
A New Hampshire Planner's Review of Recent Court Decisions and Legislation



15th Annual

Spring Planning and Zoning Conference

Manchester, NH

April 26, 2008

Recent Court Decisions

Zoning Cases

- *Simplex Technologies, Inc. v. Newington*, 145 N.H. 727 (2001)
- *Boccia v. Portsmouth*, 151 N.H. 85 (2004)
- *Garrison V. Henniker*, 154 N.H. 26 (2006)
- *Malachy Glen Associates, Inc. v. Chichester*, ___ N.H. ___ (2007)
- *Boulders at Strafford v. Strafford*, 153 N.H. 633 (2006)
- *Community Resources for Justice, Inc. v. Manchester*, ___ N.H. ___ (2007) and (2008)
- *Tonnesen v. Gilmanton*, ___ N.H. ___ (2008)
- *Thomas v. Hooksett*, 153 N.H. 717 (2006)
- *Severance v. Epsom*, ___ N.H. ___ (2007)
- *74 Cox Street, LLC v. Nashua*, ___ N.H. ___ (2007)
- *Churchill Realty Trust v. Dover*, ___ N.H. ___ (2008)

Zoning—What's a Variance? RSA 674:33

1. The variance will not be contrary to the public interest.
2. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.
3. The variance is consistent with the spirit of the ordinance.
4. Substantial justice is done.
5. The value of surrounding properties will not be diminished (this one is not statutory, but included by the Court).

Zoning—What’s “Unnecessary Hardship”?

■ Use variance - *Simplex* analysis

- ❑ The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.
- ❑ No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
- ❑ The variance would not injure the public or private rights of others.

■ Area (dimensional) variance - *Boccia* analysis

- ❑ An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.
- ❑ The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

Zoning—Use Variances

- *Garrison V. Henniker*, 154 N.H. 26 (2006)
 - ZBA granted use variance for explosives facility in a “rural residential” zone
 - Trial court reverses; Supreme Court upholds reversal
 - Site may be ideal for the proposed use, but...
 - Property not “unique”—applicant’s burden must arise from the property and not from the individual plight of the landowner
 - Must be distinguishable from surrounding property

Zoning—Area Variances

- *Malachy Glen Associates v. Chichester, _N.H._ (2007)*
 - Area variance for wetland buffer encroachment denied
 - Trial court reverses, Supreme Court upholds reversal
 - Hardship: use is presumed reasonable if it is a permitted use
 - Scaled-back alternative uses not relevant without an analysis of the financial impact to the applicant—“the benefit sought”
 - “Not contrary to public interest” related to “spirit of the ordinance”—so what’s the difference? Would it “alter the essential character of the locality” or “threaten the public health, safety, or welfare”?
 - Mere conclusory statement by ZBA insufficient in the face of contrary expert evidence (also not noted in ZBA’s findings)
 - Substantial justice: public gain must outweigh private loss
 - Also look at the proposal’s consistency with the area’s present use

Zoning—Variances & the Constitution

- *Boulders at Strafford v. Strafford*, 153 N.H. 633 (2006)
 - Open space subdivision—variances from wetland setbacks for septic systems; ZBA denial
 - Applicant challenges constitutionality of ordinance—substantive due process (legitimacy and rationality, not individual impact)
 - Trial court reverses, citing *Metzger v. Brentwood* (1977) “least restrictive means” test; Supreme Court overturns *Metzger* and upholds denial of variance
 - New constitutional test for substantive due process: rational basis—legislation must be rationally related to a legitimate governmental interest; individual impact is irrelevant
 - An invitation by the Court to do more...

