

Chapter Five

2010 and Beyond: Procedures for Boards and Developers

A. Working Through the Statutory Process

The procedure section of the workforce housing statute (RSA 674:60) sets out a series of specific actions which must be followed, by both an applicant and a local land use board, when considering any workforce housing application. Failure to comply with these statutory requirements can have important consequences for both parties.

The appeals section of the workforce housing statute (RSA 674:61) contains provisions beyond the typical local land use board appeal process provided under RSA 677:15. Workforce housing appeals may be made to superior court if:

- An application is denied; or
- The application is approved with conditions or restrictions which have a substantial adverse effect on the viability of the proposed development.

If the appeal is successful, the court may award the “builder’s remedy,” allowing the development to proceed without further review by local boards.

To utilize the provisions of the workforce housing statute, a developer must file a written declaration with the land use board stating that the application is for workforce housing. Failure to do so will preclude the applicant from seeking the builder’s remedy under the statute and will prevent the developer from using the statute’s accelerated appeal. An applicant who is challenging a local land use board’s conditions as being financially onerous bears the burden of demonstrating that such conditions would render the development economically unviable.

B. Laying Out the Procedure

The workforce housing statute language from RSA 674:60 and 674:61 is presented here, together with recommended procedures to address them:

1. Application Procedures - RSA 674:60, I

Any person who applies to a land use board for approval of a development that is intended to qualify as workforce housing under this subdivision shall file a written statement of such intent as part of the application. The failure to file such a statement shall constitute a waiver of the applicant's rights under RSA 674:61, but shall not preclude an appeal under other applicable laws. In any appeal where the applicant has failed to file the statement required by this paragraph, the applicant shall not be entitled to a judgment on appeal that allows construction of the proposed development, or otherwise permits the proposed workforce housing development to proceed despite its nonconformance with the municipality's ordinances or regulations.

This Section requires that any application filed under the statute must do so by declaring in writing, as part of the application, the intent to construct a workforce housing. If an applicant fails to adhere to this requirement, the accelerated appeals mechanism contained in RSA 674:61, II will be forfeited.

Procedurally, a community should:

- a. Amend its site plan and subdivision applications to add workforce housing as a “use” box to check off when applications are submitted, and in addition provide an area on the application to describe the project.
- b. Aside from information that a community commonly requests for any development proposal, the required “written statement” detailing the specifics of a workforce housing application should, at a minimum, call for the following:
 - i. Identify the types of housing proposed (i.e. single family, townhome, etc.)
 - ii. How many units are proposed, and how many of the dwelling units will be designated as workforce housing?
 - iii. At what price point will the workforce housing units to be sold; or if rental units are contemplated, what is the anticipated monthly rent cost?

2. Board Review - RSA 674:60, II

If a land use board approves an application to develop workforce housing subject to conditions or restrictions, it shall notify the applicant in writing of such conditions and restrictions and give the applicant an opportunity to establish the cost of complying with the conditions and restrictions and the effect of compliance on the economic viability of the proposed development. The board's notice to the applicant of the conditions and

restrictions shall constitute a conditional approval solely for the purpose of complying with the requirements of RSA 676:4, I(c)(1). It shall not constitute a final decision for any other purpose, including the commencement of any applicable appeal period.

Once the land use board has accepted the application as complete, it should be reviewed with the same procedures as any other land use proposal. For planning boards, this means following RSA 676:4, “Board’s Procedures on Plats.” As with any application, the land use board should strive to document this process intensively to provide a record for the court of its efforts to fairly and impartially review the proposal.

3. Applicant Review - RSA 674:60 III

Upon receiving notice of conditions and restrictions under paragraph II, the applicant may submit evidence to establish the cost of complying with the conditions and restrictions and the effect on economic viability within the period directed by the board, which shall not be less than 30 days.

This Section provides a workforce housing applicant with, at a minimum, a 30-day period in which to evaluate the cost implications of conditions of approval and/or restrictions. The purpose of this evaluation is to give the applicant the opportunity to identify the conditions or restrictions that impact the economic viability of the development.

The land use board may set a longer review period, or the applicant can waive the review period (this should be in writing) in its entirety as provided in 674:60, III(d) and accept the conditions and restrictions. The land use board may either table the matter to a specific future meeting date or re-notify all required parties once the review period has concluded.

