MUNICIPAL APPROACHES TO THE REQUIREMENT FOR WORKFORCE HOUSING OPPORTUNITIES

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I. INTRODUCTION

Seventeen years ago, the New Hampshire Supreme Court issued a resounding decision in favor of affordable housing. In the case *Britton v. Town of Chester*, 134 N.H. 434 (1991), the Court determined that the state's planning and zoning statutes called for every municipality to provide a reasonable and realistic opportunity for the development of housing that is affordable to low and moderate income households, and particularly for the development of multi-family structures. Although that case generated great interest and discussion among local planning boards and in the development community, that interest was not accompanied by significant and widespread action at the local level to provide the sort of opportunity that *Britton* seemed to promise. The cost of litigation, both in time and money, it seems was still too much for most developers to consider pursuing claims against exclusionary municipalities under the Court's *Britton* decision.

Over the past eight years or so, the New Hampshire Legislature introduced a number of bills that sought to codify the Court's holding in *Britton*. None of these gathered enough support to pass both the House and the Senate, although the Legislature did form a series of committees and commissions to study the problem of housing affordability in New Hampshire. The reports of those committees and commissions consistently concluded that exclusionary land use regulation was an important contributing factor to the critical lack of a diverse and sufficient supply of housing in the state.

At the same time, there was the persistent grass roots advocacy work of a half dozen regional workforce housing coalitions throughout the state, all of which sought to directly involve the business community in the debates on this critical issue. Those efforts were so successful that in 2007-08, addressing the state's housing crisis became the top legislative priority of the NH Business and Industry Association.

This year, three bills were introduced to address the impact of local land use regulations on the ability of developers to create affordable housing: HB 1472, SB 342, and SB 421. Weeks of negotiation among those with an interest in this legislation produced bill language in SB 342 that gained the support of housing advocates, the Business and Industry Association, and the NH Municipal Association. NHMA had previously established as a policy statement that it sought to codify, but not to expand upon, the Court's *Britton* decision. The amended SB 342 was passed by substantial majorities in both chambers. The bill was signed into law by Governor Lynch on June 30.

SB 342 (enacted as Chapter 299, Laws of 2008) amends the planning and zoning statues of the state by including the Court's holding from *Britton*, that all municipalities must provide reasonable and realistic opportunities for the development of workforce housing, including rental and multi-family housing. To determine if such opportunities exist, the collective impact of all local land use regulations must be considered, and workforce housing of some type must be allowed in a majority of land area where residential uses are permitted (but multi-family housing is not necessarily required to be permitted in a majority of such areas). Recognizing that some municipalities have already done what is necessary under this law, the existing housing stock of a community is to be accounted for to determine if a municipality is providing its "fair share" of current and reasonably foreseeable regional need for workforce housing. Importantly, reasonable restrictions may still be imposed for environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection.

This new law also significantly mitigates the cost of litigation by providing an accelerated appeals mechanism. If a developer proposes to create workforce housing that meets the statute's definitions and requirements and the local board reviewing the proposal either denies the application or imposes conditions on it that would have an unreasonable financial burden, the developer can petition the superior court for review. This is not new—what is changed is that for workforce housing proposals, the court must conduct a hearing on the merits within six months. As a means of addressing exclusionary municipal land use regulations, the court will be able to order the "builder's remedy," allowing the developer to proceed without further local review in situations that call for such an award.

SB 342 provides a series of definitions, including ones for "affordability" (30% cost burden), "workforce housing" (affordable for renters at 60% area median income or owners at 100% area median income), multi-family housing (5 or more units per structure), and "reasonable and realistic opportunities" (addressing the economic viability of a proposal).

Although these changes have been signed into law, they do not go into effect until July 1, 2009. This extra year will give the state's cities and towns the time they need to make careful assessments of their land use ordinances and regulations, determine the impacts of those regulations on the potential for developing affordable housing, and identify what changes might be necessary.

To help municipalities accomplish this work in the long run, during this session the Legislature also passed HB 1259 (Chapter 391), enabling the establishment of local housing commissions. Signed by Governor Lynch on July 17, 2008, this new law allows (but does not require) a municipality to establish an official local land use board that will serve as a local advocate for housing issues, and which will be able to advise other local boards and officials on issues of housing affordability. Additionally, local housing commissions will have the power to administer an "affordable housing fund," a non-lapsing fund that could be used to facilitate transactions on affordable housing. This new

law will provide an important new tool for municipalities to understand the nature of their own housing issues and to recommend appropriate courses of action.