Zoning—Variances & the Constitution

- *Community Resources for Justice, Inc. v. City of Manchester*, ___ N.H. ___ (2007)—“CRJ I”
 - Litigants’ response to Court’s invitation in *Boulders*
 - Use variance for “halfway house”—residential transitional facility for criminal offenders; not permitted in *any district*
 - CRJ invokes *Britton v. Chester* (1991) general welfare interpretation of RSA 674:16—trial court didn’t address this, so neither did Supreme Court (but seemed to like the idea)
 - CRJ also alleges equal protection violation; 3 tiers of review
 - NH recognizes “enjoyment of property” as an important substantive right, intermediate scrutiny-- legislation be substantially related to an important governmental objective
 - Burden is on the government to prove legitimacy of its law

Zoning—Variances & the Constitution

- *Community Resources for Justice, Inc. v. City of Manchester*, __ N.H. __ (2008)—“CRJ II”
 - On remand trial court found that the City’s ordinance violated the zoning enabling act (RSA 674:16-23) and violated CRJ’s equal protection rights under the NH Constitution
 - On appeal, Supremes say there’s inadequate evidence to find a violation of the statute, but...
 - The City had distinguished between halfway houses and other similar residential facilities, and
 - The City presented no evidence to justify its ban on halfway houses, therefore
 - The “*Builder’s Remedy*”!

Zoning—Special Exceptions

- *Tonnesen v. Gilmanton*, __ N.H. __ (2008)
 - RSA 674:16, V— “aircraft takeoffs and landings” are permitted accessory uses unless specifically prohibited
 - Town bans it in some districts and requires a special exception in others
 - Declaratory judgment sought, claiming that special exception requirement was invalid— “either/or”
 - Under the statute, “even if a zoning ordinance is permissive, it will not be deemed to prohibit the use of land for aircraft landings and takeoffs merely because it fails to list this use as a permitted use.”
 - Regulation and control expressly permitted by the statute— this includes special exceptions

Zoning—Administration

- *Thomas v. Hooksett*, 153 N.H. 717 (2006)
 - 2001 site plan approval for gas station/convenience store; later zoning amendment—groundwater conservation district—no gas stations within 1,000 feet of another
 - Approval challenged by Conservation Commission; Supreme Court finds that CC doesn't have standing (2003)
 - Staff tells applicant he has a year from 2003 decision to get a building permit; he does so; five months later permit is revoked by town, citing RSA 674:39
 - “active and substantial development” within a year of approval to vest against local regulatory changes
 - ZBA reversed revocation; trial court reverses ZBA; Supreme Court agrees: revocation was valid; applicants are required to know the law

Zoning—Administration

- *Severance v. Epsom*, ___ N.H. ___ (2007)
 - 1958 seasonal dwelling on 0.31 ac. on private road rendered nonconforming by 1969 (and 1978 amendment) ordinance (size, frontage)
 - “Conversion” to year-round occupancy in 2004; cease and desist order issued
 - ZBA upholds order, trial court reverses; affirmed
 - Ordinance does not distinguish between seasonal and year-round residential use
 - Mere expansion or ‘Substantial change’?
“...[n]onconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use.”

Zoning—Rehearing

- *74 Cox Street, LLC v. Nashua*, __ N.H. __ (2007)
 - Variances granted, intervenor asks for rehearing; board member motion to rehear receives no second (ergo, denied)
 - Intervenors objected that documents submitted had not been transmitted to the board; within 30 days of the original decision, the ZBA agrees to rehear the case
 - Original applicant (who got the variances) claims that the ZBA has no power to reconsider its own denial of a motion for rehearing (true, it's not in the statute)
 - "...a ZBA has the inherent authority to reconsider a decision to deny a request for rehearing, upon its own motion or at the request of a party to the proceeding, within the thirty-day appeal period established by RSA 677:4."
 - This also applies to other municipal boards— "a local board should have the first opportunity to pass upon any alleged errors in its own decisions so that the court may have the benefit of the board's judgment in hearing the appeal."

