New Hampshire
2013-14 Land Use Law in Review

Statutes and Cases

NEW HAMPSHIRE OEP OFFICE OF ENERGY AND PLANNING

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Today's Roadmap

- I. Finding the Law
- II. Recent NH Statutory Changes
- III. A Touch of Federal Issues
- IV. Recent NH Supreme Court Decisions
- V. The World According to *Koontz!*

PART I

Finding the Law

Finding the Law

NH Statutes and Bills

- Revised Statutes Annotated (RSA)
  - **www.gencourt.state.nh.us/rsa/html/indexes/default.html**
- Search for Bills
  - **http://www.gencourt.state.nh.us/bill_status/**

NH Supreme Court Decisions

  - **www.courts.state.nh.us/supreme/opinions/index.htm**

For Other Jurisdictions

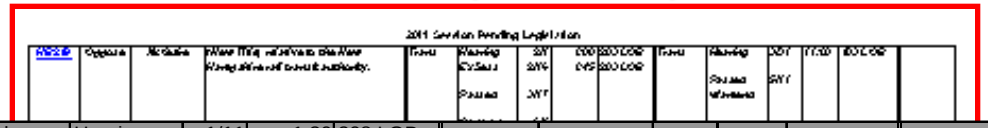
- Cornell Law School
  - **www.law.cornell.edu/**
- Google Scholar
  - **http://scholar.google.com**

Join Plan-link Nation! Confer with over 700 of your best friends

  - http://www.nh.gov/oep/planning/services/mrpa/plan-link.htm

Legislative Tracking

- Legislature's website
  - http://www.gencourt.state.nh.us/bill_Status/
- NH Municipal Association Bulletins
  - www.nhmunicipal.org
- New Hampshire Planners Association (NHPA)
  - www.nhplanners.org



HB94	Watch	Tholl	relative to public access to advisory committee meetings under the right-to-know law	Jud	Hearing WkSess WkSess ExSess ITL	1/11 1/18 1/20 2/1 2/9	1:30 1:30 1:30 11:00	208 LOB 208 LOB 208 LOB 208 LOB						
HB109	***Oppose***	***Hunt***	***relative to residential fire sprinklers.***	***M&CG***	***Hearing*** ***ExSess*** ***Recom-mitted*** ***ExSess*** ***Passed w/amend*** ***Concurs***	***1/20*** ***2/8*** ***2/16*** ***3/1*** ***3/16*** ***5/25***	***1:30*** ***1:00*** ***11:00***	***301 LOB*** ***301 LOB*** ***301 LOB***	***P&MA***	***Hearing*** ***Passed w/amend***	***4/12*** ***5/11***	***9:55***	***101 LOB***	
HB137	Watch	Hawkins	relative to the state fire code and the state building code	ED&A	Hearing WkSess WkSess ExSess Retained WkSess	1/25 2/10 3/1 3/9 3/9 4/14	1:30 3:00 2:00 1:00 2:00	306 LOB 306 LOB 306 LOB 306 LOB 306 LOB						
HB144	Watch	C.McGuire	(New Title) relative to energy efficiency and clean energy districts	M&CG	Hearing ExSess ExSess Passed w/amend	1/25 1/27 2/24 3/16	11:15 1:00 1:00	301 LOB 301 LOB 301 LOB	E&NR	Hearing Passed	4/14 4/20	9:30	102 LOB	Signed 5/16/11; Effective 7/15/11; Ch. 68

Other Sources

- *Land Use, Planning and Zoning*. Peter Loughlin, Esq. New Hampshire Practice Series, vol. 15. LexisNexis. Updated annually
- NHMA's "Town and City," online searchable index and full-text articles
- ***Don't forget to talk with your municipal attorney.*** That's the person who will be defending you in court! …and who can help keep you out of court.

"An ounce of prevention…"

PART II

Recent NH Statutory Changes

Sprinklers
2013 Ch. 278 (HB 278)

- RSA 674:36, IV and 674:51, V
  - Allows developers/owners to voluntarily offer sprinklers in 1- and 2-family structures and for such offers to be enforceable conditions of approval
  - Response to Legislature's 2011 prohibition against requiring sprinklers in such structures
  - Improves developers' options and planning board flexibility

  - But see the broad authority inferred by the NH Supreme Court in *Town of Atkinson v. Malborn Realty Trust* (2012) – the Fire Chief has the authority under NFPA Fire Code to require sprinklers when "site conditions or unique structure designs result in access design that doesn't meet specific requirements of NFPA."

Shoreland Protection
2013 Ch. 153 (HB 513)

- RSA 483-B
  - Modifies some definitions
    - Ground cover – herbaceous plant or woody seedling < 3ft.; doesn't include lawns or other landscaped areas
    - Unaltered state – means native vegetation (effective 12/31/15)
  - Amends the point system (again)
  - Refines the standards for DES entry to private property
    - Permission;
    - Attempt to notify in writing at least 23 hours in advance; or
    - Evidence of activity that would impact water quality
  - Stormwater runoff in protected shoreland: maximum 30% impervious surface or plan to mitigate 10-year, 24-hour storm

Water Resource Plans
2013 Ch. 202 (HB 634)

- RSA 674:2, III(d) – natural resources section
  - Enables municipal development of water resource management and protection plans – part of a master plan
    - Adequacy of water resources
    - *"Nothing in this subparagraph shall be construed to permit municipalities to regulate surface or groundwater withdrawals that they are explicitly prohibited from regulating."*
  - Partially repairs an inadvertent statutory deletion that generally addressed OEP

