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

Benjamin D. Frost, Esq., AICP  
Director of Public Affairs  
New Hampshire Housing  
bfrost@nhhfa.org

**Responses to questions raised during the session:**

1. In regard to *Auger v. Strafford* (I) – Roadwidth: Does the reversal hurt a planning board's purview to mitigate impacted wetlands despite no hardship being presented for the waiver? Or would it be viewed as administrative fiat?

No. With the decision having been remanded, the planning board may examine the decision again—but that's specific to this case and the Court's remand order, which in this case is quite broad.

2. Are building inspectors required/obligated to enforce sites and subdivisions be built per plan as approved by the planning board? Is there another mechanism that the planning board can use to enforce that the site is built per plan?

Yes, building inspectors are obligated, more or less, to 'enforce' the approvals of planning boards; but as Oliver Wendell Holmes observed, there must be some "play in the joints" of the law. Building inspectors need to have a little discretion in the field to make field modifications—but a little discretion goes a long way. If something in the field is substantial enough to go back to the planning board, then so it should for a modification of the approval. The role of the planning board is not to enforce its own decision, but some planning boards do follow their own decisions as they are executed in the field and assign particular board members to monitor the activity. Although the planning board has no general enforcement authority, the board does have the ultimate power to revoke an approval—a draconian measure to be sure, but legal in the right circumstances nevertheless. See RSA 676:4-a (<http://www.gencourt.state.nh.us/rsa/html/LXIV/676/676-4-a.htm>).

Also, if a planning board has required a bond or other financial surety to guaranty completion of improvements in a plan, it alone has the authority to determine how that surety is used—the Selectboard does not administer performance bonds associated with planning board approvals.

3. *Malachy Glen Association vs. Chichester*: When does purpose of ordinance (i.e. wetland buffers to protected wetlands) come into play? Isn't encroachment into buffer against purpose (i.e. spirit of ordinance)?

“Spirit and intent of the ordinance” is one of the five criteria for granting a variance. This question is a factual one that the court determined to have been met. The purpose of a variance is to grant relief from the terms of the ordinance in appropriate circumstances. Remember, the zoning ordinance is not the supreme law of the land. That place is reserved for the U.S. Constitution, which provides substantial protections to the rights of property owners, and the N.H. Constitution provides even greater protection. The purpose of the Zoning Board of Adjustment is not to protect the sanctity of the ordinance, but to balance the interests of the public against those of individuals.

4. If the planning board/school district doesn't who enforces?

It's the job of the building inspector and the board of selectmen (or other local governing body) to enforce, not the planning board. See #2. What would the school district enforce?

5. Can a planning board waive a statute?

The simple answer is no. Municipalities are political subdivisions of the state, not independent governmental units. If a statute includes a requirement, that standard must be observed by a municipality, unless the statute itself allows greater freedom (for example, if it states that it is a minimum standard, and that municipalities may adopt higher standards).

5. Why was the *Continental Paving* special exception ordered to be granted?

Uncontradicted expert testimony indicated that the proposal would have no measurable impact on the vernal pool, which was the essential question of the case. The planning board relied on other, more general information, when it turned down the request. If there had been expert testimony stating that there would have been an impact, the case might have been different.

6. *Cardinal Dev. Corp. v Town of Winchester*: Did the issue of an actual signature become part of the case? Does it matter if it is a real or faxed signature?

That did not appear to be an issue in the case. If a ZBA allows for faxed submissions, the presumably faxed signatures are also OK. In the absence of such a provision in the ZBA's rules of procedures, then you should assume that an original signature is required on an appeal form that is physically (not electronically) delivered to the office of the board.

7. Never heard of Yield Plan until today – what is this?

A conventional 'tract' subdivision will yield a certain number of lots in a subdivision, based on the standards of a zoning ordinance. Zoning provisions that are designed to preserve open space in a development by allowing for reduced lot sizes and 'clustering' the buildable lots in a portion of the overall development may require a yield plan to be developed that would demonstrate the number of lots that could be achieved in a conventional subdivision under the ordinance as a means of limiting the number of lots that will be approved in the alternative cluster plan.