Zoning—Cross Boundary Development

- *Churchill Realty Trust v. Dover*, __ N.H. __ (2008)
 - 1972 site plan to build 4 apartment buildings in Dover; 1993 municipal boundary is moved, and two buildings now partially in Rollinsford; “sometime” additional land was acquired in Rollinsford
 - No density requirements (in either D or R) at time of construction; Dover adopts 5,000 s.f./unit max. density in 1999
 - In 2004, owner seeks permission to build two more buildings (63 units) in Rollinsford—but sewer, utilities, and road access via Dover parcel. Dover denies building permit for failure to meet density requirement; ZBA upholds, as does trial court; reversed
 - RSA 674:53, I—sole street access via Dover only means that the Dover and Rollinsford parcels must be treated as one
 - RSA 674:53, III allows a developer to “borrow” land located in one municipality to satisfy the zoning in another—but the borrowed land may not subsequently be used inconsistently.

Planning Cases

- *Residents Defending Their Homes v. Lone Pine Hunter's Club*, ___ N.H. ___ (2007)
- *Property Portfolio Group, LLC v. Derry*, ___ N.H. ___ (2007)
- *Doyle v. Gilmanton*, ___ N.H. ___ (2007)
- *Guildhall Sand & Gravel, LLC v. Town of Goshen*, ___ N.H. ___ (2007)
- *Auger v. Town of Strafford*, ___ N.H. ___ (2007)
- *Upton v. Town of Hopkinton*, ___ N.H. ___ (2008)
- *Carlson's Chrysler v. Concord*, ___ N.H. ___ (2007)
- *Naser Jewelers v. Concord*, (1st Circuit, 2008)

Planning—Preemption

- *Residents Defending Their Homes v. Lone Pine Hunter's Club*, __ N.H. __ (2007)
 - 1966: Club established—ZBA says no variance required for building permit (no meeting, either); various expansions in ensuing years, with and without permits and approvals
 - 1999: Zoning applies to all sporting clubs—special exception and site plan review
 - Planning board deems RSA 159-B to preempt its authority
 - Supreme Court concludes that RSA 159-B only relates to noise
 - “...the statute does not preclude the requirement that the Club obtain a variance, because the town’s original zoning ordinance prohibiting the Club’s use was enacted years before the Club purchased its property.”

Planning—Decision and Conditions

- *Property Portfolio Group, LLC v. Derry*, ___ N.H. ___ (2007)
 - RSA 676:4 provision for “technical review” by staff team
 - No formal site plan review (conversion of fire station to restaurant)
 - Adequate notice provided
 - Appeal five months after “determination” made
 - Conditions “precedent” vs. “subsequent”
 - Precedent: contemplate additional action on the part of the town—no final approval until condition is met
 - Subsequent: approval valid as long as condition is met or continues to be met

Planning—Purpose of Regulation

- *Doyle v. Gilmanton*, __ N.H. __ (2007)
 - 3-lot subdivision, lots of wetland; subdivision regulations call for “building site” to be 30,000 s.f. contiguous suitable soil (min. 3 ft. above bedrock); also call for compliance with other laws (e.g., zoning, with all its setbacks)
 - “Building site” construed not to include zoning—kills one of the lots, another squeaks by with a waiver (“just short of compliance”)
 - Court tosses the planning board’s denial of the third lot—
”30,000 contiguous square feet for buildings alone is absurd and serves no legitimate land use purpose.”
 - Supreme Court disagrees: reviews RSA 674:36, II for purposes of subdivision regulations
 - Drainage, on-site sanitary disposal; building and “space for the development that generally accompanies a house.”

Planning—Excavation

- *Guildhall Sand & Gravel, LLC v. Town of Goshen*, ___ N.H. ___ (2007)
 - 1950's gravel operation; subsequent local regulations under RSA 155-E; permit in 2004, expires in 2007; new regulations adopted in the interim
 - Challenged as preempted—Guildhall seeks declaratory judgment
 - Trial court rules that portions are preempted by RSA 155-E
 - Legislative intent to preempt may be demonstrated where the state enacts a “detailed and comprehensive state statutory scheme governing a particular field”--as in RSA 155-E
 - “Express” vs. “Minimum” standards
 - Municipal regulations expressly authorized
 - Substantive effect, not merely procedural—regulations “may include reasonable provisions for the protection of water resources, consistent with the municipality’s local water resources management and protection plan...” RSA 155-E:11, II.

