

TOWN OF MILFORD PLANNING BOARD TRAINING

1. Role of the Planning Board—to provide assistance to applicants as required by New Hampshire law.
2. Rules of Procedure, a set of meeting guidelines, a reference tool.
3. Board Member Conflicts of Interest/Disqualification. If a member has a direct personal or financial interest in the outcome of the application that differs from the interests of other citizens, the member must recuse himself/herself. This would include abutter status to an application. Also, if the member would be disqualified for cause as a juror if this matter was to go to trial, the recusal is in order. Prejudgment—be cautious about not prejudging application, but pointing an applicant in the direction of how to comply with the Town’s subdivision or site plan regulations is not prejudgment.
4. Application Acceptance. The Planning Board’s jurisdiction begins when the Board votes to Accept the Application as complete. Your subdivision and site plan regulations (usually a checklist) should outline what materials constitute a complete application. A vote of Application Acceptance triggers the start of the 65 day approval clock per RSA 676:4, I (c), 1. Keep an eye on the clock and obtain extensions from the applicant.
5. Developments of Regional Impact, RSA 36:54. If the project is likely to have impacts beyond the Town’s border. If in doubt, provide regional impact notice at the applicant’s expense.
6. Waivers. PB may only grant a waiver when:
 - a. Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or,
 - b. Specific circumstances relative to the subdivision or site plan, or conditions of the land in such subdivision or site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations.
7. Project review. Moving towards making sure there is compliance. Importance of using third party review engineer/experts, and have them write letters addressing reviews and compliance issues.

However, Planning Board members must not engage in individual research about an application. I had a case before the Cheshire County Superior Court where the meeting minutes said the Chair looked up some issue on her laptop during the meeting then then said that information changed her mind about something. Counsel for the Plaintiff pointed that issue out to the judge, and the judge said that such independent research by a Board member was

impermissible, because the public and the applicant have a right to know what information is being presented to the Board. When Boards are reviewing an application, they are acting in a quasi-judicial capacity.

Like judges or jurors, the Board makes decisions based upon the information that is presented to them at the hearings: which means the Board reviews the application, documents submitted by engineers, other experts, and others in support or opposed to the application. All of which are documents available to the public for review, or are elements of public testimony presented at the Board's public hearings (including observations made by the on a site walk). Just as a judge or juror cannot go out and do independent research and must base their decisions upon evidence presented at trial, so too the Board cannot go out and conduct its own investigation into matters relating to the application that could influence his/her decision making. Such activity would completely undermine the public hearing process, just as such conduct by a judge or juror would completely undermine the process of conducting a trial.

8. Meeting Minutes/Circulate a sign-in sheet. Between use of a sign-in sheet and meeting minutes, you should try to capture who's in attendance. Why can this be important? Once in a great while there can be a failure to deliver notice to an abutter; however, if the person shows up, then they received actual notice (because they are present) and the notice requirement of the statute is satisfied by actual notice.

Minute taking is an art, because what you want to capture is everything said by the applicant, the public and the Board that bears on the application with enough detail so people will be able to understand what went on at the meeting, and particularly the points made relating to how the application does or does not meet the requirements of the subdivision and site plan regulations and zoning ordinance.

9. Zoning Ordinance interpretation by the Planning Board during subdivision and site plan review. The Planning Board has the authority in RSA 676:5, III to interpret, construe or apply the zoning ordinance during application review. When you do so, please do so by making a motion and taking a vote. For instance, let's assume there's some question as to whether the proposed application (an adult drug and alcohol residential treatment facility) fits within the uses set forth in the ordinance (Section 6.9, B, 8 permits "hospital, infirmary, nursing home, convalescent home" in the C District). This becomes a threshold question at the first meeting prior to application acceptance. To address this issue, someone could either make a motion to "I move that we define 'convalescent home' to include this proposed residential drug and alcohol treatment facility," explain why it is reasonable to interpret the ordinance that people in treatment are "convalescing" at such a facility from their addiction with treatment. Motion is adopted. Or, someone could make a motion "I move that we interpret this use as not falling within the section 6.9, B, 8 definition of 'hospital, infirmary, nursing home or convalescent home' and is not a permitted use under the Ordinance." This then becomes an administrative decision of the Board that must be appealed to the ZBA as specified by its rules, or within a reasonable time if the rules don't have a specific time period for appeal. The key point of the Board making a decision that involves the interpretation, construction, or application of the

zoning ordinance is that the decision is clear. You make it clear by a motion that frames the proposed interpretation of the ordinance and by a vote. The New Hampshire Supreme Court has stated that such interpretation should be made early in the Planning Board's review of an application so if someone doesn't like the decision, it can be appealed; and for those who benefit from the decision, it can be relied upon after the appeal period to the ZBA is over. This does not mean that the Board is powerless to interpret the ordinance later in its review, but ideally, you want to get these interpretation issues out of the way as soon as they arise so that if an appeal to the ZBA is authorized, it can be taken right away. Now, if the Planning Board's interpretation of the zoning ordinance arises from an interpretation of an ordinance provision that is an innovative land use control (e.g., an impact fee, or cluster development ordinance, or others as set forth in RSA 674:21,I), then an appeal of these types of ordinance interpretations goes not to the ZBA, but to Superior Court. The bottom line, however, is when the Board feels it needs to interpret the ordinance in some manner when reviewing an application, do so with a clear motion and vote—all of which should be clearly captured in the PB meeting minutes.