8. Can a planning board waive a sidewalk ordinance due to “public safety” concerns in icy winter conditions?

I'm not sure what a sidewalk ordinance is—if you're referring to a provision in a subdivision or site plan regulation, then yes, the planning board can waive it, but only under the right circumstances. But there's a baseline question here: all NH municipalities experience ice in the winter; if there's a regulatory requirement that developments should have sidewalks, wouldn't the winter ice have already been considered when the planning board created and adopted that standard?

9. Equitable Waiver – can it be used to waive violations density requirements for dwelling units?

Situation: A lot currently has more dwelling units than allowed by town ordinance and regs. Property owner is seeking an equitable waiver to allow continuation of non-conforming units.

Generally, no. Equitable waivers are to resolve issues where a good faith error has been made. Read RSA 674:33-a narrowly. But RSA 674:33-a, II provides an exception to the requirement that there be an error, in cases where the 'violation' has been present for 10 years or more and there has been no enforcement action by the municipality.

10. Define "Overlay". What legal authority – bases in law is there for "overlay"? Are all overlays "use/restriction"? May a planning board through a master plan impose "overlay" without town role?

An overlay is a zoning provision that provides additional requirements to or supersedes the underlying zoning district. Overlays are innovative land use controls that are generally provided for in RSA 674:21. Overlays are not necessarily related to use, but may also provide dimensional requirements. But this distinction has been increasingly muddled by the Court's interpretations of the distinctions between use and area variances.

The master plan is not a regulatory document. The planning board may not include standards in the master plan and attempt to enforce them without properly adopting them either as subdivision or site plan regulations or as a zoning amendment.

11. Use or area variance? Do garages have to be approved because they are considered to be a reasonable use or can ZBA deny them all?

The ZBA is not in the business of denying all or none of any particular thing; its job is to weigh the evidence in a particular circumstance and make an appropriate decision after applying the law to those facts. A garage may or may not be a reasonable use, depending on the facts of the case and the law of the town, as expressed in its zoning ordinance.

12. Define arbitrary as it refers to establishing zones and local ordinance. (we have a conservation zone based on elevation.)

First note that there is a presumption that local ordinances and regulations are valid. The constitutional due process standard states that actions of the government require only a rational basis to be substantiated—this is the lowest constitutional standard. As long as there is some basic reason for a local regulation, it will not be deemed arbitrary—but the reason should be

clearly stated in the regulation's purpose and intent section. So something is arbitrary that doesn't have a reason for it to be adopted or applied.

13. Is it that the ZBA can't make the applicant pay for an expert hired by the ZBA, or that the ZBA can't hire an expert?

The open question of law is whether a ZBA can make an applicant pay for an expert hired by the ZBA to evaluate the applicant's information. The ZBA can always hire its own expert if it has the money to do so.

14. For ZBA notification if non-direct abutting have easements & row (lot owners including town) do they have to receive notification even though they may be thousands of feet or many lots from site. (waterfront lot with beach for entire community development).

First, read the statutory definition of abutter:

<http://www.gencourt.state.nh.us/rsa/html/LXIV/672/672-3.htm>. Then compare that with the notice requirements of RSA 676:7: <http://www.gencourt.state.nh.us/rsa/html/LXIV/676/676-7.htm>. Read together, these do not require notification of every easement or right-of-way holder. They may nevertheless assert that they have standing to testify and may also have standing to appeal.

15. Is timely filing, filing after hours at the police and or fire departments on the 30<sup>th</sup> day? Is there a decision from any court regarding this above question?

This would be timely filing only if the local board adopted it as such in its rules of procedure. Absent such a provision, *Cardinal Development v. Winchester* instructs us that filing must be made during normal business hours in the office of the board.

