

2020 Land Use Law Conference

*Planning Board Basics Part 1:
91-A, Conflicts, Fundamental
Statutes*

Presented by:
Stephen Buckley, NHMA Legal Services Counsel

October 31, 2020

1

**THE RIGHT-TO-
KNOW LAW &
PUBLIC MEETINGS**

2

THE PLANNING BOARD IS A PUBLIC BODY

- ▶ Meetings require notice, minutes, and public access
 - “Work sessions” are meetings
- ▶ Hearings have additional requirements



3

3

MINUTES

- ▶ Kept and made available upon request within 5 business days
- ▶ Include members present, people participating, summary of subject matter and decisions made, and, stating persons making and seconding motions



4

4

<h3>Consultation with Legal Counsel</h3> <p>RSA 91-A:2, I(b)</p> <ul style="list-style-type: none">▶ Counsel must be present▶ Contemporaneous dialogue▶ Non-meeting	<h3>Consideration of Legal Advice</h3> <p>RSA 91-A:3, II(l)</p> <ul style="list-style-type: none">▶ Legal advice previously given▶ Orally or in writing▶ To one or more members▶ Legal counsel doesn't need to be present▶ Nonpublic session
--	---

COMMUNICATIONS OUTSIDE A MEETING



- ▶ No electronic meetings!
Don't hit reply all
- ▶ No "meetings" by email string
- ▶ Public bodies may only deliberate in properly held meetings
- ▶ May occur accidentally

Site Walks and the Right to Know Law



- ▶ Site walks are public meetings
- ▶ Minutes must be kept and the public has the right to attend.
- ▶ The property owner must consent to allow board members and the public to visit the site, if that consent not given, the site visit must be canceled.
- ▶ Individual members could visit sites, but not with other members.

7

7

CONFLICTS OF INTEREST & DISQUALIFICATION

[]

8

8

Land
Use
Boards,
RSA
673:14, I

No member of a . . . planning board . . . 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.

The Juror Standard



500-A:12 Examination. -

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (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.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

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.

11

11

Case Studies - *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.
- ▶ The other allegation of alleged bias was that the planning board member had prepared a document he brought to a hearing titled "Reasons to Deny Libbee Road Cluster Subdivision."
- ▶ His motion was not evidence of "prejudgment," but of judgment exercised at the appropriate time and place. Nor was it evidence of "bias."

12

Case Studies – *W. Robert Foley, Trustee v. Enfield*

- ▶ The day before the ZBA met to consider a rehearing request, the chair e-mailed PlanLink asking, "Should the board members consider precedents when deciding their position on a case?"
- ▶ The chair received replies from municipal employees and zoning board members in other communities.
- ▶ The ZBA denied the rehearing request the day after the chair's e-mail on the ground that granting the requested variance would violate the spirit of the ordinance by promoting overcrowding. This was the same reason the majority of the ZBA, the chair included, gave for denying the variance when it voted over one month earlier. The Court concluded that the plaintiff failed to demonstrate that he suffered any prejudice as a result of the communications.

13

Case Studies – *Z-1 Express v. Manchester*

- ▶ Application pending before planning board for a conditional use permit for a gas station convenience store.
- ▶ After the final evidentiary hearing, but before board deliberated and made final decision, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ At a subsequent meeting 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.
- ▶ The Court ruled that the member's failure to enter into and participate in deliberations with an open mind threatened the integrity of the deliberative process undermining public trust in the overall function of the planning board.
- ▶ The Court applied the *Winslow v. Holderness* rule and vacated the decision and remanded the matter back to the planning board.

14

What do you do if you have a conflict?

RECUSAL

DISCLOSURE

ADVISORY VOTE, RSA 673: 14, II

WHEN IN DOUBT, DON'T DO IT

15

Planning Board
Fundamental Statutes

16

Planning Board Applicable Statutes

- ✓ Duties of the Planning Board RSA 674:1
- ✓ Master Plan - RSA 674:2
- ✓ Capital Improvements Program RSA 674:5
- ✓ Zoning Ordinance & Amendments 675:3
- ✓ Subdivision regulation 674:36
- ✓ Site Plan regulation 674:44
- ✓ Workforce Housing RSA 674:58-:61
- ✓ Roads & Driveway regulation - 236:13
- ✓ Merged Lots RSA 674:39-a
- ✓ Offsite Exactions RSA 674:21 (V)(j)

17

17

RSA 674:1 - Duties of the Planning Board

- ▶ Adopt, update and promote Master Plan
- ▶ Attend municipal planning conferences
- ▶ Authorized to enter private property with consent to conduct surveys
- ▶ No regulation of timber harvesting unless incident to subdivision or site plan review.

18

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

19

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



20

20

<h2>Zoning Amendments</h2> <h3><u>RSA 675:3</u></h3>	<ul style="list-style-type: none"> ▶ Planning Board proposes initial zoning adoption ▶ Planning Board & Select Board may propose amendments ▶ At least one public hearing by Planning Board ▶ Another hearing 14 days later if proposal substantively modified ▶ Deliver final proposal to town clerk 5th Tuesday before town meeting ▶ Petitioned Amendments RSA 675:4, Planning Board states approval or disapproval on ballot
--	---

<h2>Subdivision & Site Plan Approval</h2>	
<p>SUBDIVISION:</p> <ul style="list-style-type: none"> ✓ Require preliminary review of subdivisions. ✓ Approve plats and plans. ✓ Approval showing streets. ✓ Approval showing utility facilities & services. 	<p>SITE PLAN:</p> <ul style="list-style-type: none"> ✓ Municipality must have zoning. ✓ Planning board has adopted subdivision regulations. ✓ Board may approve site plans for the <i>development or change or expansion of use</i> for nonresidential uses or for multi-family dwelling units (structures with > 2 dwelling units)

Workforce Housing Statute **RSA 674:58-:61**

- ✓ Allow workforce housing in a majority of the land area zoned residential.
- ✓ Does municipality have its fair share of workforce housing?
- ✓ Housing for sale - affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for County in which the housing is located.
- ✓ Rental housing - affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for the County where the housing is located.

23

Innovative Land Use **RSA 674:21**

- ▶ An innovative land use control when supported by the master plan.
- ▶ Administration through conditional or special use permits, by the planning board, board of selectmen, zoning board of adjustment, or such other person or board as the ordinance may designate.
- ▶ If planning board does not administer permits, planning board shall review prior to final consideration by the administrator.

24

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

25

Driveways - RSA 236:13



- Planning Board authorized to approve driveway permits on town roads.
- Must adopt driveway regulations.
- Delegate permit issuance and enforcement to Road Agent 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.

26

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.

27

27

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

28