10. Continuing the application—always continue an application before moving on to the next agenda item to a specific date and time—thus informing the public of when the application will next be heard, and sparing the expense of re-noticing. Make sure this info gets into the meeting minutes.

11. How to handle abutter or general project opposition. First, the Board conducts public hearings on the application. The public hearing is an opportunity for the applicant to present the plan, for abutters and members of public to comment on the plan, and for members of the Board to ask the applicant or its representative questions. The public hearing is not an opportunity for the members of the public or the applicant to question the Board. The Board has no obligation to respond to questions from the public. In fact, the Board as a whole speaks through its votes on matters. Individual Board members may have opinions, but one member of the Board does not speak for the Board. The Chair can politely explain to the public that the purpose of the public hearing is for the Board to be able to listen to the input from the applicant and the public, there is no dialogue between the Board and the public. Similarly, the framework within which the Board conducts its review of the application is whether or not the application meets the Board's regulations and the zoning ordinance. The Board can use conditions of approval to mitigate impacts that might otherwise be unacceptable and not meet the spirit and intent of the regulations without the imposition of certain conditions. The Rules of the Game, so to speak, are the zoning ordinance and the subdivision or site plan regulations depending on whether it's a subdivision or site plan application. Everyone has to follow the rules, and the rules confer rights on property owners to use their land.

12. Conditions of Approval. As often application reviews will take more than a meeting or two, it is important to track along the way of what conditions the Board members might be thinking about imposing as aspects of the application are taken up, reviewed, resolved (and then likely not revisited again until the last meeting). As part of the Board's deliberations on an application after the close of the public hearings, there should be a discussion about what conditions should accompany any proposed motion to approve. There should be some

discussion about why condition X, Y or Z is important. If other members agree, or disagree, people should say so and explain briefly why, linking if you can the conditions to the specific regulation aims, or explaining how they will project the public, abutters, et cetera—even if it is to say, “I agree with what member A said.” Conditions should be clear and should be captured in the meeting minutes. Don’t be shy about working together during deliberations to get agreement on the language of a satisfactory condition.

13. Application Denials. RSA 676:4, I (h) specifies that in the case of disapproval of any application submitted to the Planning Board, the ground for such approval shall be adequately stated upon the record of the Planning Board. Denials ordinarily mean that something really went off the rails. Your engineer and planner should be providing information to the Board to support a denial. It’s long been recognized that an approval with conditions that are well supported, but that the applicant may not be thrilled about, is far superior to a denial that’s not meticulously supported by the record. If the Board learns during its deliberations that there’s not support approve an application and therefore it looks as though the Board is moving towards a denial, I encourage you to continue the Board’s deliberations on the application to another meeting to allow the Board to consult with legal counsel, so that you can have the benefit of counsel’s advice on the issue, and get advice on how best to word the motion and make findings of fact that will support the Board’s decision.

14. Recording the plan/performance guarantees/easement/deeds. The Board’s Rules of Procedure should set forth what has to be done by the applicant before the plan will be recorded. The applicant will have to post a performance guarantee in a form and amount acceptable to the Town’s engineer or planning staff, and its legal counsel. I suggest that Board accept either a cash bond or letter of credit, rather than an insurance bond, as insurance bonds are usually difficult to collect and expensive in terms of Board legal fees if the Board needs to call the bond due to non-performance. Letters of credit are comparatively easy to draw upon, provided that they are in the correct form. I can provide you with a model letter of credit format to require applicants to follow.

The plan should be recorded by the Town, not by the applicant (to ensure it gets done promptly). As the registry of deeds can be picky about how much detail is set forth on the plan, and will reject them if there is too much detail, applicants (and their engineers or surveyors) should be required to confirm that they have obtained registry pre-approval of the plan for recording so the town will not have to deal with a rejection of the plan when it goes to record it.

Easements and deeds to accompany plan recording. The easements and deeds that are necessary to support the plan (e.g., the deeds relating to a lot line adjustment), or an access easement, should be provided by the applicant so that they can be recorded at the same time as plan goes on record. This requirement can be addressed as a condition of approval.