16. Can "duty to assist" be interpreted to allow ZBA to recommend alternative solutions to applicant?

The ZBA may always make recommendations, but it cannot base its decision the existence of alternatives. This is exactly what the ZBA did in *Nine A v. Chesterfield*—the ZBA made a suggestion about what its decision might be under an alternative scenario, then based its decision on the facts of the case before it.

17. We have an ordinance adopted under "innovative land use". The ordinance not only allows "conditional use permits" by the planning board, but says the planning board can waive parts of the ordinance as well. Is innovative land use zoning different or is there an error in the ordinance?

It's not unusual for an innovative land use control to have elements of flexibility that allow the board to exercise its discretion by waiving certain requirements. The critical element of such a provision, however, is that there should be standards to guide the board's consideration of the appropriateness of the waiver in any given situation. See RSA 674:21, II dealing with conditional use permits (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-21.htm>).

18. How can you have fair hearings when you have planning board members who ran for election (and got elected) in order to “get rid of rules”.

People sign up for local office for a variety of reasons, often because they have an ax to grind. That's not what matters. What matters is how they fulfill their duty once they're in office. Just note that statements a person makes while campaigning for office can be an indicator of bias with regard to an application that comes before a board—but the concern over bias doesn't mean they can't try to change the regulations, as that's a different role for a board member.

19. If a subdivision or site plan is approved for duplexes with the conditions of obtaining proper approvals from state, DES, and Attorney General's Office is there an expiration on the approval if the plan has been recorded and a year or more later the conditions have not been met?

Approvals don't automatically expire, but boards are wise to couch their approvals in such situations as “preliminary.” Approvals become final upon issuance of all necessary permits (and any other conditions the board deems necessary prior to granting final approval). Compare this situation with the vesting provisions of RSA 674:39 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-39.htm>).

Note that duxplexes don't need the approval of the Attorney General, unless they're going to be condominiums.

20. Is it legal to request developers (including LLC's or any other entity) to be required to sign documents holding them personally liable and be sure they have the appropriate value in said personal assets commensurate with the project?

Simply put, no, it is not legal. It is not the function of the local land use board to ensure that the developer is a good business person and has a good business plan. But the local board should protect the interests of the town by requiring appropriate surety as a condition of approval as would be necessary to complete any required public improvements (such as road construction).

21. Should a Planning Board's notice of decision be included in the meeting minutes and as such be “accepted” by the Planning Board?

Although a board may do this, it is not necessary and is overkill in my opinion. Minutes are not intended to be a verbatim record of everything that was said and done. The notice of decision is something that should reflect a decision of the board and may repeat elements of what appears in the minutes, but they are different things.

22. HB 446: How does the ZBA determine a “reasonable and economically viable use”? Does this change as the economy changes?

By increments, what is economically viable will change over time; but then, what we perceive as being reasonable will also change over time. Zoning ordinances are not intended to be immutable, carved in granite as monuments to the past. They should be living documents that reflect changes in society and in how we relate to the land.

23. What would the process be if a developer wanted and a conservation conservator agreed to create an affordable housing conservation subdivision?

This is really a land planning question—if I were the owner, I'd hire a developer whose work I respected, and a natural resources expert to help me identify those areas of my land that really should be conserved—this is the essence of a “conservation design” subdivision. Once I'd figured out what I wanted to conserve, then I'd work with the developer to come up with an affordable housing development plan. The developer might be a non-profit company that does such work, or I could also consult with any of the state's regional workforce housing coalitions (see [www.workforcehousingnh.com](http://www.workforcehousingnh.com)) to help guide me through long-term affordability restrictions.

24. In respect to government use, when a local ordinance is more stringent than a state ordinance does the local ordinance have any authority or enforcement? This is in respect to CSPA set back 50 feet. State 75 feet local. Included in the purpose of the ZO “ensure the wise and efficient expenditure of public funds.”