Many other tools and approaches are also available to New Hampshire's cities and towns as they seek to address what the new workforce housing statute calls for them to do. These materials are intended as both background and introduction; they are not intended to replace the assistance of a professional planner, whether as part of town staff, a circuit rider from a regional planning commission, or an independent consultant. Nor are these materials intended to replace the assistance and review of a municipality's attorney. Whenever a town is presenting a new ordinance or regulation for adoption, it should seek competent legal advice.

II. THE WORKFORCE HOUSING LAW

SB 342—CHAPTER 299, LAWS OF 2008

AN ACT establishing a mechanism for expediting relief from municipal actions which deny, impede, or delay qualified proposals for workforce housing.

Language of the Law as Adopted	Explanation
299:1 Findings and Statement of Purpose.	Section 1 of the law is not codified, but serves as an important purpose statement—a message of the Legislature's reasoning and intent in enacting the law.
I. The state of New Hampshire is experiencing a shortage of housing that is affordable to working households. This housing shortage poses a threat to the state's economic growth, presents a barrier to the expansion of the state's labor force, undermines state efforts to foster a productive and self-reliant workforce, and adversely affects the ability of many communities to host new businesses.	The rapid escalation of land and housing costs—particularly since 1995—has been felt by NH businesses as a constraint on growth as they have had difficulty both hiring and retaining qualified employees. Although that is not the exclusive cause of this difficulty, it is one aspect that can be partly mitigated through modification of local land use ordinances to allow for an appropriate level of housing development that is affordable to families of low and moderate incomes.
II. Achieving a balanced supply of housing, which requires increasing the supply of workforce housing, serves a statewide public interest, and constitutes an urgent and compelling public policy goal.	New Hampshire's housing supply is presently imbalanced—there is an inadequate supply to meet the current and future demand, which has contributed to the rapid increase in housing costs, especially for those families wishing to purchase a home.

III. The purpose of this act is to clarify the requirements of Britton v. Chester (134 N.H. 439 (1991)) and to provide additional guidance for complying with those requirements to local officials and the public.	Codification, but not expansion, of the court's *Britton* decision has been a policy position of the NHMA for several years. While some of the provisions of this law seem new, they are actually intended to provide definition and clarity that *Britton* lacked in many respects.
IV. Section 2 of this act is intended to provide the maximum feasible flexibility to municipalities in exercising the zoning powers under RSA 674 consistent with their obligation to provide reasonable opportunities for the development of workforce housing, and is not intended to create a system of statewide land use regulation or a statewide zoning process.	The approach taken in this law is consistent with the general precepts of 'local control' that are important to New Hampshire's municipalities. Instead of imposing a rigid numerical or formulaic standard with specific steps that must be undertaken, the law leaves it up to each individual community to determine how it should meet its general obligation. Some states have chosen to go in other, more prescriptive, directions—New Hampshire's approach keeps it in the hands of its cities and towns.
299:2 New Subdivision; Workforce Housing Opportunities. Amend RSA 674 by inserting after section 57 the following new subdivision:	Section 2 of the law adds four new sections to Chapter 674.
Workforce Housing	
674:58 Definitions. In this subdivision:	
I. "Affordable" means housing with combined rental and utility costs or combined mortgage loan debt services, property taxes, and required insurance that do not exceed 30 percent of a household's gross annual income.	The 30% cost burden (expense/income) is a commonly-used indicator of housing affordability; this was specifically recognized in *Britton v. Chester*. This should not be confused with the indices use by mortgage lenders to qualify prospective borrowers.
II. "Multi-family housing" for the purpose of workforce housing developments, means a building or structure containing 5 or more dwelling units, each designed for occupancy by an individual household.	This is different from the jurisdictional threshold of 3 units per structure, which serves as the basis for planning board review of multi-family structures for purposes of site plan review (see RSA 674:43)—this definition only means that for purposes of meeting its workforce housing obligation, a municipality may not restrict multi-family structures to 3 or 4 units.