Planning—Waiver of Regulations

- *Auger v. Town of Strafford*, __ N.H. __ (2007)
 - Read cases carefully—this one is ***not*** about conservation design subdivisions and yield plans
 - Variances and waivers are not the same
 - RSA 674:36, II(n) authorizes waivers where “strict conformity would pose an unnecessary hardship” and waiver would not be contrary to the spirit of the ordinance
 - No hardship demonstrated for waivers
 - Maximum number of lots on a dead-end—planning board preferred cul-de-sac to a loop road; road width in yield plan
 - So is some level of hardship to be expected?
 - What would qualify for a waiver is probably not what would be needed for a zoning variance—“practical difficulty” in RSA 674:41

Planning—Subdivision Conditions

- *Upton v. Town of Hopkinton*, ___ N.H. ___ (2008)
 - 5-lot subdivision (replacing 1 house) proposed on gravel road subject to frequent flooding; outskirts of town, long emergency response time; substantial relative additional traffic
 - Board observed that it could deny as “scattered or premature”
 - Installation of box culvert necessary; cost \$250-300K; planning board approves, with condition that owner pay 1/3 cost of culvert; owner appealed, trial court affirmed;
 - “Impact fees” (RSA 674:21, V): rational nexus, proportionality
 - Without an ordinance, exactions for limited specific purposes
 - Supremes: “The board could reasonably have determined that ‘[e]xposing more households to the risk that emergency vehicles would be unable to respond when their services were required’ magnified the Turnpike’s existing hazard, and made it imperative that the Turnpike be improved now.”

Planning and Zoning Cases of the Year!

- *Carlson's Chrysler v. Concord*, __ N.H. __ (2007)
 - 2005 denial of a permit to change from manual readerboard to electronic sign for inventory ads
 - ZBA upholds denial; superior court reverses, holding City's ban on electronic message center signs unconstitutional (1st Amendment freedom of speech) where time/date/temp EMCs are allowed
 - Supreme Court reverses
 - Ordinance did not overreach in regulating commercial speech, while allowing non-commercial speech— "The most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to prohibit them."
 - Aesthetics and public safety are legitimate concerns
 - City "need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics."

Planning and Zoning Cases of the Year!

- *Naser Jewelers v. Concord*, (1st Circuit, 2008)
 - After Carlson's Chrysler suit is filed, City amends its ordinance to prohibit **all** electronic message center signs (including time/date/temp)
 - Federal District Court upholds ordinance as a content neutral exercise of the police power
 - Appellate court affirms
 - Ordinance is narrowly tailored to serve a significant governmental interest—traffic safety and aesthetics, “long been recognized to constitute significant governmental interests.”
 - Reasonable alternative channels of communication are provided—traditional manually change reader boards
 - Deference accorded to the common sense judgment of local law makers—studies to substantiate City's safety claims “would impose great costs on local governments.”

Recent and Pending Statutory Changes

Community Revitalization

- RSA 79-E (Ch. 167, Laws of 2006)
 - Enabling legislation
 - Limited time relief from increased property taxes attributable to substantial rehabilitation
 - “Downtown” areas, as locally defined
 - Up to 5 years
 - Longer term allowed for new housing (2 years, 4 if affordable), historic structures (4 years)—max. 13 years
 - Some communities have adopted this—Berlin, Manchester, Pittsfield, Concord

Housing and Conservation Planning Program (HCPP)