The Comprehensive Shoreland Protection Act (CSPA; for more information, see <http://des.nh.gov/organization/divisions/water/wetlands/cspa/index.htm>) provides for a statewide minimum primary building setback of 50 feet around certain bodies of water. This supersedes any lower local setback (e.g., 25 feet) around such waters, but municipalities may adopt a higher standard. This is enforceable as a zoning provision and would apply to governmental uses of property in the same manner as any other zoning provision. For more on governmental land uses, see RSA 674:54 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-54.htm>).

25. Is conservation commission membership to a land conservation trust by monetary donation an authorized power not an optional power?

I regard this as an inherent power of a conservation commission, not one that requires independent authorization under the new “optional powers” statute.

26. Who is charged with determining regional need of workforce housing?

As one of their duties under RSA 36:47, II (<http://www.gencourt.state.nh.us/rsa/html/III/36/36-47.htm>), regional planning commissions are required to develop regional housing needs assessments every five years. But recognize that this is not a fair share analysis; it merely is a study that shows the regional need for housing.

27. Growth management – Does rejection of warrants/funding by the Legislature give a reason for a GMO to remain in force, or be invalidated? I contend that towns are wide open for GMO's being invalidated.

For a growth management ordinance to be validly exercised under RSA 674:22 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-22.htm>), there has to be a plan in place to overcome the infrastructure deficiencies that are deemed to be the underlying basis of the ordinance in the first place, and the municipality needs to fulfill that plan as part of its responsibility while limiting growth. So yes, if the local voters reject the infrastructure improvements, the legal basis for upholding the growth management ordinance is weakened.

28. Why is workforce housing statute really necessary? Wouldn't/shouldn't/doesn't the housing market in a particular area most efficiently determine the appropriate amount of affordable housing?

The market would determine the appropriate amount of affordable housing if the market were allowed to function with out excessive local restriction. The statute (RSA 674:58 - :61) was made necessary because some municipalities have abused their power to regulate land by adopting regulations that either intentionally or inadvertently have the effect of preventing the development of affordable housing.

29. Can a town and/or school district vote to have local zoning ordinances apply to municipal or governmental use projects/particularly the dimensional requirements? Safety requirements?

Yes, a municipality can subject itself to local zoning itself by vote of the local legislative body. But note that the town can't make the school district comply. The voters of the school district at its annual meeting would need to make such a vote. Certain safety requirements would always apply, whether it's a governmental land use or not—so school buildings are subject to the local building code and driveway permitting.

30. A zoning restriction can't interfere with a landowner's reasonable use of land, but is the test the reasonableness of the proposed use or is it whether the landowner's use can't be achieved by some other means (i.e. landowner is pursuing use in a reasonable manner)?

Both of these may be considerations in granting a variance, and this is part of the Court's analysis in its 2001 *Simplex v. Newington* decision. The proposal must be a reasonable one, and the ZBA should consider as part of its analysis the economic implications of the zoning restriction as it is applied to the property in question.

31. *Naser vs. Town of Deering*: Could/should conservation easement include provision that land area not be used to satisfy zoning requirements for other land?

This would probably be a good idea, but each conservation instrument will be judged by its own terms—my advice here is to consult with the town attorney; in fact, a planning board should not accept a legal instrument as part of an approval without it having been reviewed and approved by town counsel.

32. *Green Crow Corp. vs. New Ipswich*: To upgrade from class VI to V could not rely on non-compliance with master plan increase on services etc. Does the same hold true for building permit on class VI to be denied?

*Green Crow* deals with a subdivision proposal, and not building permits. And no, the granting of building permits on a class VI highway is governed by a different statute, RSA 674:41 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-41.htm>).

Towns should consider adopting Class VI Highway policies. There are several examples of these on the OEP website at <http://www.nh.gov/oepr/resourcelibrary/referencelibrary/c/classviroads/index.htm>.

