

## Auger v. Town of Strafford

[Auger v. Town of Strafford](#) 

I've been asked by a few people to take a look at this case and to provide some observations, though the case is now several months old.

I do remember some comments about this case and how it offered guidance on yield plans in relation to conservation design subdivisions (CDS). A careful reading of the case, however, reveals that it does not provide such guidance at all. Rather it deals with sufficiency of evidence and the standards for granting waivers.

References in the case to yield plans and conservation subdivisions refer ONLY to the provisions of the Town of Stratham's subdivision regulations and zoning ordinance-they should not be construed as "general guidance" on such matters, unless the relevant provisions of your community's regulations match those of Stratham.

The real import of this case is what planning boards can learn about the standard for granting waivers to subdivision (and site plan) regulations. For subdivisions, planning boards may include a waiver provision in their regulations according to RSA 674:36, II(n), which reads

The subdivision regulations which the planning board adopts may: ... "Include provision for waiver of any portion of the regulations in such cases where, in the opinion of the planning board, strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations."

See a parallel provision for site plan regulations at RSA 674:44, III(e).

The Stratham planning board granted waivers to the maximum number of lots on a dead-end (10, but the board approved 17, because it preferred the cul-de-sac to the alternative loop road) and to the required 50-foot right-of-way width (allowing 45 feet in the yield plan

The Supreme Court found that there was no evidence on the record of any hardship to the applicant that would compel the planning board to grant these waivers. The statute calls for "undue hardship" and the Court emphasized this, stating "[t]he board had no evidence before it that the loop road configuration would cause any hardship to [the applicant], much less 'undue hardship.'" This suggests that there is some level of hardship that is an essential element of the land development process, a notion that is consistent with other opinions of this court as well as those of the U.S. Supreme Court (see, for example, *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 535 U. S. 302 (2002) (delay is inherent in the development process, even a 32-month-long pair of moratoria) (opinion at <http://www.law.cornell.edu/supct/html/00-1167.ZO.html>))

But just what constitutes "undue hardship"? I don't know. It probably doesn't rise to the level of hardship that must be found by a ZBA when granting a variance, but it seems that the Court is looking for some demonstration that goes beyond mere inconvenience.

Standards exist in regulations for a reason-at the time of their adoption the planning board thought they were a good idea. If the current planning board no longer thinks it's a good idea, then it should change the regulation, rather than to continue to waive the regulation. The problem is that no regulation can anticipate all circumstances, so waiver is sometimes appropriate. But what happens when a planning board is faced with a situation where a waiver will enable a better development, but denial will not present an "undue hardship"? The board simply cannot grant the waiver.

There are a couple of interesting side issues in this case: one is that language in Stratham's subdivision regulations requires wetlands impacts shown in a yield plan to comply with DES standards. So to determine if a yield plan will yield the "correct" number of lots, the applicant must provide a significant amount of fully engineered information, which is expensive. If planning boards want to truly encourage conservation design, they should seek ways to make it efficient and economical for developers to get through the process, yet give municipalities what they're looking for. Shouldn't the issue be getting a good design, not limiting the profit of the developer by allowing for the possibility of a lot or two more than might be found in a conventional tract

subdivision? This point argues in favor of using a formula as a basis of developing the number of lots allowable in a conservation design, rather than requiring the creation of an expensive yield plan (alternatively, simpler yield plan requirements might suffice).

A second side issue is how the Court addressed the plaintiffs' claim that their right to due process was violated because of the absence of one of the planning board members from two of the hearings on the matter. This was an issue that came up in another case a couple years ago, [Fox v. Town of Greenland](#) (2004), in which a ZBA member was absent from 2 of 5 hearings, but had taken the time to familiarize himself with the record from those meetings from which he was absent. The Court was able to dodge the issue then because it determined that the matter had not been raised in a timely manner. Here, it appears that timeliness was not an issue. Interestingly, however, the Court addressed the matter on the basis of the U.S. Constitution, rather than the N.H. Constitution, as apparently the plaintiff did not raise it as a claim based in state law. The Court found that the absence of a planning board member from 2 out of many hearings over the period of a couple years did not deprive the plaintiffs of their right to due process, citing a Federal case ("[T]he [U.S.] Constitution does not [necessarily] require that all members of an administrative board must take part in every decision, or that the failure of one participating member to attend one hearing vitiates the entire process.").

Would this be decided differently if the plaintiffs had grounded the due process claim in the N.H. Constitution? Probably not, as the N.H. Supreme Court has taken pains over the last two years to establish consistency between N.H. and federal law in due process and equal protection tests.

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