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Changes to Planning & Zoning Laws in 2023: *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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During the 2023 session, the legislature enacted a number of pieces of legislation that affect local planning and zoning processes and regulations. This guide serves as a summary of the effect of those changes.

Summary of Changes Pursuant to HB 42

HB 42 requires that no homeowner's association in a municipality whose land use board approved the existence of the homeowner's association as a conditional of approval may take action to dissolve without first having a hearing before the approving land use board pursuant to RSA 676:2. RSA 676:2 pertains to joint meetings between municipal land use boards and gives discretion to each involved board as to whether to accept the invitation from the other to hold a joint meeting. As a homeowner's association is not a municipal land use board, newly created RSA 292:8-m would override the local land use board's authority to decline the invitation for a joint meeting.

Presumably, the local land use board's chair would chair the hearing and, as required by RSA 676:2, II, procedures for joint meetings or hearings relating to testimony, notice of hearings, and filing of decisions shall be consistent with the procedures established by RSA chapter 676 for individual boards. **This change goes into effect January 1, 2024.**

Summary of Changes Pursuant to HB 252

HB 252 alters 31:39, I(n) to read as follows: (n) Regulating noise, except that no "quiet hours" ordinance or bylaw that attempts to regulate noise from activities related to farms, agriculture, and farming as defined in RSA 21:34-a shall be enforceable within a town. This exception shall not apply to agritourism as defined in RSA 21:34-a, II(b)(5).

Existing RSA 674:32-c, II created a special process for land use boards to grant "waivers" of "noise" and other local regulations. RSA 674:32-c, II provided that if local regulations are "unreasonable in the context of an agricultural use or activity," including by effectively prohibiting the use or activity, the board must grant the waiver unless it "would have a demonstrated adverse effect on public

health or safety, or the value of adjacent property.” Now, no such waiver process is necessary for agricultural activity (except for agritourism).

Of note RSA 674:44, II(n) still allows planning boards to adopt site plan review regulations which regulate noise including from farms, agriculture, and farming. **This change goes into effect August 19, 2023.**

Summary of Changes Pursuant to HB 296

HB 296 is a relatively short, two-sentence amendment to RSA 153:5, the fire code statute. It states, in part, that “the provisions of the state fire code and associated rules shall not supersede the authority of local land use boards under planning and zoning provisions of Title LXIV of the RSA to regulate and permit driveway access, when not governed by RSA 236:13, for detached one or two-family dwelling units in a structure used only for residential purposes, and provided that minimum driveway width shall not be less than 12 feet for driveways over 150 feet in length.” The intent of the legislature was to avoid situations where the planning board approved a plan, construction started, and then an issue arose with the fire code.

The new law continues, “Before issuing the approval, the local land use boards shall give due consideration to any written recommendations of the municipal fire chief regarding fire department access, to include width, vertical clearance, grade, suitability of road surface, bridges, dead-ends, and the ability to pass and turn around once in the driveway.” In communities that have a Technical Review Committee (TRC), the consideration of written recommendations of the municipal fire chief can be satisfied through the TRC process. In communities that don’t have a TRC, these written recommendations can be brought forward for due consideration during the public hearing (if required) and/or included in the staff report to a Planning Board about an application. **This change goes into effect October 3, 2023.**

Summary of Changes Pursuant to SB 78

SB 78 makes a number of changes to RSA 674:36 relative to performance bonding. Previously, a planning board had the discretion to prescribe the type and amount of security, and specify a period for completion of the improvements and utilities to be expressed in the bond or other security, in order to secure to the municipality the actual construction and installation of such improvements and utilities. The changes made by **SB 78** include:

- A planning board may not limit the type of security to only one type of security. Instead, it must allow at least two of a letter of credit, cash, or passbook. No forfeiture or automatic call bonds are allowed to be required by the planning board.
- Cost escalation factors applied by the planning board **are now allowed to be up to 15 percent per year, instead of 10 percent.** However, no cost increases are allowed for engineering, administration, or other non-construction reasons.
- **A planning board must allow road and utility construction to start without a bond, however, a bond for infrastructure, including roads and utilities, must be in place prior to sale of any parcel or an application for a building permit for structures.** Previously, planning boards could require a bond to be in place prior to commencement of any construction. Planning

boards who would like to guard against incomplete infrastructure that isn't bonded still have the option to require an on-site engineer to inspect infrastructure construction.

- Partial releases of securities are prescribed “when substantial improvements are made” during the course of project building. If an inspection is required by the municipality for release of a bond, it must be completed within 30 business days of written request delivered by hand or sent by courier. Notification by the municipality of non-compliance shall be sent within 15 business days of the inspection to the bonded party. Any fix must be completed within 30 days of receipt of notification, and reinspection must occur within 15 business days of notification that the fix has occurred. All bonds shall be released within 90 days of final sign off.