33. In *Green Crow*, does that decision imply that town concerns relating to fire, school, police costs for new development need to be covered by impact fees at planning board approval stage?

It doesn't imply that they need to be addressed through impact fees, but that could be an effective solution to the problem presented by the case. Alternatively, the planning board can fall back on "scattered or premature" as a basis for denial (see RSA 674:36, II(a), <http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-36.htm>), but use that authority very sparingly, and only on the advice of town counsel

34. Can cost alone be a legally acceptable "hardship"?

This really depends on the facts of the case. If what the applicant proposes is reasonable, then cost may be a consideration; and if the local regulation strips the owner of all reasonable use of the property, the ZBA should consider granting the variance because to deny it might result in an unconstitutional taking of private property.

35. *Green Crow Corp. v. New Ipswich*. The Planning Board has authority not the Selectmen. Would the Planning Board still have authority under a different form of government (i.e. city rule with Mayor/Council over site)?

No, the form of government would make no difference in this case, because the statutory role of the planning board does not change from one form of government to another.

36. Please expand on your definition of substantial justice and provide guidance on how to determine whether substantial justice or injustice is done.

Would "substantial justice be done" is one of the criteria for a ZBA to consider when granting a variance. This is a weighing question: if the variance is denied, what does the public gain, and what does the owner lose? If the owner loses more than the public gains, then the criterion would be met (substantial justice would be done by granting the variance). If they're equal, decide in favor of the land owner.

37. Which of the following are "local land use Boards"?

- Local Housing Commission
  - No, but this appears to have been oversight
- Conservation Commission
  - No
- Heritage Commission
  - Yes

See the statutory definition at RSA 672:7 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/672/672-7.htm>).

38. Does RSA 36:57 IV (Chapter 357, 2008) defining building inspectors as “local land use board” only apply for purposes of small wind energy applications only?

Building inspectors have always been included in the definition of “local land use board,” so this is not a change. The change deals with how building inspectors should review any development of regional impact, not just small wind energy systems.

39. Small Wind Energy System – Process/Authority

The statute assigns authority to the building inspector. Can the planning board look at these under its existing (revised) site plan review regulations? Can local ordinance assign this to the planning board?

It depends on whether it's a non-residential use—if a small wind energy system is proposed for a residential use, then it is accessory to that, and would not be subject to site plan review. Local ordinance cannot “switch” the authority from the building inspector to the planning board, but in appropriate circumstances may provide an additional layer of review (for example, conditional use permit by the planning board or special exception by the ZBA)—just don't overdo it; the purpose of the statute is to facilitate the creation of these systems, not to give towns a reason to prevent their use.

The building inspector is also assigned authority for determination of regional impact. The planning board does this for other uses – can this be combined in planning board's regs?

The building inspector should make a regional impact determination **if another local land use board doesn't or hasn't already done so.**

40. How does RSA 674:62-66 deal with small wind energy system involving multiple turbines? More than one site? Perhaps serving more than one living unit?

The statute doesn't prohibit more than one turbine per property, so there could be multiple turbines on a single piece of land—but they would, in combination, be subject to local noise standards consistent with the statute, they would have to be consistent with net metering requirements, they would have to meet the state or local setback requirements, they would have to comply with any other zoning provisions that are consistent with the statute, and they would all have to be primarily for on-site electric consumption.

41. You said that the planning board cannot waive a zoning ordinance unless the zoning ordinance gives the planning board the power to grant a waiver, so does that mean that an ordinance can be written such that it grants the planning board the authority to waive it or a portion of it?

A zoning ordinance may grant the planning board (or another board) the power to issue conditional use permits in appropriate circumstances. Such a permit may allow the board to waive or vary particular standards of the ordinance, but standards to guide the board's decision

must be included in the ordinance. See RSA 674:21, II  
(<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-21.htm>).