III. "Reasonable and realistic opportunities for the development of workforce housing" means opportunities to develop economically viable workforce housing within the framework of a municipality's ordinances and regulations adopted pursuant to this chapter and consistent with RSA 672:1, III-e. The collective impact of all such ordinances and regulations on a proposal for the development of workforce housing shall be considered in determining whether opportunities for the development of workforce housing are reasonable and realistic. If the ordinances and regulations of a municipality make feasible the development of sufficient workforce housing to satisfy the municipality's obligation under RSA 674:59, and such development is not unduly inhibited by natural features, the municipality shall not be in violation of its obligation under RSA 674:59 by virtue of economic conditions beyond the control of the municipality that affect the economic viability of workforce housing development.	This term is derived from the *Britton v. Chester* case. It identifies the factors that should go into a municipality's analysis of whether it is complying with the law: Can workforce housing be profitably developed in the municipality; i.e., is it "economically viable"? Look at the "collective impact" of all of the land use regulations, including any ordinance adopted under the zoning power (including a growth management ordinance or interim growth management ordinance), as well as historic district ordinances, building codes, and subdivision and site plan regulations. Municipalities will not be held responsible for things that are beyond their control, such as the overall real estate market, existing "built out" conditions (note that developed parcels can be redeveloped, but municipalities can only partly control the cost of land), or natural features of the land that may preclude development of workforce housing (e.g., steep slopes). To the degree that municipal regulations prevent the development of workforce housing in a setting that would otherwise allow for it, then reasonable and realistic opportunities are not being provided. Note that this is not just a "facial" test, but is also an "as applied" test. This means that municipalities must consider the practical implications of their ordinances and regulations.
IV. "Workforce housing" means housing which is intended for sale and which is affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development. "Workforce housing" also means rental housing which is	This definition recognizes the important differences between the renter and purchaser markets. Those who are ready to enter the purchaser market typically can afford "more house" than a renter can. But by the same token, renter households tend to be smaller—thus, these target standards: ownership housing affordable at 100% area median income (AMI) for a family of four; renter housing affordable at 60% of AMI for a family of three.

affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development. Housing developments that exclude minor children from more than 20 percent of the units, or in which more than 50 percent of the dwelling units have fewer than two bedrooms, shall not constitute workforce housing for the purposes of this subdivision.	The geographical areas that are most likely to be useful are the HUD Fair Market Rental Areas (HMFA), for which median incomes indexed by family size are published on an annual basis. "Housing for older persons" permitted under federal and state law does not fall within the definition of "workforce housing"; this law is intended to encourage the development of family housing. Similarly, developments where a majority of the units have fewer than two bedrooms will not qualify—however, a mix of unit sizes may be socially beneficial by encouraging the creation of neighborhoods with diverse populations.
674:59 Workforce Housing Opportunities.	
I. In every municipality that exercises the power to adopt land use ordinances and regulations, such ordinances and regulations shall provide reasonable and realistic opportunities for the development of workforce housing, including rental multi-family housing. In order to provide such opportunities, lot size and overall density requirements for workforce housing shall be reasonable. A municipality that adopts land use ordinances and regulations shall allow workforce housing to be located in a majority, but not necessarily all, of the land area that is zoned to permit residential uses within the municipality. Such a municipality shall have the discretion to determine what land areas are appropriate to meet this obligation. This obligation may be satisfied by the adoption of inclusionary zoning as defined in RSA 674:21, IV(a). This paragraph shall not be construed to require a municipality to allow for the development of multifamily housing in a majority of its land zoned to permit residential uses.	This paragraph contains the operative requirement of the law, and relies upon the terms defined above. It applies to any municipality that adopts land use ordinances and regulations pursuant to RSA Chapter 674. Both owner- and renter-occupied housing must be reasonably permitted in the municipality, and this specifically includes renter-occupied multi-family housing. Lot size and density are two of the most critical issues to consider when formulating appropriate ordinance amendments. Workforce housing must be allowed in a majority of the municipality's land area that is zoned to permit residential uses. Where and how this is to be accomplished is up to the municipality to decide, but inclusionary zoning is specifically recognized as an appropriate tool. Note that even while workforce housing must be allowed in a majority of residentially-zoned areas, multi-family housing need not be so widely allowed—but

	a municipality must make some reasonable provision for the development of multi-family housing. See paragraph IV for a limitation on this requirement.
II. A municipality shall not fulfill the requirements of this section by adopting voluntary inclusionary zoning provisions that rely on inducements that render workforce housing developments economically unviable.	For a municipality to validly meet its workforce housing requirement using inclusionary zoning, the provisions of such an ordinance must be economically practicable by a developer. That is, the quid pro quo offered by the municipality in its ordinance must be a bona fide inducement to build workforce housing that is at least equal to the added economic burden carried by the developer by building lower cost housing.
III. A municipality's existing housing stock shall be taken into consideration in determining its compliance with this section. If a municipality's existing housing stock is sufficient to accommodate its fair share of the current and reasonably foreseeable regional need for such housing, the municipality shall be deemed to be in compliance with this subdivision and RSA 672:1, III-e.	Although it is not required to do so, a municipality may wish to undertake a "fair share analysis" to determine whether it has met its obligation under this law. The term "fair share" is taken from the *Britton* case. But remember that "fair share" considerations are not relevant if a community is providing a reasonable and realistic opportunity for the development of workforce housing. Demonstration that a community has met its fair share is only an affirmative defense—that is, a justified admission that reasonable and realistic opportunities for the development of workforce housing are not being provided in that particular community. A court would view such a claim as rebuttable by evidence presented by an applicant. As enacted here, "fair share" takes both a present and prospective view of the demand for housing in a *region*. What type of region is appropriate may vary from one community to another: for one, it might be the regional planning commission; for another it might be the labor market area; for yet another, it might be the HUD fair market rental area.
IV. Paragraph I shall not be construed to	Even with the enactment of this law,