- SB 217 (Chapter 348, Laws of 2007)
 - Incentive-based approach
 - Technical support for municipalities
 - Treats housing development, economic planning, historic preservation, and conservation as part of a unified “growth and development” strategy
 - \$400,000 appropriation for the biennium
 - www.nh.gov/oep/programs/hcpp

Shoreland Protection

- RSA 483-B (Ch. 267 & 269, Laws of 2007)
 - Statute will require a DES permit (Ch. 269)
 - New standards for impervious surfaces
 - 20% maximum coverage within protected shoreland area; development constraint, opportunity for deployment of Low Impact Development techniques
 - Natural woodland buffer “rewrite”—DES administrative rules have undergone “rewrite”, too!
 - Relationship with local regulation clarified—all local permits required (but who goes first?)
 - But local variances do not exempt property from state law!
 - Statute effective as of April 1, 2008; revised Administrative Rules effective as of April 1, 2008 (not the end of the story)
-

Shoreland Protection

But wait! There's more! Or less!

- **HB 1151**—passed by the House to extend the reporting deadline for the Instream Flow Pilot Program
- The Senate has other ideas—amended it to include a delay in the implementation of the CSPA revisions (to October 1, 2008)
 - Where does that leave the April 1 effective date, the Administrative Rules, and the staff that DES is supposed to hire to implement this?

Pre-Application Vesting (New and Pending)

- RSA 676:12 (Ch. 285, Laws of 2006)
 - “Design review” protection of plans; doesn’t apply to “preliminary conceptual consultation”—see RSA 676:4, II(a) and (b)
 - Protection from local regulatory changes for up to a year from the completion of the design review process

But wait! There’s more!

- **HB 331** (passed the House; now in the Senate)
 - Allows planning boards to identify when design review period ends (is this really necessary?)

Small Wind Energy Systems (Pending)

- **HB 310** (passed the House; now in the Senate)
 - Limits how municipalities can regulate turbines used mainly for on-site energy consumption
 - Notice provisions for abutters and affected neighboring municipalities
 - Amendment pending in the Senate
 - Establishes a procedure for building inspectors to initiate Development of Regional Impact notification in the absence of review by another local land use board
 - Statutory minimum property line setback; variance provision

Local Housing Commissions (Pending)

- **HB 1259** (passed both the House and the Senate)
 - Enables municipalities to establish local housing commissions as a local land use board
 - Advisory only, not regulatory
 - Assist other local boards in the development of housing plans and identifying needs; responding to particular development proposals
 - Establishment of a local affordable housing fund; similar to the conservation fund administered by the conservation commission—may be used to facilitate transactions involving affordable housing
 - Bill also enables the creation of affordable housing revolving funds under RSA 31:95-h

Growth Management (Pending)

- **HB 1260** (passed the House; now in the Senate)
 - Recodification of RSA 674:22 (GMO) and 23 (IGMO)
 - Growth Management Ordinance
 - Demonstrated need to regulate timing of development, based on a study by or for the planning board or governing body, or submitted by petition
 - Specific termination date required
 - Directs the planning board (or CIP committee) to develop plan to accommodate growth; annual evaluation by planning board, presented to local legislative body
 - Temporary Moratoria or Development Limits
 - Unusual circumstances requiring prompt attention
 - Planning board findings
 - One year maximum; additional moratoria may be adopted for different circumstances

Energy Planning (Pending)

- **SB 422** (passed the Senate; now in the House)
 - Enables development of master plan chapter on local energy planning
 - Analysis of energy and fuel resources, needs, scarcities, costs, and problems affecting the municipality and a statement of policy on the conservation of energy
 - Amendment pending in the House that will limit the scope of the bill

Planning Board Waivers (Pending)

- **SB 416** (passed the Senate; now in the House)
 - Addresses the limitation on planning board authority imposed by *Auger v. Strafford*
 - Restores board flexibility approximately to where it was under common law (*Frisella v. Farmington*, 1988)
 - Waivers may be granted if
 - (current law) Hardship is shown and granting would not be contrary to the spirit and intent of the regulation, OR
 - (proposed) The evidence before the planning board demonstrates that the granting of the waiver would better serve the public interest, and the granting of the waiver would not be contrary to the spirit and intent of the regulations.

