

LEGAL LUNCH AND LEARN WEBINAR SERIES

The Workings of the Planning Board

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Today's Presenters

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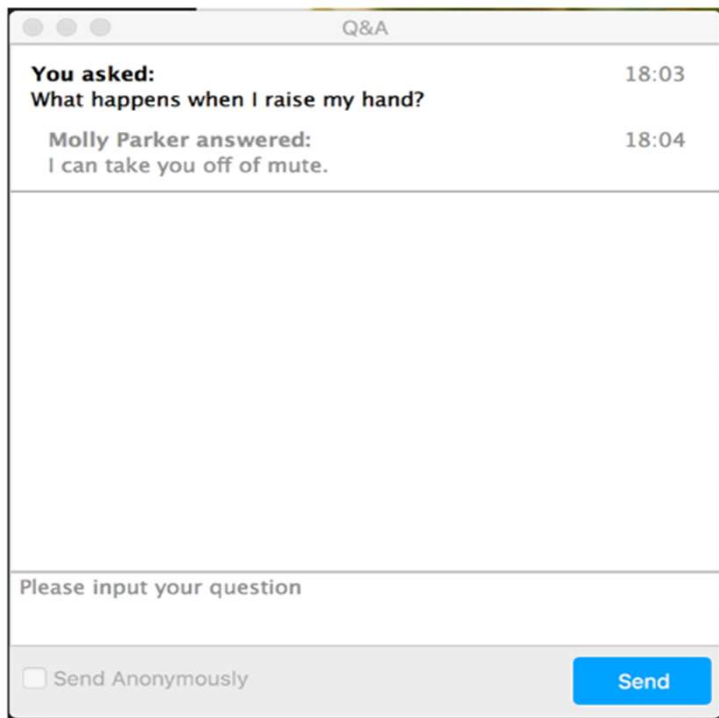
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How Do I Ask a Question?

The chat function for this workshop has been disabled.

In order to ask a question of please use the Q&A function in Zoom.

Once your question has been answered, it will then appear under the *Answered* tab.



The screenshot shows a Zoom Q&A window with a title bar labeled "Q&A". The main content area displays a question and its answer. The question is "What happens when I raise my hand?" asked at 18:03. The answer is "I can take you off of mute." provided by Molly Parker at 18:04. Below the answer is a large empty text box for asking a question, with the placeholder text "Please input your question". At the bottom, there is a checkbox labeled "Send Anonymously" and a blue "Send" button.

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Today's Presentation

- ✓ Duty to assist, Conflicts of Interest
- ✓ Statutory Duties; Subdivisions & Site Plans, Master Plan, Workforce Housing, CIP, Zoning Amendments, Innovative Land Use, Streets, Driveways, Merged lots
- ✓ Preliminary review, Applications, Timeline for Review, 3rd Party consultants, Developments of Regional Impact, Public Hearing, Deliberations, Making the decision, Conditional approvals, Vesting, Appeals



Duty to Assist

- Planning boards have an obligation under the New Hampshire Constitution to provide assistance to all citizens. *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- The subdivision/site plan process is not a completely adversarial process.
- The planning board has a duty to advise applicants and otherwise work with them as they attempt to negotiate the permit process.

Conflicts of Interest

RSA 673:14 Disqualification of Member.

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity 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. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

Juror Standard

- (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.

Case Study: Z-1 Express v. Manchester (2019)

- CUP application before planning board.
- After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- One of the members who voiced opposition on social media was asked to recuse himself, he refused, and he later voted to deny the application.
- Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind “threaten[ed] the integrity of the deliberative process” undermining public trust in the overall function of the planning board.

Conflicts of Interest

- Advisory Vote – RSA 673:14, II.
- Recuse (yes) vs. Abstain (no)
- Avoid Social Media Opinions on Pending Matters
- Disclose and Remove Yourself
- Err on the Side of Caution!

Planning Board - Statutory Duties

- ✓ Master Plan - RSA 674:2
- ✓ Capital Improvements Program 674:5
- ✓ Recommend Zoning Ordinance & Amendments RSA 675:3
- ✓ Subdivision Regulation 674:36
- ✓ Site Plan Regulation 674:44
- ✓ Excavation Regulation 155-E:1 (III) (a)
- ✓ Driveway Regulation – 236:13

Master Plan: RSA 674:1 - :4

Mandatory Section:

- “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.