require municipalities to allow workforce housing that does not meet reasonable standards or conditions of approval related to environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection.	municipalities are still fully able to protect important natural resources, to address septic disposal issues, to make decisions that call for appropriate transportation improvements because of safety considerations, and to impose and enforce necessary codes related to public safety. Workforce housing does not trump environmental and public safety concerns.
674:60 Procedure.	
I. Any person who applies to a land use board for approval of a development that is intended to qualify as workforce housing under this subdivision shall file a written statement of such intent as part of the application. The failure to file such a statement shall constitute a waiver of the applicant's rights under RSA 674:61, but shall not preclude an appeal under other applicable laws. In any appeal where the applicant has failed to file the statement required by this paragraph, the applicant shall not be entitled to a judgment on appeal that allows construction of the proposed development, or otherwise permits the proposed workforce housing development to proceed despite its nonconformance with the municipality's ordinances or regulations.	This paragraph requires an applicant before any local land use board (planning board, ZBA, historic district commission, agriculture commission, housing commission, building inspector) to file a written statement as part of the application, invoking this workforce housing statute. To be legally effective, this must be done at the outset of filing the application. The practical effect of such a filing is that the developer puts the land use board on notice that it needs to fully examine the effect of its process and conditions of approval on the economic viability of the proposal as a workforce housing development (this is an "as applied" consideration). Failure to file such a declaration means that (1) the applicant is not entitled to the accelerated appeals mechanism in RSA 674:61, II, and (2) the applicant is not entitled to "the builder's remedy."
II. If a land use board approves an application to develop workforce housing subject to conditions or restrictions, it shall notify the applicant in writing of such conditions and restrictions and give the applicant an opportunity to establish the cost of complying with the conditions and restrictions and the effect of compliance on the economic viability of the proposed development. The board's notice to the applicant of the conditions and restrictions shall constitute a conditional approval solely	At the end of the approval process, the land use board must give the applicant an opportunity to evaluate the cost of the conditions as a means of demonstrating their impact on the economic viability of the proposed workforce housing development. The period during which an appeal may be filed does not commence at this time, but only after the applicant has been able to evaluate the conditions for their cost implications and to present such findings to the land use board, and the land use board

for the purpose of complying with the requirements of RSA 676:4, I(c)(1). It shall not constitute a final decision for any other purpose, including the commencement of any applicable appeal period.	has made a response.
III. Upon receiving notice of conditions and restrictions under paragraph II, the applicant may submit evidence to establish the cost of complying with the conditions and restrictions and the effect on economic viability within the period directed by the board, which shall not be less than 30 days.	The applicant may take at least thirty days to conduct a cost-impact analysis and to respond to the land use board's conditions; or the applicant may accept the conditions and waive the review period (see III(d) below).
(a) Upon receipt of such evidence from the applicant, the board shall allow the applicant to review the evidence at the board's next meeting for which 10 days' notice can be given, and shall give written notice of the meeting to the applicant at least 10 days in advance. At such meeting, the board may also receive and consider evidence from other sources.	The land use board must formally consider the applicant's response and must give the applicant notice of the meeting at which such consideration will be made. Although not addressed here, it is probably also advisable to give notice to those who were entitled to notice of the application's initial public hearing. This can be accomplished by continuation from an earlier meeting, provided the applicant's 30 day review period and the 10 day notice period can be accommodated. But in all cases, the applicant must be notified in writing.
(b) The board may affirm, alter, or rescind any or all of the conditions or restrictions of approval after such meeting.	After considering the cost implications of the conditions of approval, the land use board may wish to make changes to allow for the development's economic viability. Any decision should be based on facts that are stated in the board's record.
(c) Subject to subparagraph (d), the board shall not issue its final decision on the application before such meeting, unless the applicant fails to submit the required evidence within the period designated by the board, in which case it may issue its final decision any time after the expiration of the period.	The applicant's failure to submit additional information to the land use board is tantamount to an acceptance of the conditions imposed by the board. There should be no further grounds for appeal on the basis that the conditions render the development economically unviable.
(d) If an applicant notifies the board in writing at any time that the applicant accepts the conditions and restrictions of approval, the board may issue its final decision	The applicant may accept the conditions imposed by the board, and thereby waive the 30-day review period and also the need for further consideration of the application