The changes in **SB 78** should prompt local land use coordinators and boards to review their locally adopted processes related to performance bonding. It is likely that some of the statutory changes will require alterations to local processes. **This change goes into effect October 3, 2023.**

Time to Get Started

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.

ARTICLE VIII: PERFORMANCE AND MAINTENANCE SECURITIES

8.01 POSTING OF PERFORMANCE SECURITIES

- A. At the discretion of the Planning Board, Community Development Director and the Director of Public Works, all proposed Commercial, Industrial and Residential development shall require completion assurances to cover costs such as, but limited to, the following: drainage, landscaping, work involving public ways or utilities, offsite improvements, paving, erosion control measures, bounds and other areas that may be deemed necessary.
- B. The Planning Board will accept the following methods of posting a performance security:
1. Cash deposited with the Town Finance Director
 2. A bond issued by a guarantee company authorized to do business within the State of New Hampshire, in an amount and manner acceptable to the Planning Board
 3. An irrevocable letter of credit in an amount and manner acceptable to the Planning Board after consultation with Town Counsel
- C. A performance or maintenance security is required to be sufficient to cover the cost of all construction and improvements; including materials, labor and inspections.
- D. Performance securities shall be submitted to the Town prior to the construction of any road, utility work, and public improvement or to obtaining a building permit on a new road.
- E. Proper performance or maintenance securities shall be maintained at all times by the developer or successor in interest. A developer or successor in interest's insolvency, commencement of foreclosure proceedings against, appointment of a receiver or petition into bankruptcy shall constitute default of security and shall entitle the Planning Board to draw upon any Letter of Credit or other securities unless reasonable and comparable assurances regarding the completion of all improvements have been provided to the Town.
- F. Failure to maintain proper completion assurances shall result in the denial of a Certificate of Occupancy and the revocation of all building permits outstanding for the subdivision. This does not pertain to any lots within the subdivision that have previously received a Certificate of Occupancy.

8.02 RELEASE OF PERFORMANCE SECURITIES

Upon inspection of a partial completion of required improvements, the Community Development Department may authorize in writing for approval by the Board of Selectmen, a reduction in the performance security equal to the work completed. The Town shall retain sufficient funds for the current cost to complete the remaining improvements and inspections plus a ten (10%) percent retainage, as indicated by a qualified contractor's bid estimate approved by the Planning Board. If the costs for completing the required improvements exceeds the amount of the performance security held by the Town, additional funds shall be required by the Planning Board in order to ensure completion before the

development proceeds any further. The retainage shall be held until the completion of all required improvements have been inspected and approved by the Planning Board.

Should progress toward the completion of all required improvements fall substantially behind the approved phasing schedule or reasonable timetable, the Planning Board may obtain a completion cost estimate from the developer's contractor or a qualified contractor of the Planning Board's choice. If the estimated completion costs exceed the amount of the performance security posted with the Town, the developer shall post an additional performance security as is necessary to complete the required improvements. The developer shall post such security within 30-days of the notice thereof.

The final release of the performance security (or balance thereof) shall be released when:

- A. The Director of Public Works has certified completion of all required site improvements in accordance with the approved plan,
- B. Complete As-Builts has been submitted and approved,
- C. A maintenance security (if necessary) has been received by DPW, and;
- D. All easements, deeds and required legal documentation has been submitted by the applicant and reviewed by Town Counsel (as necessary) and approved by the Director of Community Development.

Please see APPENDIX VI: ROADWAY ACCEPTANCE INFORMATION for complete road acceptance guidelines.

8.03 MAINTENANCE SECURITIES

For public improvements within the Town right-of-way, or for roads intended to be turned over to the Town, the Board will not release the performance security until a maintenance security is in place. The maintenance security will cover the maintenance of public roads and other public improvements for a period of one (1) year from the date of road acceptance by the Board of Selectmen. The amount will be two (2%) percent of the original total performance security unless otherwise determined by the Director of Public Works. All Road Maintenance Bonds are held by the Department of Public Works. If repair or unusual maintenance is needed or additional improvements are required then such costs as are necessary shall be drawn against said security.

ARTICLE IX: EXPIRATION, ENFORCEMENT, FINES, PENALTIES AND APPEALS

9.01 ENFORCEMENT

These regulations shall be enforced by the Planning Board or its duly authorized enforcement authority. Should the Planning Board or its duly authorized enforcement authority determine that an applicant is proceeding contrary to these regulations or the terms of the approved site plan or subdivision plan signed by the applicant and Planning Board, the Planning Board or its authorized representative shall notify the applicant in writing of the specifics of such violation(s) and the appropriate steps, including a timetable, for remedying said violation(s). This notification procedure shall, if deemed appropriate by the