4. Additional Hearing - RSA 674:60, III(a)

Upon receipt of such evidence from the applicant, the board shall allow the applicant to review the evidence at the board’s next meeting for which 10 days notice can be given, and shall give written notice of the meeting to the applicant at least 10 days in advance. At such meeting, the board may also receive and consider evidence from other sources. (b) The board may affirm, alter, or rescind any or all of the conditions or restrictions of approval after such meeting.

After this review period, and if deemed necessary by the applicant, this section allows the applicant to claim and present cost data that the board’s conditions of approval and/or restrictions impact the project’s economic viability. A hearing for this specific purpose should be held, and:

- unless the project had been tabled to a specific date, notification to all relevant parties shall be required; and
- at this hearing, the land use board may consider data from the applicant or other sources.

In evaluating any applicant's claim of adverse economic impact affecting the viability of a workforce housing proposal, a local land use board should bear in mind that the cost components of a development project are numerous and that some of these costs are greatly influenced by local ordinances and regulations. This issue is discussed in greater detail in Chapter 3.

An applicant making a claim that a land use board's conditions of approval and/or restrictions adversely impact the economic viability of a development project should be able to identify specific line items contained in Figure 3-1 that gave rise to the claim. During this review, the land use board should consider the following:

- a. Provide the applicant with a copy of Figure 3-1 (or request that the applicant submit a similar outline) and request that cost data for all components identified on this figure be provided for the board's consideration.
 - i. The applicant should identify to the board those specific cost components that are adversely affected by the conditions imposed by the board, and state how such effects would render the development economically unviable.
 - ii. If a claim is made that factors other than those found in Figure 3-1 are impacting the project's economic viability, then the applicant should provide detailed evidence supporting the claim.
- b. Once received, the board may want to seek the services of a third party expert, paid for by the applicant, to review the applicant's claims. A land use board often seeks outside advice in reviewing an application, and this process would be no different. After reviewing the data submitted, along with any consultant's report, the statute provides the land use board with an opportunity to affirm, alter, or rescind any or all of the conditions or restrictions of approval. The board should be very clear when documenting any decisions that are made, noting all actions in writing to the applicant.

5. Final Alterations and Approval - RSA 674:60, III(c)

Subject to subparagraph (d), the board shall not issue its final decision on the application before such meeting, unless the applicant fails to submit the required evidence within the period designated by the board, in which case it may issue its final decision any time after the expiration of the period. (d) If an applicant notifies the board in writing at any time that the applicant accepts the conditions and restrictions of approval, the board may issue its final decision without further action under this paragraph.

With its evaluation complete, the land use board is entitled to issue its final decision (at a public meeting) on the application.

If the applicant has failed to submit any requested data to the board within the specified time period, the board is free to vote on the application. Failure on the part of the

applicant to submit any supporting cost data should eliminate the applicant's ability to appeal the land use board's decision on the basis of lack of economic viability.

C. After the Procedures: Possibility of Appeal

1. Basis of A Workforce Housing Appeal - RSA 674:61, I.

Any person who has filed the written notice required by RSA 674:60, and whose application to develop workforce housing is denied or is approved with conditions or restrictions which have a substantial adverse effect on the viability of the proposed workforce housing development may appeal the municipal action to the superior court under RSA 677:4 or RSA 677:15 seeking permission to develop the proposed workforce housing. The petition to the court shall set forth how the denial is due to the municipality's failure to comply with the workforce housing requirements of RSA 674:59 or how the conditions or restrictions of approval otherwise violate such requirements.

The steps of an appeal are as follows:

- a. An appeal must be made to superior court within 30 days of a final decision by the local land use board, pursuant to the typical land use appeal procedures outlined in RSA 677:4 and 677:15. However, the workforce housing statute provides for the "builder's remedy" as a potential award to the applicant. As with any land use application, it is imperative that the land use board carefully analyze any application and fully document all decisions.

RSA 674:61, I notes that at the end of the local process, an applicant proposing a workforce housing development may appeal the board's decision, alleging one of two things:

- i. That the collective impact of the municipality's land use regulations preclude the proposed workforce housing development; or
 - ii. That the conditions imposed by the land use board would render it economically unviable.
- b. As with any appeal, the burden of proof is upon the applicant filing the appeal. If a municipality has determined that it has provided its "fair share" of workforce housing, then the community may assert this as an affirmative defense.