without further action under this paragraph.	before rendering a final approval.
674:61 Appeals.	
I. Any person who has filed the written notice required by RSA 674:60, and whose application to develop workforce housing is denied or is approved with conditions or restrictions which have a substantial adverse effect on the viability of the proposed workforce housing development may appeal the municipal action to the superior court under RSA 677:4 or RSA 677:15 seeking permission to develop the proposed workforce housing. The petition to the court shall set forth how the denial is due to the municipality's failure to comply with the workforce housing requirements of RSA 674:59 or how the conditions or restrictions of approval otherwise violate such requirements.	At the end of the local process, an applicant proposing a workforce housing development may appeal to superior court, alleging either that the collective impact of the municipality's land use regulations preclude proposed workforce housing development, or that the conditions imposed by the land use board would render it economically unviable. The burden of proof is upon the applicant filing the appeal. If a municipality has determined that it has provided its "fair share" of workforce housing, then it may assert this as an affirmative defense.
II. A hearing on the merits of the appeal shall be held within 6 months of the date on which the action was filed unless counsel for the parties agree to a later date, or the court so orders for good cause. If the court determines that it will be unable to meet this requirement, at the request of either party it shall promptly appoint a referee to hear the appeal within 6 months. Referees shall be impartial, and shall be chosen on the basis of qualifications and experience in planning and zoning law.	Unlike other appeals, here the superior court is obliged to hold a hearing on the merits within 6 months. If the court is unable to do so, it must appoint an impartial referee qualified on the basis of experience in planning and zoning.
III. In the event the decision of the court or referee grants the petitioner a judgment that allows construction of the proposed development or otherwise orders that the proposed development may proceed despite its nonconformance with local regulations, conditions, or restrictions, the court or referee shall direct the parties to negotiate in good faith over assurances that the project will be maintained for the long term as	The "builder's remedy" may be awarded in certain circumstances (as was done in *Britton*). If the builder's remedy is awarded, the parties must work together to determine an appropriate means of ensuring the affordability of the housing units proposed as workforce housing.

workforce housing. The court or referee shall retain jurisdiction and upon motion of either party affirming that negotiations are deadlocked, the court or referee shall hold a further hearing on the appropriate term and form of use restrictions to be applied to the project.	Failure of the parties to reach accord will cause the court to intervene and find a solution.
299:3 Planning and Zoning; Declaration of Purpose. Amend RSA 672:1, III-e to read as follows:	
III-e. All citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families is in the best interests of each community and the state of New Hampshire, and serves a vital public need. Opportunity for development of such housing[~~, including so-called cluster development and the development of multi-family structures, should~~] ***shall*** not be prohibited or ***unreasonably*** discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers;	This amendment to the fundamental statement of purpose for local land use regulation in New Hampshire identifies an important focus—that providing an opportunity for the development of affordable housing is a clear obligation of every municipality. Thus the change of "should" to "shall." The inclusion of the term "unreasonably" indicates that there are circumstances in which affordable housing development may be discouraged by appropriate use of local regulatory powers (e.g., important natural resource considerations). The deletion of reference to multi-family structures is intended to avoid confusion between two different definitions of that term: 3 units per structure as a basis for planning board jurisdiction as a site plan under RSA 674:43; and 5 units per structure as workforce housing under RSA 674:58. The deletion of reference to cluster development reflects the contemporary understanding that such types of development are not inherently affordable—they can have certain attributes that help to reduce development costs, but that is not necessarily the case.
299:4 Effective Date. This act shall take	This effective date gives all municipalities one full town meeting cycle in which to

effect July 1, 2009.	make necessary changes to their zoning ordinances.
Approved: June 30, 2008 Effective Date: July 1, 2009	

III. WORKFORCE HOUSING STATUTE FREQUENTLY ASKED QUESTIONS

1. What Land Use Regulations are Subject to the Workforce Housing Law?

The law applies to any ordinance or regulation that has its enabling authority in RSA Chapter 674. This would include subdivision regulations in those communities that don't adopt zoning. It would also include those communities that do not adopt zoning, but adopt flood plain ordinances in order to participate in NFIP (but see caveat below). But with a flood plain ordinance there's no regulation of specific land uses, so while the Workforce Housing statute would apply, it would have no practical effect. Such an ordinance would also fall under the exceptions found in the bill's RSA 674:59, IV—"Paragraph I shall not be construed to require municipalities to allow workforce housing that does not meet reasonable standards or conditions of approval related to environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection."

Flood Plain Caveat: flood plain ordinances are the only circumstance in which a municipality may adopt "single purpose zoning" in NH, at least with specific statutory authority; and this authority was only recently enacted. Other ordinances (e.g., a telecommunications facility ordinance in a town that otherwise doesn't have zoning) are legally suspect because they don't have an enabling statute.