Optional Sections: 14 optional elements - now including a solid waste reduction plan

Subdivision & Site Plan Approval

SUBDIVISION:

- ✓ Require preliminary review of subdivisions.
- ✓ Approve plats and plans.
- ✓ Approval showing streets.
- ✓ Approval showing utility facilities & services.

SITE PLAN:

- ✓ Municipality must have zoning.
- ✓ Planning board has adopted subdivision regulations.
- ✓ Board may approve site plans for the *development or change or expansion of use* for nonresidential uses or for multi-family dwelling units (structures with > 2 dwelling units).

Capital Improvements Program

- 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



Zoning Amendments RSA 675:3

- ▶ Planning Board proposes zoning, historic district ordinance, or building code amendments to be adopted by the town meeting.
- ▶ No zoning ordinance, historic district ordinance, or building code shall be established or amended until after a public hearing is held in accordance with the procedures required under RSA 675:7
- ▶ If an amendment is submitted by the governing body, the ballot shall so indicate and along with a notation stating the planning board's approval or disapproval. In the same manner, if an amendment is submitted by petition the ballot shall also contain a notation stating the board's approval or disapproval.



Innovative Land Use Controls

RSA 674:21

- Must be supported by the master plan.
- Administration of the ordinance can be granted to the PB, ZBA, or other such person or board according to the ordinance.
- If administration is not designated to the PB, any proposal under the regulation shall be reviewed by the PB prior to final consideration by the administrator.

Planning Board & Public Streets

- Approves Subdivision Roads 674:36, II (e)
- Approves Site Plan Roads RSA 674:44, II, (d) (e) (f)
- Establishes Road Construction Standards
- Establishes minimum completion before occupancy 676:12, V
- Imposes performance bonding, 674:36, III

DRIVEWAYS –

[RSA 236:13](#)



Planning Board or Select Board authorized to approve driveway permits on town roads.

Must adopt driveway regulations.

Delegate permit issuance and enforcement to Public Works Director or other designee.

Continuing authority over any driveway even if no permit issued.

Property owner can be ordered to fix driveway that is hazard to traveling public or threat to road integrity.

Merged Lots – RSA 674:39-a



Merger of 2 or more *contiguous* preexisting approved or subdivided lots or parcels.



No public hearing or notice shall be required.



No new survey plat need be recorded.



Notice of the merger endorsed by the planning board recorded at registry of deeds.



If any lot is under a mortgage, lender must consent.

Off-Site Exactions

RSA 674:21, V (j)

- No impact fee ordinance adoption necessary to impose exactions as condition of Planning Board approval.
- Improvements that are necessitated by a development located outside the project boundaries.
- Subject to rational nexus test.
- Limited to highway, drainage, and sewer and water upgrades pertinent to that development.

Preliminary Review- Conceptual Consultation - Design Review

- **Planning boards may mandate preliminary review, if authorized by town meeting. RSA 674:35, I**
- **Preliminary Conceptual Consultation, RSA 676:4, II (a):** nonbinding, no abutter notification required - general discussion of type of development, relationship to the master plan, issues that will arise under local regulations, what particular procedure the board will follow, site visits, possible need for expert assistance, etc.
- **Design Review, RSA 676:4, II (b):** Still nonbinding, but 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, etc.

Formal Application, RSA 676:4, I

Completed application.

Regulations specify what is completed application.

Checklist can specify types of plans, studies, designs, etc. to minimize review and revisions.

Fees for costs & consultants' studies; detailed accounting. RSA 676:4-b

Application accepted by vote at meeting, with abutter and published notice.

Timeline for Decision, RSA 676:4, I



Preliminary Consultation No Set
Time Limit



Application submitted 21 days before
acceptance at meeting.



Notice to Abutters and public 10 days
before meeting for plan acceptance.



Hold at least one public hearing and
make decision within 65 days of plan
acceptance.



Issue written decision within 5
business days.

Plan Acceptance

- Is application complete satisfying checklist of required plan content as specified in regulations
- Initial completeness assessment by staff leading to public meeting scheduling for board acceptance of a completed application, or by full board at conceptual consultation
- Decision to accept plan as complete done at public meeting with notice to applicant, abutters, easement interest holders
- This is a public meeting not a public hearing – whether to invite or permit public comments within discretion of the board

Effect of Plan Acceptance

- The Planning Board shall approve or disapprove within 65 days of plan acceptance
- If the planning board does not take final action on the application within the 65-day period, then the city council or select board is required to approve the application
- Board can no longer seek 90-day extension for final action from city council
- If Board determines the project will have a regional impact under RSA 36:56 this will extend review period an additional 30 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.