Planning Board Appeals 2013 Ch. 179 (SB 49)

- RSA 677:15
  - Addresses the problem faced by parties appealing planning board decisions that involve an interpretation of zoning
    - Until now, prudence required simultaneous appeals to ZBA and superior court
  - Requires all matters appealable to ZBA to be decided there first; then appeal to court could be made within 30 days after ZBA's decision on rehearing
  - Court may also stay its own proceedings (*sua sponte* or by motion of a party) if it finds an issue that should have been decided by ZBA; limited to first 30 days after service of process on defendant; appeal must be presented to ZBA within 30 days of court's order to stay

Variance / Special Exception Expiration 2013 Ch. 93 (SB 50)

- RSA 674:33
  - Establishes a statewide 2-year period to exercise a variance or special exception; may be extended by local ordinance or by ZBA "for good cause"
  - But no expiration until 6 months after planning board action, if any
    - This allows for the planning board's review of an application for which a variance had been granted; the 2-year period is tolled until 6 months after the planning board is done
  - **NOTE:** if your community's ordinance has a shorter period for exercising a variance or special exception, it must be changed to comply with this new law

RSA 79-E for Historic Structures 2013 Ch. 78 (SB 80)

- RSA 79-E – Community Revitalization Tax Relief Incentive
  - Adds energy efficiency work to historic structures to the list of eligible activities
  - Standard minimum: substantial rehabilitation of 15% of pre-rehab assessed valuation or $75,000 (whichever is less)
  - Historic structure: substantial rehabilitation may include 10% or $5,000 (whichever is less) as a portion of the standard minimum to be spent on energy efficiency

Cell Tower Collocations 2013 Ch. 267 (SB 101)

- RSA 12-K, RSA 674:33, RSA 674:43
  - Collocation/modification applications must be reviewed in 45 days
    - Deemed complete unless notice given within 15 days of deficiencies
    - Then applicant has 15 days to meet deficiencies
    - Local decision must be made within 45 days (unless applicant takes longer to cure application deficiencies)
    - ***Application approved*** if community fails to act within 45 days

Cell Tower Collocations (cont'd) 2013 Ch. 267 (SB 101)

- RSA 12-K, RSA 674:33, RSA 674:43
  - Modifications to existing cell towers (PWSFs) shall not require variance, special exception, or site plan review, unless it is a "substantial modification"
    - Increases height by more than 10% or 20ft, whichever greater
    - Horizontal extension by more than 20 feet
    - Increases equipment compound more than 2,500 s.f.
    - Defeats the effect of camouflage
  - Requires local review of successive modifications that would have the effect of substantial modification
  - **NOTE:** building inspector will be the gatekeeper of what "substantial modification" means

Planning, Zoning Board, Cons Comm Permits | 2013 Ch. 270 (SB 124)

- RSA 676:4, I(b) and RSA 674:33
  - Clarifies that planning board and ZBA cannot require state or federal permits to be granted prior to accepting submission of application – but granting of such permits can still be a condition of approval

- Integrated Land Development Permit, RSA Ch. 489
  - Establishes an optional process at DES for projects that require different permits from different divisions and bureaus
    - "One-stop shopping" – streamlined, more efficient review
  - Adds ILDP as an innovative land use control in RSA 674:21
    - Allows for flexible local process to facilitate ILDP process

Coastal Management Plans
2013 Ch. 164 (SB 164)

- RSA 672:2, III
  - Adds new optional section to master plans
  - (o) A coastal management section which may address planning needs resulting from projected coastal property or habitat loss due to increased frequency of storm surge, flooding, and inundation

C-PACE
2014 HB 532 (Pending)

- RSA 53-D "Property Assessed Clean Energy Districts"
  - Enables municipalities to lend money to property owners to undertake energy efficiency and renewable energy improvements
  - Repayment made as part of the property tax bill
  - Secured by a lien on the property
    - How the lien is treated in foreclosure has been a source of conflict since the law was adopted several years ago
  - Bill would require PACE liens to have prior mortgage holder's permission to be able to survive foreclosure
  - Bill would limit PACE to commercial ("C") & industrial properties (includes 5+ multifamily properties)
  - Passed by the House; hearing by Senate Energy & Natural Resources Committee held on 4/30/14

Road Standards
2013 HB 1371 (Pending)

- RSA 236:13, V; RSA 674:35, I; RSA 674:42
  - Allows local legislative body to transfer authority to create road construction standards from the planning board to the local governing body
    - "…the extent to which and the manner in which streets within subdivisions shall be graded and improved…"
  - Passed by both House and Senate

Notification of Zoning Changes 2013 SB 228 (Pending)

- RSA 675:7
  - As passed by the Senate, this would require municipalities to notify all property owners of public hearings for zoning changes affecting their property, if the change would affect at 500 properties or fewer
    - Boundary change, or change of uses, setbacks, or lot sizes
    - Notice by first class mail
  - House is likely to send it to “interim study” – apparent real desire to do *something*, but unsettled on what that might be

PART III
A Touch of Federal Issues

Federal Telecom. Act "Shot Clock"

- Telecommunications Act of 1996
  - "Preservation of local authority"
  - Requirement for local boards to act within a "reasonable period"
  - **2009 FCC Order ➔** "reasonable period" =
    - 150 days for a new tower; 90 days for a collocated antenna*; more than that is presumptively unreasonable, applicant may sue in federal or state court
      - **NOTE:** Ch.267 2013 (SB 101) reduces this to 45 days for collocations
    - 30 days (inclusive) from receipt of application (not "acceptance") for local boards to request information; doing so tolls the clock until applicant provides information; failure means the clock still ticks
    - **Implications**:
      - Date stamp materials, especially initial applications
      - Develop a means of checklisting applications quickly to identify missing, incomplete, or inadequate material for purpose of requesting within 30 days
      - Denials: must be in writing supported by substantial evidence (more than a scintilla, less than a preponderance); minutes are insufficient
  - See: http://www.nh.gov/oep/planning/resources/wireless/index.htm for further guidance and resources