2. Who Determines Whether An Inclusionary Zoning Ordinance Will Render Development Economically Unviable? RSA 674:59, II

The first test of the impact of inclusionary zoning incentives should be done by the planning board when it is drafting the ordinance. For that reason, planning boards should talk with developers to find out what kinds of incentives would work. The provision in the law that addresses that (RSA 674:59, II) really means that a municipality cannot adopt an unusable inclusionary zoning ordinance and hope to meet the "obligation" in RSA 674:59, I. After that, the tests would be in the planning process when a land use board is processing an application, then in court if an appeal if filed. It is important to remember that inclusionary zoning can only be voluntary (see the statutory definition at RSA 674:21), and can only meet the terms of the law's requirement if development can occur under it and remain economically viable. That means that that inducements offered in the ordinance must be realistic attempts by the municipality to create a regulatory environment that encourages developers to build affordable housing.

3. How do we determine what our community's "fair share" is?

First, bear in mind that *all municipalities* are *always* responsible for meeting their 'fair share' of their present and reasonably foreseeable regional need for workforce housing (this is equally true under the statute and under *Britton v. Chester*). If a community's existing housing stock provides that fair share, then the municipality needs to take no other action under this law.

The regional planning commissions look at information for their regions to the extent they are able to re-aggregate available data, but the age of Census data is a problem, as will be the lack of detailed information in future iterations of the Census. This is because the long form in the Census has been eliminated, and replaced with the American Community Survey (ACS), which does not have the same level of detail and accuracy for smaller geographies. But RPC regions are not necessarily always the best fit for all communities. This was the apparent upshot of the Strafford County Superior Court's first order in *Great Bridge Properties v. Town of Ossipee* (2005)—the court found that the Lakes Region Planning Commission data was not appropriate, and that the Conway Labor Market Area was better suited to analyzing the Town of Ossipee for questions of housing affordability.

New Hampshire Housing is presently revising a model for use by regional planning commissions that will be based on currently available data, and that could be used by the RPCs to identify municipal fair shares of workforce housing. But the law does not require RPCs to do this, and it is ultimately a municipality's responsibility. There are various methods that might be used to identify a community's fair share, if it chooses to undertake such an analysis. Consultation with your regional planning commission is the first best step for your municipality to take if you if you determine that it is important to identify what your community's fair share of affordable housing is.

A more important issue is that it is actually unnecessary for any community to identify what its fair share responsibility is, as long as it is providing the opportunity for the development of workforce housing. The fair share question only comes up as an "affirmative defense" asserted by a community that has failed to provide reasonable and realistic opportunities for workforce housing development. If the framework of a community's land use regulations and ordinances provides a reasonable and realistic opportunity for the development of workforce housing, including multifamily rental housing, then conducting a fair share analysis is an unnecessary exercise.

4. How do we know that workforce housing will actually be—and remain—affordable?

When a developer promises to build affordable housing, for many communities it is important for those housing units to remain affordable for a long period and for them to specifically target the intended beneficiaries. Any municipality is free to impose long-term affordability requirements on workforce housing that gets created through inclusionary zoning, and there are many different options that have been used. The Workforce Housing statute does not need to address this, because the communities already have the power to do this.

Alternatively, if a workforce housing development is created through a court appeal and the developer is awarded the builder's remedy, then the law outlines a clear process for creating long-term affordability restrictions on housing units that are intended to be affordable. New Hampshire Housing has created a model affordability covenant that allows a the owner of an affordable property to gain the benefit of equity gains through market increases, as well as those gained through owner-motivated home improvements—but there are also many other models available for use by municipalities.

5. *Why is multifamily housing separately defined in this law?*

In this statute, multifamily housing is defined as a structure with 5 or more units—this is tied to RSA 204-C, which deals with housing affordability, rather than RSA 674:43, which is a threshold of jurisdiction for planning board review and is unrelated to issues of affordability. This does not mean that a municipality needs to change its definition of multifamily housing, unless it actually prohibits multifamily structures with less than 5 units per structure. Reasonable provisions must exist in the municipality's ordinances and regulations for the development of multifamily housing with at least 5 units per structure.

6. *Workforce housing must be allowed in a majority of residentially-zoned area, but what about multifamily housing?*

The final sentence in RSA 674:59, I specifically states that multifamily housing does not need to be permitted in a majority of residentially-zoned areas. The zoning ordinance only needs to provide some reasonable opportunity for multifamily housing of 5 or more units per structure to be developed—it is up to the municipality to decide where it would be most appropriate. But a municipality could otherwise satisfy its overall workforce housing obligation by allowing affordable housing developments of 3 or 4 units per structure

IV. COMMUNITY RESPONSES TO THE WORKFORCE HOUSING LAW*

General

- Determine if in compliance with 'fair share'
- 'Audit' existing zoning and regulations
  - ID and consider removing or reducing unnecessary provisions that add to housing cost;
  - Evaluate compliance with SB 342 (>50% provision, multifamily housing standard (allowing structures with at least 5 units), etc.)
- Develop zoning & regulatory strategy to 'allow workforce housing in a majority of land zoned residential.'
- Amend zoning, subdivisions & site plan regulations accordingly
- Develop procedures for Workforce Housing applications

Fair Share?

