development Corp. v. Town of Bartlett,**  
133 N.H. 618 (1990)

- The case: The Board of Selectmen illegally denied a building permit for amenities (tennis court, swimming pool, bathroom) which developer sought to construct which were not shown on the approved subdivision plan, and the board had not yet adopted site plan review regulations.
- The haunt: Planning board has no authority, under subdivision regulations, to review or control the construction of facilities.



**Cohen v. Town of Henniker,**  
134 N.H. 425 (1991)

The case: Planning board illegally denied application to convert preexisting nonconforming apartments to condominium form of ownership because they did not comply with the then applicable zoning ordinance.

The haunt: Although RSA 356-B:5 allowing towns to require approval for condominium conversions, that approval may not be denied if conversion would not in fact have an effect on land use.





**Brewster v. Town of Amherst,**  
144 N.H. 364 (1999)

- The case: Planning board legally revoked site plan approval after a pattern of complaints and alleged violations by the owners, followed by hearings before the board and promises of remedial action, only to recur again.
- The haunt: While planning boards are to use their revocation powers judiciously, they are not required to ignore a history of violations and non-compliance.



**Town of Seabrook v. Vachon Management,**  
144 N.H. 660 (2000)

- The case: Town's requested injunction against live nude dancing should have been granted because the change of use from retail sales of computer equipment to mud wrestling, which predated the adoption of the zoning ordinance prohibiting it, required site plan review, which it had not obtained.
- The haunt: Change of use from one permitted use to another triggers site plan review, even if the change of use is not substantially different.



**Richmond Co. v. City of Concord,**  
149 N.H. 312 (2003)

- The case: Planning board legally denied site plan application for failure to comply with various regulations even though the board had not shared its specific concerns regarding the applications' compliance with the one of the regulations during the public hearing process, because the purpose of the deliberative session is to decide the issues.
- The haunt: Though all municipal boards have a constitutional duty to assist applicants with their projects, the board's actions in providing assistance to an applicant must be reasonable.



**Simpson Dev. Corp. v. City of Lebanon,**  
153 N.H. 506 (2006)

The case: Planning board properly revoked conditional approval of amendment to subdivision plan upon receiving advice from its attorney that the board had no authority to permit the amendment because the new lots would be located in previously designated open space area, which was not permissible.

The haunt: Because the approval was not final, the board was not barred from reviewing its decision and voting to void the conditional approval. The purpose of allowing conditional approval is to avoid requiring that any impediment to full approval result in formal disapproval and the wasteful necessity of starting all over again. Conditional approval is only an interim step in the process of the board's consideration.



**Auger v. Town of Strafford,**  
156 N.H. 64 (2007)

The case: Planning board illegally granted a waiver from its limitation that there be no more than 10 lots on a dead end street because it preferred the proposed cul de sac configuration to the loop road alternative.

The haunt: Absent any evidence of “undue hardship or injustice” to the applicant, the board may not waive its requirements.

Fri Nov 4th, 2022

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