Alternative Site Plan Approval and Review Procedures

- The town meeting may authorize the planning board to delegate its site review powers for minor site plans to a committee of technically qualified administrators. RSA 674:43, III.
- Establish a Technical Review Group to provide advice to planning board applicants on their proposed projects.
- Town Meeting or planning board may establish thresholds based on the size of a project or a tract below which site plan review shall not be required. RSA 674:43, IV

Acceptance Vesting

RSA 676:12, VI

- Amendments to zoning or planning regulations do not apply to an application which has been the subject of legal notice of plan acceptance prior to the first legal notice of any such change or amendment.
- This also applies to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

Developments of Regional Impact (RSA 36:54 - :58)

- DRI when development “could reasonably be expected to impact on a neighboring municipality.”
- Within five (5) days of the meeting at which the DRI determination was made, send copies of the minutes of that meeting, by certified mail, to the RPC and to the affected neighboring municipalities.
- At the same time, submit a set of initial development plans to the RPC. The applicant bears the cost of providing and sending such plans.
- At least 14 days before the public hearing, the board must notify, by certified mail, all affected municipalities and the RPC of the date, time, and place of the hearing and of their right to testify concerning the development.

Decisions Shall Include Written Findings of Fact

- New language in RSA 676:3, I expands on requirement that local land use boards provide specific written findings of fact that support an approval or disapproval:

The decision shall include specific written findings of fact that support the decision. 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, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.

- This change went into effect on August 23, 2022.

The Planning Board shall approve or disapprove with 65 days

- 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.
- 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.

90-Day Extension Eliminated

- HB 1661 eliminated the ability of the planning board to request an extension to act on an application from the governing body.
- (Prior law allowed the planning board to petition the governing body to extend the time to act on an application by 90 days.)
- This change went into effect August 23, 2022.

Public Hearing Procedures

- ▶ 676:4, I (e) hear from applicant, abutters, others with direct interest, and others as permitted by board.
- ▶ Impartially follow rules of procedure.
- ▶ Site visits are public meetings.
- ▶ Riggins Rules.



Public Hearing Rules

- Should be written as part of the board's rules of procedure adopted under RSA 676:1
- Applicant presentation time limit?
- Abutter/easement holder/directly affected persons time limit is ok (5 minutes?)
- Testimony shall be germane to the plat/plan/application
- Permit rebuttal by applicant?

Alternate Participation

- “The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.” RSA 676:1
- Alternates should be permitted to ask questions during public hearing
- Once the public hearing is closed and the application is returned to the board for a decision, the alternate’s participation should end.

Deliberation & Weighing the Evidence

- ▶ Get all necessary information before closing public hearing.
- ▶ Board can deliberate and vote at later meeting.
- ▶ Avoid ex parte contacts with parties or deliberation among members outside meeting.
- ▶ 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 based on competing evidence that is explained in written decision. *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007)
- ▶ Cannot ignore uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989)

Dartmouth v. Hanover

New Hampshire Supreme Court

November 6, 2018

- Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.
- Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.

Written Notice of Decision

- ✓ Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
- ✓ RSA 676:4, I (c) (1) also requires decision to approve, approve with conditions or disapprove.
- ✓ Decision shall include findings of fact
- ✓ Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
- ✓ A tie vote is not a decision.