- SB342: Municipality exempt if deemed to be meeting current and foreseeable fair share need for workforce housing
- Current RPC Regional Housing Need Assessment does not address fair share obligation
- Communities with substantial workforce housing stock may wish to conduct analysis based on 5 factor method.
- Few will meet the standard

Audit Existing Zoning and Regulations

- A long standing RPC recommendation
  - Identify zoning and regulatory provisions that add to housing cost but are not serving a valid purpose;
  - Evaluate compliance with >50% provision .
- Identify workforce housing friendly provisions that could be added:
  - Accessory apartments
  - Mixed uses
  - Multifamily definition (should allow structures with at least 5 units)
- Develop set of amendments to address these

Develop Strategy

- Remove or reduce unnecessary provisions that add to housing cost;
- If necessary, make adjustments to definition of multifamily housing
- Address Compliance with >50% Provision:

  OPTIONS:

* This outline is from a presentation by Cliff Sinnott, Executive Director, Rockingham Planning Commission.

- Make all zones compliant
- Special purpose workforce housing zones
  - Zoning & regulatory stds. relaxed
  - Other developer incentives
- Inclusionary Housing*/ Workforce Housing Overlay Zone

  * 674:59- "This obligation [to allow workforce housing…] may be satisfied with the adoption of inclusionary zoning…"

Inclusionary Zoning

- As a strategy to comply with SB342, has significant advantages over other options.
  - Can be applicable to 100% of zones (as overlay)
  - Evaluated & controlled case by case via Conditional Use Permit
  - Flexible standards;
  - Mixes market and workforce housing
  - IZIP planning asst. grants through NH Housing
- SB342 prohibits using inclusionary housing 'conditions' to exclude workforce housing – the message: conditions have to be reasonable to the objective

Implement the Strategy

- Zoning Amendment for Spring 2009 Town Meeting
- Adopt Subdivison and Site Plan Regulation amendments prior to July 1, 2009
- Show good faith; show good progress; get help if you need it.

V. WHAT CAN MUNICIPALITIES DO TO PROMOTE AFFORDABLE HOUSING?

A. Create a Local Housing Commission. The New Hampshire Legislature has amended the planning and zoning statutes to enables the state's cities and towns to create local housing commissions with specific powers (HB1259—Chapter 391, Laws of 2008). Previously, some communities had created task forces or affordable housing committees to make policy recommendations (they can still do this), but now municipalities can create housing commissions as local land use boards.

Unlike local housing authorities, the purpose of a local housing commission is not to own property as a landlord, but it could involve temporary ownership for the purpose of facilitating transfers of property in the interest of keeping it or making it affordable. As its primary purpose, a local housing commission would be created advise other municipal boards and officials on policies and plans related to housing, and to make specific recommendations on housing development proposals. A municipality's regulatory structure could be amended to give the local housing commission a role in the local development permit process, similar to the way some communities empower conservation commissions to review development proposals for certain types of environmental impacts using the conditional use permit authority of RSA 674:21.

A local housing commission could also be the municipality's agent to receive funds and to make expenditures on affordable housing through the creation of a housing fund, similar to a local conservation commission's role regarding a conservation fund. Unlike the conservation fund's use in permanently acquiring property, however, the housing fund would only serve the purpose of facilitating transactions relative to affordable housing. The affordable housing fund is established whenever a community creates a housing commission under this new statute, but no local appropriation is required. The affordable housing fund is a non-lapsing fund.

Establishment of a housing commission requires action by the local legislative body.

B. Create an Affordable Housing Revolving Fund. As an alternative to creating a local housing commission and affordable housing fund, a municipality can create an affordable housing revolving fund, as now authorized by RSA 31:95-h. This authority was created in the same law that enabled the creation of local housing commissions (HB 1259—Chapter 391, Laws of 2008).

Affordable housing is often created through some action by a municipal regulatory process, such as an inclusionary zoning approval by a planning board. Such an approval commonly establishes a property interest held by the municipality as a means of ensuring the long-term affordability of the housing. This property interest typically has a measurable value, yet the purpose of the interest is not to serve as a revenue source for the municipality, but to help its residents afford homes in a fast-growing market. In some circumstances, the value of the property interest may be recaptured by the municipality.