* Includes height increases of 20' or 10%, whichever is greater

Federal RLUIPA

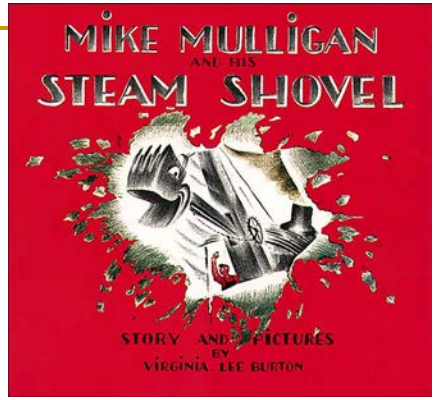
- Religious Land Use and Institutionalized Persons Act
  - **General Rule:** No government shall impose or implement a land use regulation in a manner that imposes a ***substantial burden*** on religious exercise, unless in furtherance of a ***compelling governmental interest*** and using the ***least restrictive means***
    - Comes into play when individualized assessments are made (such as a local land use approval)
    - Religious exercise – not necessarily compelled by, or central to, a system of religious belief
    - "Substantial burden" is undefined
  - "Equal Terms" Rule: cannot treat religious land use on less than equal terms with similar nonreligious uses
  - Discrimination among religions prohibited, as is outright exclusion
  - <u>Practice points</u>: be careful what you say (it's evidence!); it's OK to demand anything you would of similar proposals for nonreligious uses; get advice of counsel early and often

PART IV

Recent NH Supreme Court Decisions

- All NH Supreme Court opinions are available on its website – go to www.nh.gov, find the Judicial Branch link on the right side, then click on the Supreme Court tab and select “Slip Opinions.”
- You can also get onto the Supreme Court’s email list for notices of decisions.

Excavations and Preemption



- *Town of Carroll v. Rines* (2013 – replaces 2012 decision)
  - Enforcement action to enjoin continued excavation until owner gets a variance and planning board excavation permit
  - Trial court approves stipulation that owner won't excavate until he gets a variance; owner continues to remove stockpiled earth material for use on highway projects; planning board approves subdivision and owner starts excavating; owner seeks relief from variance requirement, and court denies
  - Trial court found that owner had engaged in two types of excavation: excavation for highway purposes prior to subdivision; and excavation "incidental to construction" and/or for highway purposes after subdivision
    - Both types exempt from an *excavation* permit under RSA 155-E; but because statute didn't preempt local regulation, variance was required – zoning still applies

Excavations and Preemption

- *Town of Carroll v. Rines* (cont'd)
  - Supremes: zoning does not permit excavation in district; town has a permissive zoning ordinance (permitted uses are listed), so requirement for variance need not be stated
  - "Administrative gloss" from past failure to require excavation permit for building construction? Court: ordinance is unambiguous, so application of administrative gloss doctrine is precluded
  - But trial court erred by requiring variance for excavation incidental to construction (remanded)
    - Permissive zoning allows those uses that are expressly permitted or incidental to uses so permitted
    - Not clear if necessary permits had been obtained
    - Not clear what excavation was incidental to construction
  - **Practice Point:** subdivision plan, building permit with septic plan, or approved site plan should provide the "incidental to construction" detail; excavation for highways requires DOT hearing

Excavations and Preemption

- *Town of Carroll v. Rines* (cont'd)
  - Preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local legislation.
    - RSA 155-E is a comprehensive scheme – but does not totally preempt local regulation
  - Excavations requiring permits are subject to greater municipal standards
  - Preemption for "highway-purpose" excavations only if State Transportation Appeals Board authorizes DOT
  - Remand: to what extent was the excavation incidental to building construction?
  - **Practice Point:** multiple regulatory schemes may seem to overlap, but they are distinct and separate jurisdictions of different bodies

Signs, Signs, Everywhere Signs

- *Bartlett Board of Selectmen v. Bartlett ZBA* (2013)
  - River Run, owner of Attitash condos, received permit for sign, then later added "**REGISTRATION .3 MILES BACK ON LEFT**" – Selectmen deny permit, zoning prohibits outdoor signs "on any premises other than the premises where the activity to which the sign pertains is located"
  - Appeal to ZBA; no definition of "premises" in zoning; determines it's a "directional" sign, exempt from off-premises restriction
  - Selectmen move for rehearing (denied), then appeal; argue that it's not directional and that "premises" cannot include more than one lot
  - Supremes: ordinance defines "lot" as "a tract, parcel, or plot of land"; if the drafters had wanted to limit "premises" to one lot, they could have instead said "lot" – here, premises may be multiple lots on which a single business conducts its activity
  - **What's in a word?** Lots, if the word is premises!

ZBA Variance Process

- *Bartlett v. City of Manchester* (2013)
  - Brookside Congregational Church – non-conforming use since 1958; sought permit for a "work-based, self-help organization" for mentally ill adults; denied by City as prohibited by zoning
    - Variance sought (no administrative appeal) – use would be "similar to other church activities" – neighbors object; variance granted; rehearing denied
    - Trial court: no hardship demonstrated; BUT, the use is a lawful accessory use and no variance is necessary
  - Supremes: permitted uses and hardship are interconnected, so the trial court could provide relief that was not sought – here, accessory uses are permitted
    - The mere filing of a variance application doesn't prevent the ZBA from considering whether the applicant's proposed use of property requires a variance in the first place
  - **Practice Point:** ZBA's *threshold variance question* – is the variance necessary? Document your findings and reasoning.