2. Accelerated Appeals - RSA 674:61, II

A hearing on the merits of the appeal shall be held within 6 months of the date on which the action was filed unless counsel for the parties agree to a later date, or the court so orders for good cause. If the court determines that it will be unable to meet this requirement, at the request of either party it shall promptly appoint a referee to hear the appeal within 6 months. Referees shall be impartial, and shall be chosen on the basis of qualifications and experience in planning and zoning law.

This section provides for an accelerated appeal for workforce housing applications. Unlike appeals of other land use decisions, with workforce housing cases the superior court is obligated to hold a hearing on the case merits within six (6) months, unless a later date is agreed to by both parties or extended by the court for good cause.

- a. If the court is unable to hear the case within the 6 month time period, it must appoint an impartial referee qualified on the basis of experience in planning and zoning. The referee would have the authority to make a ruling on this matter.
- b. The court then decides the appeal based on a few factors.
 - i. If the municipality does in fact have its fair share of the current and foreseeable regional need for affordable housing, the court can accept this as a defense and affirm the municipality's decision.
 - ii. If the municipality does not have this fair share and the builder has enough evidence in his favor, the court can order a "builder's remedy" or other relief deemed appropriate by the court. The "builder's remedy" is awarded in unusual circumstances, such as when a municipality has adopted blatantly exclusionary land use ordinances and regulations.

3. If the Builder's Remedy is Awarded - RSA 674:61, III.

In the event the decision of the court or referee grants the petitioner a judgment that allows construction of the proposed development or otherwise orders that the proposed development may proceed despite its nonconformance with local regulations, conditions, or restrictions, the court or referee shall direct the parties to negotiate in good faith over assurances that the project will be maintained for the long term as workforce housing. The court or referee shall retain jurisdiction and upon motion of either party affirming that negotiations are deadlocked, the court or referee shall hold a further hearing on the appropriate term and form of use restrictions to be applied to the project.

This Section specifies that if a judgment is made awarding the builder's remedy to the applicant, then the court or referee can direct the parties to negotiate in good faith to ensure that workforce housing units will remain affordable for the long term. Failure of the parties to reach accord will cause the court to intervene and potentially impose a resolution.

D. Further Suggestions for Compliance

1. Documentation of Findings

As with any land use application, it is important for all decisions and analyses to be fully documented to ensure that a complete record is established. To avoid a challenge and/or reduce the chances that a court will rule against a board's decision, the municipality should ensure that it has fairly and thoroughly reviewed its local ordinances and regulations to allow for the construction of workforce housing.

If a local decision is made that the community is currently in compliance with the statute, this conclusion should be fully documented with facts justifying the municipality's position.

2. Recommended Site Plan and Subdivision Regulation Amendments

In order to adequately address the Procedure requirements of RSA 674:60, planning boards should amend their site plan and subdivision regulations to create a specific section that outlines the application procedure that must be followed in order to comply with the specific statutory requirements. Aside from altering the application form as recommended above, the following provisions should be noted:

1. Request a detailed written outline of the proposed project, noting how many of the units will be workforce housing, along with other relevant details.
2. State that the board will provide the applicant, in writing, a list of all conditions of approval and/or restrictions. With the issuance of this notice of decision, the application is deemed "conditionally approved."
3. The land use board must set a review period (a minimum of 30 days) in which an applicant can evaluate the economic impacts of the conditions and/or restrictions placed on the project.
4. When a conditional approval is given to the applicant, the land use board can table the matter to a specific date. Or once an applicant has submitted his/her supporting data claiming adverse economic impact (within the specified time period), a hearing date must be set that is properly noticed.
5. At the additional hearing, the land use board can review the evidence provided by the applicant and affirm, alter, or rescind any conditions of approval and/or restrictions and issue its final decision. If an applicant has not submitted written evidence within the specified time period, the land use board (at a duly notified meeting) can issue its final decision.

E. The Workforce Housing Roles of Other Local Land Use Boards

1. Local Land Use Boards

While most of the issues involving municipal responses to the workforce housing statute involve the planning board – including housing assessments, regulatory audits, development of amendments to zoning and other land use regulations, and processing of applications, there are some circumstances in which other land use boards may also play a role.

As defined in RSA 673:7, "local land use boards" include the following: planning board, zoning board of adjustment (ZBA), historic district commission, building code board of appeals, and the building inspector. The first four are regulatory boards with authority

over the use of land, and the building inspector is included to provide a route of appeal of building permit determinations and zoning interpretations. The ZBA typically also serves as the building code board of appeals. The decisions made by all of them, including the building inspector, may fall within the reach of the workforce housing statute. The same tools of economic analysis that may be used by a planning board, such as a developer's pro forma, are also suitable for any other local board.

