

# **Local Land Use Authority: A Primer of Relevant Laws for Those Appearing Before a Municipal Planning Board**

By: *Steven Whitley, Esq.*

What follows will provide an overview of local authorities and the process for siting commercial and/or residential developments in a typical municipality. This is not intended to be an exhaustive review but an introduction to those unfamiliar with the applicable law and procedure before local Planning Boards.

*Jurisdiction: What might bring a party before the Municipal Planning Board?*

## Planning Board Jurisdiction and Procedures

Planning Boards have jurisdiction over subdivisions and site plans.

### **Subdivisions**

Subdivisions are defined in RSA 672:14,I:

...the division of the lot, tract, or parcel of land into 2 more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development.

RSA 674:35, I provides Planning Boards the power to regulate the subdivision of land, provided the Board has adopted Subdivision Regulations according to the procedures of RSA 675:6, which requires a public hearing and a vote by the Planning Board to adopt or amend the Subdivision Regulations. *See* RSA 674:36. The Planning Board is given broad authority in enacting its Subdivision Regulations to provide for the health, safety and welfare of municipal residents. *See generally* RSA 674:36, II.

### **Site Plans**

Site Plan jurisdiction authorizes the Planning Board 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 [more than 2 units]...whether or not such development includes a subdivision or resubdivision of the site. RSA 674:43, I.

Similar to Subdivision regulation, to exercise the power to regulate Site Plans, the Planning Board must adopt Site Plan Regulations pursuant to RSA 675:6. RSA 674:36,I.

Both the Subdivision and Site Plan Regulations are required to set forth the criteria for the submission of a completed application necessary to invoke the Board's jurisdiction. RSA 676:4,I(b). What constitutes a "completed application" varies widely and can be a source of constant debate. The Planning Board may not consider or vote on any Subdivision or Site Plan proposal until the applicant has submitted a "completed application" and the Planning Board has jurisdiction to proceed with a public hearing. Accepted applications must then obtain preliminary and final approval, as required in the regulations, and a final decision comes in the form of a "Notice of Decision."

Site Plan and/or Subdivision approvals will likely carry conditions to the Planning Board's approval. RSA 676:4,I(i). These conditions are either "precedent" or "subsequent" and that distinction can be quite important. Those parties opposed to the proposed development have the right to be heard on the applicant's compliance or lack thereof with conditions *precedent*, but have no such right regarding conditions *subsequent* that are not substantive and are merely administrative. *See id; Sklar Realty v. Town of Merrimack*, 125 NH 321 (1984).

### *Considerations When Appealing an Adverse Decision*

#### Record Before the Board and Subsequently the Court

It is imperative that while appearing before the Planning Board, the parties do an adequate job of creating the "record." The Record is important because if any party appeals an adverse decision to Superior Court, the subsequent hearing before the Court will be limited to the record compiled by the Board from the proceedings below. The Record is the compilation of all written materials submitted to the Board by any party before it, and also includes the Board's own materials such as meeting minutes, notices, and agendas. Each party bears the responsibility for ensuring that any materials, legal issues, or items that are relevant to the matter before the Board, or to that party's position, must be generated, filed and affirmatively made a part of the Record.

#### Appeal of Adverse Decisions to Superior Court

For appeals from Planning Board decisions (not involving the interpretation of the Ordinance), the appealing party has 30 days from the date of the Planning Board's decision to file an appeal directly to Superior Court. RSA 677:15,I. If a party fails to timely appeal, the Superior Court has no jurisdiction to accept and hear the case and it shall be dismissed by the Court. *See Prop. Portfolio Group, LLC v. Town of Derry*, 154 NH 610 (2006). On the other hand, if the Planning Board's decision interprets the Ordinance, then the appealing party must appeal that decision to the Zoning Board of Adjustment (ZBA) within a "reasonable time", to afford the ZBA an opportunity to rule on the proper interpretation of the Ordinance prior to any subsequent appeal to Superior Court. *See* RSA 676:5. The Supreme Court has stated that the appeal from the Planning Board to the ZBA under RSA 676:5 is a **mandatory appeal**, and if not filed with the ZBA, the Superior Court has no jurisdiction to hear any subsequent appeal. *See Route 12 Books and Video v. Town of Troy*, 149 NH 569 (2003).