Filing Deadlines

- *Trefethen v. Town of Derry* (2013)
  - RSA 677:4 – appeals of ZBA decisions must be made within 30 of board's decision
  - RSA 21:35, II – filing deadlines that fall on a Saturday, Sunday or legal holiday will be extended to the next business day
    - Applies to all statutes, unless it would be inconsistent with legislative intent or repugnant to the statutory context
    - No such language in RSA 677:4

  - **Practice Point:** When a specific statute is has terms that are unclear, ambiguous, or undefined, turn to the more general rules of statutory construction found in RSA 21

Standing

- *Hannaford Bros. Co. v. Town of Bedford (2013)*
  - Market Basket granted variance to build 78,332 s.f. building on Route 114 in a zone that limits buildings to 40,000 s.f.; ZBA found the limitation was intended to apply to Route 101, not to Route 114 – consistent with the "spirit of the ordinance"
  - Hannaford built a 36,541 s.f. store on Route 101 – 3.8 miles away from Market Basket site; Hannaford moves for rehearing – ZBA denies, finding Hannaford not to be a "person directly affected" (RSA 677:2)
  - Trial court: RSA 677:4 – "any person aggrieved" by the ZBA; court finds Hannaford lacks standing

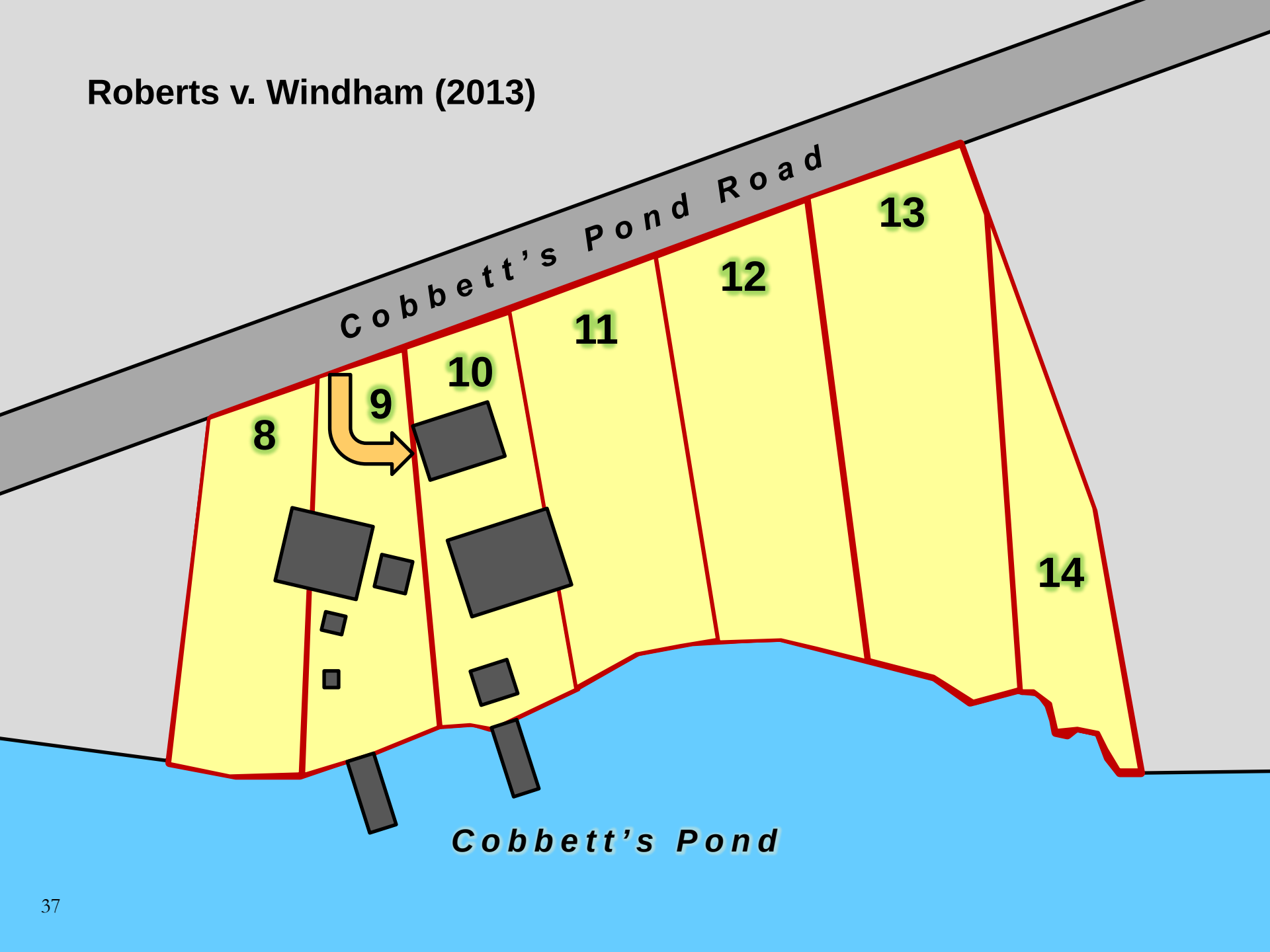
Standing

- *Hannaford Bros. Co. v. Town of Bedford* (cont'd)
  - Supremes: Weeks test for standing
    1. Proximity of challenging party's property
    2. Type of change proposed
    3. Immediacy of the injury claimed
    4. Challenging party's participation in administrative hearings
    5. (And anything else that's relevant to the circumstances)
  - Hannaford concedes on proximity (#1)
  - Court: variance allows for a big change, and Hannaford was active at the ZBA (Nos. 2 & 4 in its favor)
  - Focus on #3: ZBA compared the Hannaford Rt. 101 site to Market Basket's Rt. 114 site in considering "spirit of the ordinance"; Hannaford claims this affects its ability to expand
  - Court analyzes the "spirit of the ordinance would be observed" criterion – but this is approached in the negative: would it be "inconsistent with the spirit?" and if not, then it would be consistent

The Spirit of Zoning

- *Hannaford Bros. Co. v. Town of Bedford* (cont'd)
  - The test: granting a variance would be inconsistent with the spirit of the ordinance if it would violate the ordinance's basic zoning objectives (this is a required part of the test)
  - *One way* to ascertain if a variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality
    - Locality is a judgment call – while the ZBA compared the two properties, that doesn't mean they're the same locality
  - Market Basket site: variance was consistent with zoning
    - Inference: Hannaford site would not be – but this speculative – not a "direct, definite interest in the outcome"; therefore, no standing; business competition does not confer standing – there is no "injury in fact"
  - **Practice Point:** all variances go against the ordinance – the question is one of *degree*; you can't say that a variance shouldn't be granted because it's needed to allow a proposed use

Roberts v. Windham (2013)



Mergers and UnMergers

- Roberts v. Town of Windham (2013)
  - 1 acre of land on Cobbett's Pond; originally acquired as 7 separate lots (lots 8 through 14 on a 1913 plan); shown on Town's tax maps as one lot since the maps were created in early 1960s
  - Lots 9, 10, 11 acquired in 1918 in a single deed: "…meaning and intending to convey lots #9, #10, and #11."
  - Lot 12 acquired in 1920; part of lot 8 acquired in 1926
  - Structures:
    - Lot 10: seasonal cottage, screen room, dock, garage (accessed only via lot 9)
    - Lot 9: privy, woodshed, doghouse, 2nd dock
    - Lots 8/9: bunkhouse
  - Driveway to lot 10 traverses lot 9

Mergers and UnMergers

- Roberts v. Town of Windham (cont'd)
  - Subsequent owner acquired lot 13 and part of lot 14 in 1962 – current configuration
  - Early 1960s: Town administratively merged all lots when it created its first tax maps; here, a single tax bill and street address; owner doesn't object
  - RSA 674:39-aa enacted in 2011
    - Addresses practice of involuntary lot merger by municipalities for zoning, assessing, or taxation purposes
    - Allows owners of involuntarily merged lots to petition for restoration of separate lot status
    - **BUT** owner's subsequent overt actions may amount to voluntary merger – burden on municipality to prove

Mergers and UnMergers

- Roberts v. Town of Windham (cont'd)
  - New owner petitions Selectboard to "unmerge" the seven lots and form 4 new lots (8/9, 10/11, 12, 13/14)
  - Selectboard grants unmerger of 12-14; involuntarily merged
  - Denied as to lots 8-11; owner had voluntarily merged
    - Lots 9-11 were conveyed in a single deed
    - Buildings were developed in an "estate" style on these lots
    - Physical layout of buildings demonstrated use as single lot
  - Denial of unmerger of lots 8-11 appealed to ZBA
    - Affirms on same grounds, plus owner's acceptance of Town's taxation as a single lot
    - Rehearing denied
  - Trial court affirms ZBA; owner appeals to the Supremes