In addition, utilizing the authority RSA 674:21 ("innovative land use controls"), a local zoning ordinance may grant to any other local body or official the authority to issue conditional use permits. To the extent that such a delegation of authority occurs, the decisions of that body or official may also be subject to the workforce housing statute.

For example, some zoning ordinances grant local conservation commissions the authority to review impacts on wetlands or wetland buffers. If this authority is greater than the advisory role of the conservation commission under the "dredge and fill" statute (RSA 482-A) and includes the ability to deny a project (as opposed to simply advising the planning board), then such a decision should include consideration of the cost implications on workforce housing proposals. This does not mean that the conservation commission could not deny such a project or impose conditions of approval. It means that the commission's decision would need to be reasonable in light of the circumstances, and that the commission would have to be aware of the substantive and procedural requirements of the workforce housing law.

2. Zoning Boards of Adjustment

Whenever the Zoning Board of Adjustment (ZBA) is dealing with a proposal that has been declared by the applicant as workforce housing, the ZBA must apply the same economic viability "sensitivity analysis" as the planning board would when faced with such an application. The ZBA may be involved in the workforce housing law in several circumstances.

Special Exceptions. A zoning ordinance may specifically authorize the ZBA to grant special exceptions for certain types of workforce housing proposals, such as accessory dwelling units in existing single family residences, some combinations of mixed uses, or multi-family developments.

Administrative Appeals. A ZBA may also hear an administrative appeal of a zoning decision made by another local board or official – such as a decision of the planning board in which a zoning interpretation is made on a workforce housing proposal, or a ruling by the local officer charged with enforcing the zoning ordinance. Note, however, that the appeal of any decision made by a planning board under an innovative land use control adopted pursuant to RSA 674:21 (such as inclusionary zoning) may only be made to superior court.³⁶

Variations. Finally, the ZBA may also be presented with a request for a zoning variance that would allow a workforce housing proposal to proceed, where it would otherwise not

³⁶ RSA 676:5, III.

be allowed under the municipality's zoning ordinance. This might be the case where the municipality has failed to properly address the requirements of the workforce housing statute by enacting appropriate zoning amendments, or where use of a particular parcel of land might require some regulatory relief to allow a reasonable workforce housing proposal to proceed.

The purpose of the zoning variance is to provide relief in appropriate circumstances to prevent the unreasonable application of the ordinance to a parcel of land. As such, the variance is regarded as zoning's "safety valve" to eliminate unconstitutional takings of private property. Because of this, the ZBA must always consider the economic implications of the regulatory environment that has been created by the municipality's zoning ordinance, whether the ZBA is hearing a proposal for workforce housing or any other type of variance request. In fact, the New Hampshire Supreme Court has stated that "financial considerations have always been a part of variance determinations in New Hampshire."³⁷ As a result, the ZBA might find itself more familiar with the economic concerns presented by a workforce housing proposal than other local land use boards.

3. Historic District Commission

The Historic District Commission (HDC) occupies a unique role in local development permitting, both because its authority is geographically limited to an historic district as defined by the local legislative body, and because its concerns largely deal with the aesthetic impacts of development on the built environment and of changes to structures.

Like the ZBA or the planning board, when presented with a workforce housing proposal the HDC will be required to view that application through a filter of economic viability. Its decision must consider the impact of the local land use regulation – in this case, the historic district ordinance and regulations – on the profitability of the workforce housing development. An HDC may be able to impose certain conditions, such as requiring particular architectural details or building materials, provided that the conditions are reasonable and do not have the effect of making the workforce housing development economically unviable. As with any other local land use board decision, the burden would still be on the applicant to demonstrate the economic impact of conditions of approval.

4. Building Inspector and Building Code Board of Appeals (BCBA)

The workforce housing roles of the building inspector and the BCBA are more limited than those of other local land use boards, but the workforce housing law will have effect in any situation where the local building code contains provisions that exceed those of the state building code enacted under RSA 155-A. In those situations, the same considerations of regulatory impacts on a workforce housing proposal's economic viability must be taken into account.

³⁷ *Boccia v. City of Portsmouth*, 155 N.H. 84, 93 (2004)(quoting *Bacon v. Town of Enfield*, 150 N.H. 469, 477-78 (2004)(Duggan and Dalianis, JJ., concurring specially)).