Conditional Approval

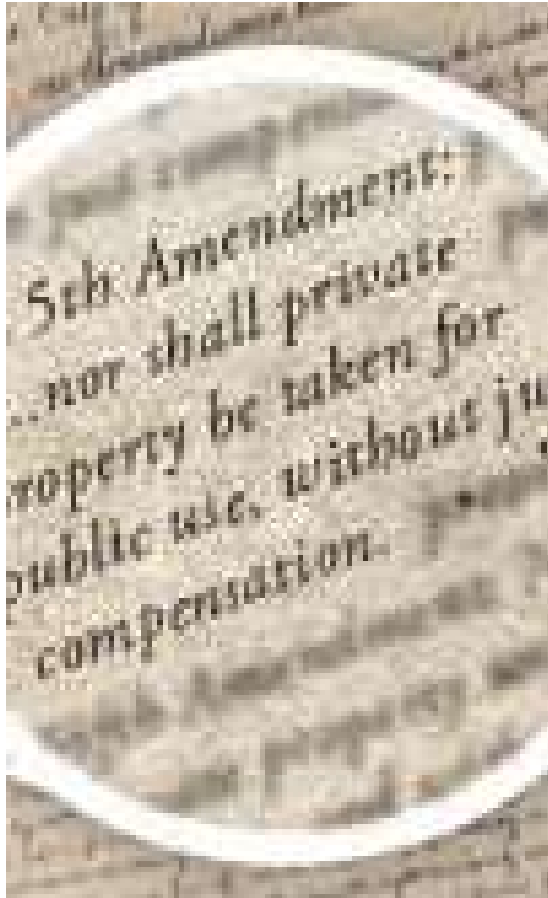
- ▶ Representations by applicant are not binding unless clearly made a condition of approval.
- ▶ Conditions must reasonably relate to ensuring compliance with relevant criteria.
- ▶ Standard conditions.
- ▶ Conditions precedent.
- ▶ Conditions subsequent.
- ▶ Compliance hearing.

New Performance Bond Rules

RSA 674:36

- No bond cost escalations for engineering, administration or other non-construction reasons.
- Shall not require letter of credit, cash, or passbook as the only method securing the completion of the work.
- Shall allow road and utility construction to start without a bond, however, a bond for the infrastructure, roads, and utilities must be in place prior to the sale of any parcel of land within the subdivision or a request for a building permit for structures for human occupation.
- Bond release inspections within 30 business days of written request, with notice by municipality of any incomplete or non-compliant work within 15 business days of the inspection.
- Municipal inspection of incomplete/noncompliant work within 15 business days of notice of completion, with final bond release in 90 days of final sign off.

“Grandfather Rights”



- Planning Board 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 7-year exemption automatically.
- Vesting periods modified by HB 413, eff. 7/1/25

Notable Recent Cases

- Impact Fees Shall Have an Essential Nexus to Legitimate Government Interests and Must Have a Rough Proportionality to a Development's Impact on Such Land Use Interests - *Sheetz v. County of El Dorado* - United States Supreme Court Case No. 2022-1074 – 4/12/24
- Denial of Site Plan Approval Cannot be Based Solely on the Purpose Provisions of the Planning Board's Regulations - *Mojalaki Holdings v. City of Franklin* - New Hampshire Supreme Court Case No. 2022-0122 – 4/9/24
- Whether a Nonconforming Use is Lawful Depends Upon the Facts Existing at the Time the Change in the Zoning Ordinance Created the Nonconforming Use - *Monadnock Rod and Gun Club v. Town of Peterborough* - New Hampshire Supreme Court Case Nos. 2023-0538 – 10-29-24
- Subdivision Approvals are Subject to RSA 674:41 and Lots Shall have Street Access - *Harvey v. Barrington* - New Hampshire Supreme Court Case No. 2021-0601 – 2/27/24

Housing Appeals Board -

<https://www.hab.nh.gov/>

- Three members, appointed by the Supreme Court.
- Will hear appeals of final decisions of municipal boards regarding “questions of housing and housing development.”
- Party has option of appealing to superior court or HAB; appealing to one waives right to appeal to the other.
- Hearing procedure is identical to procedure in superior court.
- Standard of review is identical to that in superior court.
- Board must hold hearing on the merits within 90 days after receipt of notice of appeal and must make decision within 60 days after hearing.
- Decisions may be appealed to N.H. Supreme Court.

Superior Court Appeal

RSA 677:15

Effective January 1, 2024 – The Land Use Review Docket shall have jurisdiction to hear all appeals to the Superior Court from decisions of municipal planning boards, zoning boards, historic district commissions, and conservation commissions.

All pending land use cases (except those that already had a hearing) were also transferred to the Land Use Review Docket

All new Land Use Review cases filed on or after January 2, 2024, are automatically transferred to the Land Use Review Docket in Hillsborough Superior Court North without the need for a separate transfer order.

The court shall schedule a merits hearing to be held within 60 days of receipt of the certified record.

The primary purpose of RSA 491:7-a is to provide a forum for the prompt resolution of land use appeals by a judge with knowledge and experience in land use matters.





Questions?



For Attending Our Webinar!

NHMA'S MISSION



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