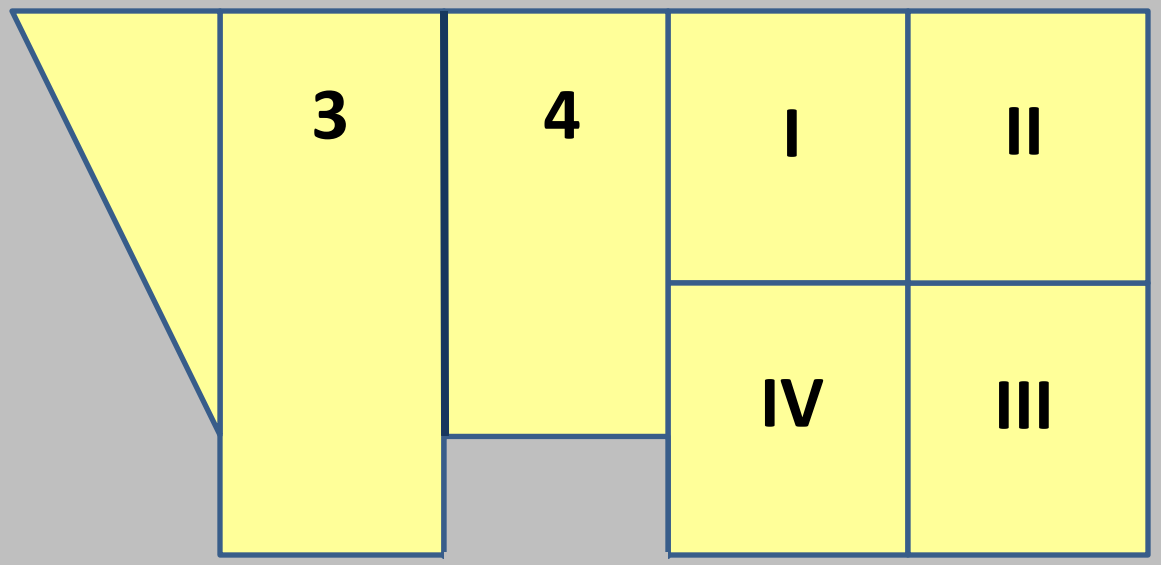
Mergers and UnMergers

- Roberts v. Town of Windham (cont'd)
  - **Supreme Court:** conveyance in a single deed does not, standing alone, support a finding of voluntary merger, nor does acquiescence to a single tax bill (after all, the Selectboard had agreed to unmerge lots 12-14)
  - Placement of garage reasonably interpreted as intent to merge
  - Cottage on lots 10-11; bunkhouse on lots 8-9 – reasonable to conclude that they were intended to be used together as a "waterfront estate"
  - Shared driveway for lots 8-11
  - **Practice Point:** when looking at requests to unmerge lots, look at the totality of the evidence to ascertain an intention to voluntarily merge; remember, the burden is on the municipality to demonstrate the owner's intent to voluntarily merge the lots
  - **Hypothetical:** what if the buildings straddling the lot lines had been removed? Once merged, always merged?

And Yet More Mergers

- Town of Newbury v. Landrigan (2013)
  - 1935: Lots 3 & 4 deeded to original owner by Town, then also deeded four cottage lots
  - 1961: plan recorded with no boundary between lots 3 & 4
  - 1972: owner deeds southern portion of lot 4 to abutter
  - 1973: Town deeds adjacent triangular parcel to owner
  - Town starts taxing as one lot
  - Property transferred 3 times, each using a single description that doesn't refer to internal property lines
  - 2004: Landrigans purchase property
  - 2006: new survey recorded showing the "old line" between 3 & 4; then two more surveys showing a solid line
  - 2010: Landrigans execute two separate deeds to themselves; Town files enforcement action for violation of RSA 676:16 – illegal subdivision

Town of Newbury v. Landrigan (2013)



And Yet More Mergers

- Town of Newbury v. Landrigan (cont'd)
  - RSA 676:16 – in communities where the planning board has been granted subdivision jurisdiction, lots may not be conveyed without planning board approval - $1,000 penalty per lot
  - Trial court: property treated as a single lot for 50 years or more, and owners originally thought they were purchasing a single lot
  - Supremes: consistent metes and bounds description since 1975; outweighs general "meaning and intending" clause that relates back to 1935
  - 1961 plan is probative of owner's intention to merge
  - Driveway crosses both lots described in 1935 deed
  - Owners admit they thought they were originally purchasing a single lot

PART V

The World According to *Koontz*

What's a Taking?

"…nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment V

Types of Takings

- Direct appropriations and permanent physical occupations = *per se* takings
- Inverse Condemnations/Regulatory Takings:
  - Complete denial of all valuable use: *Lucas per se* takings
  - Substantial restrictions on property use: potential *Penn Central* takings, depending on the level of economic impact, the degree of interference with investment-backed expectations, and the character of the government action (harkens back to *Mahon* – a regulation is a taking if it "goes too far."
  - *Nollan*, *Dolan* and now *Koontz* "exaction" claims

Nollan v. CA Coastal Comm. (1987)

Dolan v. City of Tigard (1994)

Dolan v. City of Tigard (1994)