Workforce Housing (Pending)

- **SB 342/421** (passed the Senate; now in the House)
- **HB 1472** (passed the House; now in the Senate)
 - Primary aim is to codify Britton v. Chester (1991)
 - All communities must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable”
 - Also adds a series of definitions as a means of providing greater guidance than the Court’s opinion
 - Affordable: 30% of gross income
 - Renter household at 60% area median income
 - Owner household at 100% area median income
 - Exceptions for those communities that can demonstrate that they have provided their “fair share” of current and projected regional needs for affordable housing
 - Accelerated appeals mechanism—hearing within 6 months, either by judge or by court-appointed referee

Electronic Billboards (Pending)

- **SB 341** (passed the Senate; now in the House)
 - ❑ Prevents the installation of electronic billboards in or around federal highways or state turnpikes
 - ❑ Prevents conversion of existing billboards
 - ❑ Presently, there is no authority to limit this type of sign



A Pleasant Surprise

- Conservation Easements
 - Conservation easements as “charitable trusts” within the definition of RSA 7:21, II(a):
 - “...any fiduciary relationship with respect to property arising under the law of this state...and subjecting the person to whom the property is held to fiduciary duties to deal with the property within the state for any charitable, nonprofit, educational, or community purpose
 - Conservation easements are held in trust for the benefit of the public; as such, they are subject to oversight by state attorneys general and the courts under charitable trust principles
 - The NH Attorney General takes the position that conservation easements are “charitable trusts”; as such, they are enforceable by the state

Legislative Tracking

- Legislature's website
 - www.gencourt.state.nh.us/ie/billstatus/defaultpwr.asp
- Local Government Center (NHMA)
 - www.nhmunicipal.org
- New Hampshire Planners Association (NHPA)
 - www.nhplanners.org

2008 Session Pending Legislation														
NHPA Priority Explanations below: Enacted Interim Study/Rereferred ITL/Killed														
Bill	LSR	Sponsor	Description	House Comm	Action	Date	Time	Room	Sen Comm	Action	Date	Time	Room	Gov's Action
HOUSE														
HB 76	282	Ryan	creating an environmental policy for New Hampshire.	E&A	Tabled									
HB 185	285	Ryan	(New Title) relative to economic revitalization zone credits.	W&M	Passed w/amend				W&M	Passed				
HB 255	706	Patten	establishing a committee to study the implementation and use of growth management ordinances.	M&CG	ITL									
HB 270	322	Renzullo	allowing municipalities to adopt a homestead exemption for property tax assessments on a person's principal principal place of residence.	M&CG	ITL									
HB 310	916	Chase	<i>(New Title) allowing municipalities to regulate small wind energy systems.</i>	M&CG	Passed w/amend				P&MA	Hearing	3/25	8:30	101 LOB	
HB 331	928	Skinder	<i>(New Title) relative to time limits on design review.</i>	M&CG	Passed w/amend				P&MA	Hearing	3/25	8:45	101 LOB	
HB 487	696	Ryan	(New Title) establishing a state climate change policy commission and developing a climate action plan and to report on climate change issues.	ST&E	ITL									

Finding the Law

NH Cases

- NH Supreme Court website
 - www.courts.state.nh.us/supreme/opinions/index.htm

NH Statutes

- Revised Statutes Annotated (RSA)
 - www.gencourt.state.nh.us/rsa/html/nhtoc.htm
- For Other Jurisdictions—Cornell Law School
 - www.law.cornell.edu/

For More Information:

Join Plan-link Nation!

www.nh.gov/oep/programs/MRPA/PlanLink.htm

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