The statute's inclusion of Planning Board decisions based upon the Planning Board's interpretation of the Ordinance can present a problem for those appearing before the Planning Board. Interested parties must determine if the Planning Board's decision was based upon its interpretation of the Ordinance and then appeal accordingly. In practice, this can be a very difficult decision to make. Many parties file simultaneous appeals, one an appeal to the ZBA of any decision made by the Planning Board based upon the interpretation of the Ordinance, and the other appeal to Superior Court, via RSA 677:15,I, regarding decisions of the Planning Board under its powers of Site Plan or Subdivision Review.

If a party appeals to the ZBA and the ZBA renders an adverse decision, the losing party must first request the ZBA to rehear, or reconsider, the decision or order within 30 days. RSA 677:2. Note that RSA 677:2 even allows the Board of Selectmen of a municipality to appeal the decision of its Zoning Board. Appeals must be made to Superior Court within 30 days of the ZBA's adverse decision on rehearing. RSA 677:4. In the Request for Rehearing filed with the ZBA, the appealing party **must** "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 677:3. Any argument made to the Superior Court **must**

first have been raised in a Request for Rehearing to the ZBA, otherwise the Superior Court will refuse to hear it as it does not have jurisdiction to do so. *See Shaw v. City of Manchester*, 118 NH 158 (1978). This procedure ensures that the ZBA will have an opportunity to correct any action illegally taken or any illegal interpretation or application of the Ordinance, if correction is necessary, before an appeal to Superior Court is filed. *See Bourassa v. Keene*, 108 NH 261 (1967) (decided under prior law). The ZBA is not required to grant rehearing, so it is not uncommon for the ZBA to deny the request for rehearing; and the appealing party may then file in Superior Court for relief, setting forth any claim already pled within the just-denied Request for Rehearing.

### Standing to Appeal

“Person[s] aggrieved” by a decision of the Planning Board may file a subsequent appeal to Superior Court. *See RSA 677:15*. The Supreme Court has interpreted the requisite standing the same for either case, stating that standing does not apply to all persons in a community who feel injured or affected, but that the person appealing must have a direct, definite interest in the outcome. *See e.g. Goldstein v. Town of Bedford*, 154 NH 393 (2006). In a string of cases, the Supreme Court has identified several factors to determine whether a party has this threshold inquiry to bring the appeal: the proximity to the proposed site; the type of the outcome proposed; the immediacy of injury to the appellant; and the prior participation in the administrative hearings below. *See Thomas v. Town of Hooksett*, 153 NH 717 (2006); *Nautilus v. Town of Exeter*, 139 NH 450 (1995); and *Weeks Restaurant Corp. v. Dover*, 119 NH 541 (1979). Abutting landowners to a proposed development site almost surely have the requisite standing to request rehearing and/or appeal an adverse decision to Superior Court. The above factors and analysis are generally utilized more frequently when a non-abutter, such as a near neighbor, wishes to request rehearing or appeal.

### Burden of Proof

Once before the Superior Court, the burden of proof for the Petitioner, the party bringing the appeal, for both Planning and Zoning Board appeals is essentially the same. *Bayson Properties v. City of Lebanon*, 150 NH 167 (2003). The burden is on the

appealing party to prove that the decision appealed from was unlawful or unreasonable. The decision of the Board cannot be set aside or vacated unless there is an error of law, or the Court finds that based upon the balance of the probabilities from the evidence before it, the decision was unreasonable. RSA 677:6 and 677:15,V; *see also Rancourt v. City of Manchester*, 149 NH 51 (2003). Although all factual findings of the Board are presumed to be lawful and reasonable and accorded deference by the Court, the Superior Court is not bound by the Board's conclusions of law and may review any question of law without deference to the Board's determination below. *Sundberg v. Greenville ZBA*, 144 NH 341 (1999). In addition, the Court may not sit as a "super land use board" and cannot substitute its own factual determinations for those of the Board. *Lone Pine Hunters' Club v. Town of Hollis*, 149 NH 668 (2003).

If you wish to appear before a local municipal board or would like to appeal a Board's decision, but are not sure of your rights and how best to proceed, please feel free to contact the experienced attorneys at Baldwin & Callen, PLLC, for a free 30 minute consultation regarding your concerns. Located at 3 Maple Street near downtown Concord, via phone at (603) 225-2585, or on the web at [www.nhlandlaw.com](http://www.nhlandlaw.com).