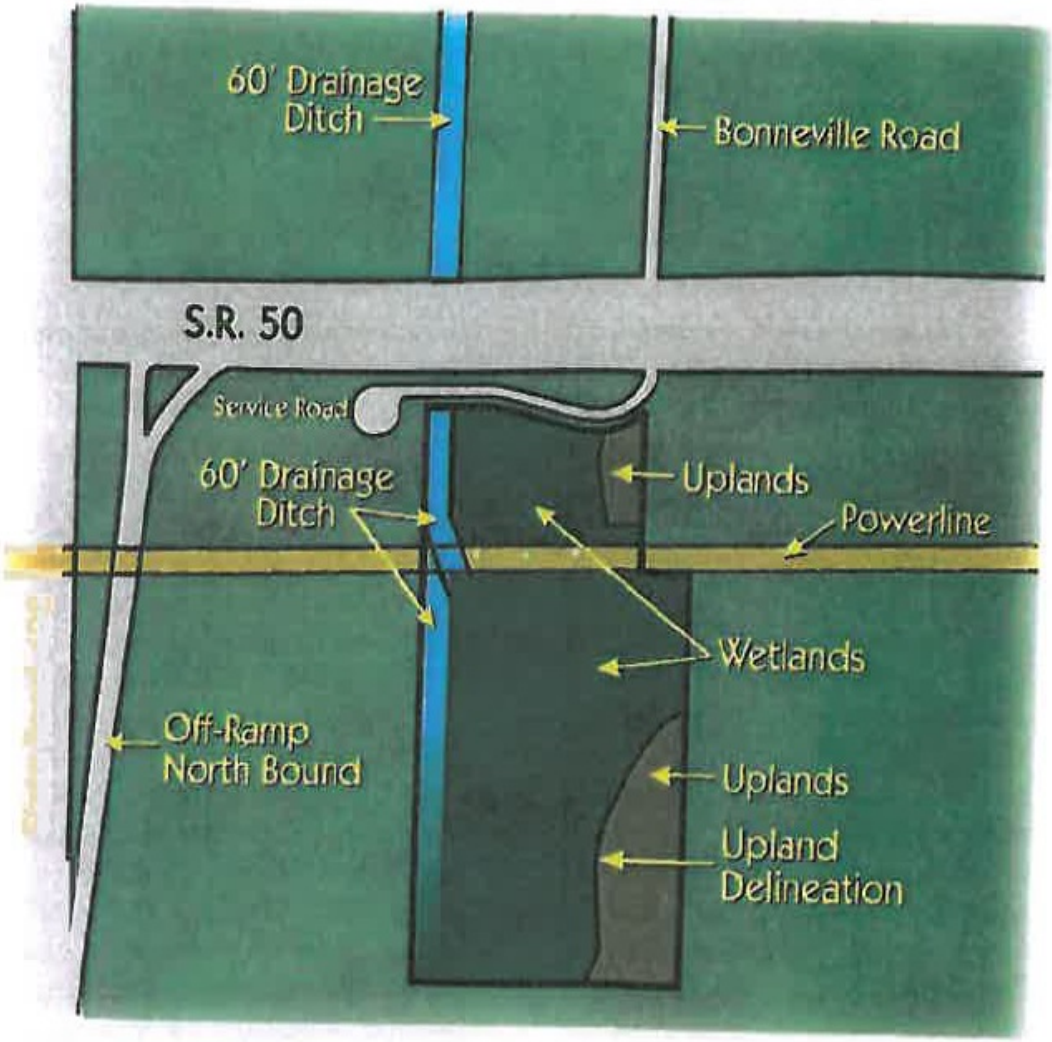
The *Nollan/Dolan* Standards

- An exaction of a property interest in the context of a permitting process is *not* a taking, *provided* the exaction meets these standards:
  - "essential nexus"(*Nollan*)
  - "rough proportionality" (*Dolan*)
- Otherwise, a permit exaction *is* a taking
- Remember, all conditions of approval are some sort of limitation of property rights

Nollan/Dolan Residue

- Are exactions imposed through general legislation (statutes and ordinances), rather than in *ad hoc* permitting proceedings, subject to *Nollan/Dolan*?
- Do *Nollan/Dolan* extend to "monetary exactions"? (see *Eastern Enterprises* (1998) – government mandates to spend or pay money are outside the scope of the Takings Clause*)*
- What proof and analysis is needed to successfully defend an exaction under the *Nollan/Dolan* standards?

And then *Koontz*



Coy Koontz Jr., left, and his attorney Alan E. DeSerio tour the land in November. (George Skene, Orlando Sentinel / January 1, 2000)

Left to right: Coy Koontz Jr., Mary Koontz, the late Coy Koontz, Sr.

Koontz: Basic Facts I

- Koontz purchased a 14.9-acre parcel east of Orlando, FL in 1972 for approximately $95,000
- In 1987, a transportation agency took 0.7 acres of Koontz's property, paying $402,000 in compensation for the land taken as well as "severance" damages
- In 1994, Koontz filed an application for permits to develop 3.7 acres of the remaining property, including 3.4 acres of wetlands, in order to construct a small commercial shopping center
- Koontz proposed to address the District's requirement to avoid adverse environmental impacts by placing deed restrictions on the remaining 11 acres of the property; the District rejected this proposal based on the 10:1 preservation ratio in its guidelines

Koontz: Basic Facts II

- The District suggested that Koontz either
  1. Consider reducing the size of the development to one acre; or
  2. Accomplish further mitigation by restoring wetlands on District-owned property in the basin by paying to replace culverts and/or fill ditches
- Koontz rejected these options
- The District denied Koontz's application
- In 1994, Koontz filed suit in Florida Circuit Court claiming a taking of his private property
- The trial court ultimately ruled that the District's permit denial was a taking and awarded compensation

Koontz: Basic Facts III

- In 2009, the Florida Fifth District Court of Appeals affirmed, 2-1, the trial court finding of takings liability.

- In 2011, the Florida Supreme Court reversed, holding that *Nollan* and *Dolan* do not apply when, as in this case, (1) a permit is denied (as opposed to when a permit is granted subject to conditions) and (2) the conditions involve the payment or expenditure of money (as opposed to when the conditions involve dedication of a right of way or another interest in real property).

- Appeal to the US Supreme Court

The Legal Issues in the Supreme Court

1. Whether the *Nollan/Dolan* standards apply when the government denies a development application because the applicant has refused to accede to a government "demand" that the applicant comply with a requirement that would trigger *Nollan/Dolan* if it were made a condition of project approval?

2. Whether the *Nollan/Dolan* standards apply to so-called "monetary exactions" -- permit conditions requiring permittees to pay or expend money to mitigate project impacts?

The Court Decision – Issue #1

1. All of the justices agreed that *Nollan*/*Dolan* apply equally regardless of whether the government approves a permit subject to an exaction (a condition subsequent) or rejects an application because the applicant refuses to accede to a government "demand" for an exaction (a condition precedent)
2. The Court stated that a permit denial in these circumstances does *not* constitute a taking; rather it is a "*Nollan/Dolan* unconstitutional conditions violation"(whatever that is)
3. The majority assumed, without actually deciding the issue, that there was a "demand" in this case, because the Florida courts proceeded on the assumption that there was a demand
4. The four dissenters said there was no demand because the District merely offered "suggestions" and the applications were denied based on the unacceptable effects of the project

The Court Decision – Issue #2

1. The Court ruled 5-4 that the *Nollan/Dolan* standards are not limited to exactions involving an interest in real property, but also apply to "monetary exactions" – i.e., permit requirements to expend or pay money

2. The dissent contends that the ruling (1) is inconsistent with the logic of *Nollan* and *Dolan*, (2) will extend the Takings Clause "into the very heart of local land-use regulation and service delivery," and (3) logically converts all real property taxes into takings (although the majority says the ruling is not intended to reach that far)

Cleaning up after *Koontz*

1. What types of policies and regulatory actions do – and do not – trigger application of the *Nollan* and *Dolan* standards.

2. If *Nollan* and *Dolan* do apply (or may turn out to apply), how can planners and regulators ensure that the standards are satisfied?

Some Post-*Koontz* Thoughts

- Permit Denials
  - Receipt of developer's voluntary offers will probably avoid *Koontz*
  - Providing a range of options will not avoid *Koontz*
  - Failed negotiations can give rise to a *Koontz* claim
    - Seems to mean that a clear denial is better/safer
    - Leaves the applicant to figure out what path would lead to approval
    - If you're negotiating, get expert help to document the costs and impacts of the proposal – demonstrate ***essential nexus*** and ***rough proportionality***

More Post-*Koontz* Thoughts

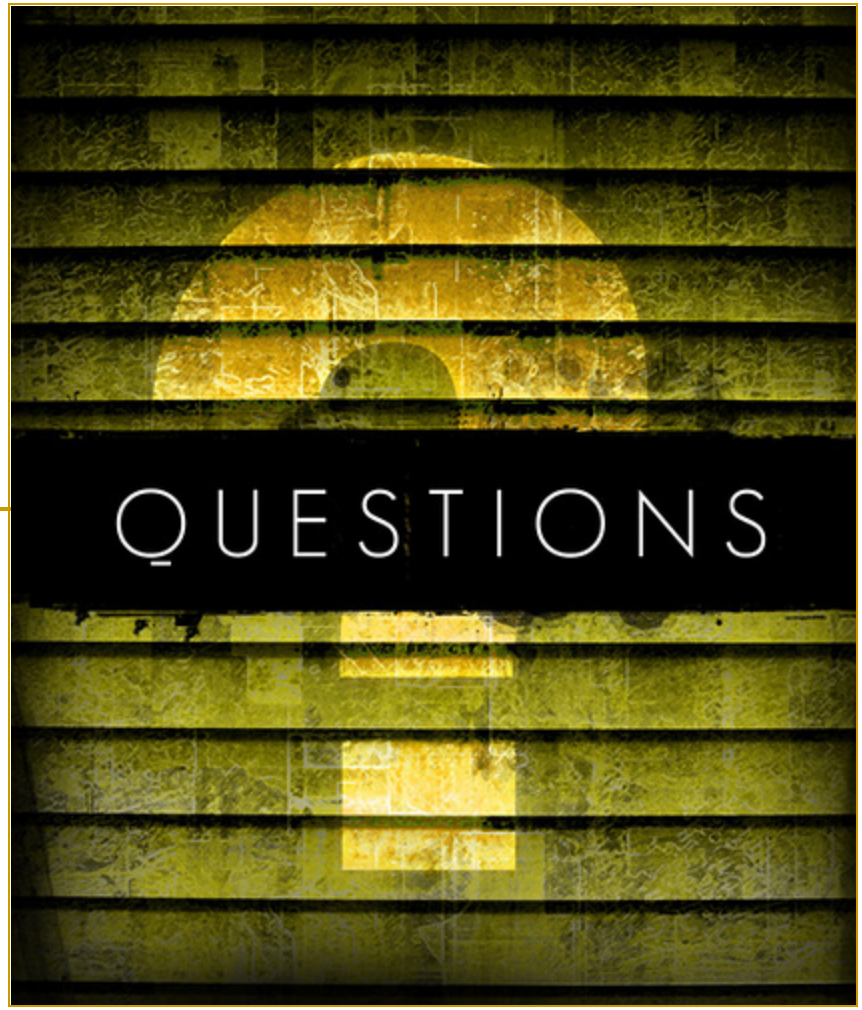
- Monetary Exactions
  - Does Koontz apply to monetary actions based on legislative actions? E.g., state statutes and regulations, local ordinances and regulations.
  - In NH and elsewhere, a lot of deference to legislative actions – typically more deference than to *ad hoc* decisions
    - See *Caparco v. Town of Danville* (2005) – impact fee ordinance upheld, where ordinance conferred upon the planning board authority to update the fee schedule; planning board relied on outside expert to assist
  - But was *Koontz* exaction based on legislation or *ad hoc* decision?
  - Is there no wiggle room, or room for "play in the joints" of the law? (to quote Justice Oliver Wendell Holmes, Jr.)
  - **NOTE:** burden of proof is on the public agency to demonstrate the reasonableness of its action

More Post-*Koontz* Thoughts

- Monetary Exactions
  - Compare impact fees and exactions
    - **Impact fees -** RSA 674:21, V(a): "The amount of any such fee shall be a **proportional share** of municipal capital improvement costs which is **reasonably related** to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee. Upgrading of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid for by impact fees."
    - **Exactions** – RSA 672:21, V(j): "The amount of any such exaction shall be a **proportional share** of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is **reasonably related** to the benefits accruing to the development from the improvements financed by the exaction."

Practice Points from *Koontz*

- Rely more on legislative actions (such as impact fee ordinances) than on *ad hoc* exactions
- Rely on development agreements that follow a standard format and that are signed by the developer as a condition of approval – demonstrates the applicant's assent
- Be careful about negotiating – rely on outside experts to demonstrate essential nexus and rough proportionality
- If negotiations fail, deny based on the totality of the reasons


QUESTIONS