Although it is within the right of the municipality to deposit that money into its general fund, under this new authority the municipality is also enabled to reinvest that money in other affordable housing if it desires—but this requires authorization of the local legislative body.

C. Revise Your Master Plan. Take a look at your community's master plan—it probably has some general statements about encouraging a variety of housing types to provide opportunity for people of different income levels. It may not, however, take the important additional step of identifying areas within the community where growth is acceptable or wanted. It may also not specify that affordable housing is an important goal, despite the statutory requirements that it do so, and it may not enumerate different regulatory approaches that the community can take to facilitate the development of affordable housing. If the master plan is lacking in these measures, it should be updated. Although the master plan itself does not carry the weight of law, it should serve as the fundamental basis for all of the substantive aspects of the zoning ordinance. As such, the master plan must anticipate the types of measures that the planning board might propose to be included in the zoning ordinance.

D. What kinds of zoning provisions should your master plan address? Generally, there are four areas in which municipalities can act to promote affordable housing: (1) patterns of development, (2) type and size of construction, (3) mixture of uses, and (4) directly influencing costs. Remember that affordable housing is all about money—land purchase cost, transaction costs, and construction costs. Anything that reduces the cost to the developer will tend to increase his/her ability to provide affordable housing. The following simple matrix neatly depicts the interplay between the developers' costs and how the public influences it.

Development Costs and Public Responses

Cost Input	***Public Response***
Land Cost	Increase density Sale/grant of publicly owned property
Carrying Costs Interest Property Taxes	Permit streamlining Subsidies/Low-interest loans
Hard Costs Construction costs Site preparation costs Off-site exactions	Zoning for manufactured housing Accessory dwelling units Cluster/zero lot-line standards Modification of existing zoning requirements governing: Street widths; Off-street parking; Lot coverage; Sidewalks; and Curb and gutter. Targeted exemptions
Facilitating the Development Process	Regulatory incentives Early vesting and development agreements Inclusionary zoning Housing trust funds Public-private partnerships

Source: *Affordable Housing*, American Planning Association, Planning Advisory Service Report Number 441, 1992

1. **<u>Patterns of Development</u>.**

a. *Lot Size*. The factor of development that has the greatest impact on affordability is the cost of the land. If your community's zoning ordinance requires several acres per housing lot, then the cost of housing will be dramatically increased. There may be legitimate reasons for such a requirement, such as septic capacity, steep slopes, or other natural constraints to development, or the desire to preserve open space or agricultural land, or to protect rural character. It is likely, however, that blanketing the entire municipality with a large lot size requirement does not fully serve even its intended goals. Certainly, no community is entirely underlain by shallow bedrock or is located entirely on 25% slopes. Your master plan should plan for growth by identifying areas within your community where growth is more appropriate. In those areas, reduced lot sizes would be appropriate as a means of reducing the cost of development. It is true that this will facilitate the creation of more housing, and many people fear that consequence—but fostering the creation of more housing opportunities is the community's legal obligation.

b. Density. Even better than simply modifying the lot size requirement is changing the density of development, an approach that many communities use. Increasing the number of dwelling units permitted per acre can dramatically reduce the cost to home buyers or renters. If the master plan identifies a particular area as appropriate for future growth, then increasing the density of development there is a logical means of promoting affordable housing. Even if affordable housing is not the specific goal, increased density of development will have the resulting benefit of promoting it. To balance the potential for greater growth in higher density areas, the master plan could also identify areas within the community that are appropriate for reducing density of development, such as areas with poor highway access, high conservation value, or other important attributes.

c. Open Space Design. Commonly referred to as "clustering," this is an equally commonly misunderstood approach. Clustering of development does not necessarily provide for an increased number of housing units in a development, as compared to a conventional "tract-style" residential subdivision. It simply refers to the proposition that in a development, the housing units can be concentrated in a smaller area, preserving the remainder as permanent open space. The open space development standards should ensure that a portion of the open space is "usable" land for recreation, agriculture, forestry or some other use—i.e., that it would otherwise be appropriate for development. Without such a standard, then developers would clearly be inclined toward leaving only wetlands and steeply-sloped land as open space—namely, land that would have remained undeveloped in a conventional subdivision.

Open space design has the capacity to increase housing affordability because it reduces the developer's costs (less land to clear, shorter roads and driveways, and shorter utility infrastructures), but it alone is not enough. It is certain that even in a cluster subdivision, multi-million dollar mansions can be built. This is true of the Hollis zoning ordinance, which contains many elements that are important to open space design, yet it has not worked to promote affordable housing in that community. This result partially reflects the low density requirement that the Town maintains (2 acre minimum), but it also is based on the strong real estate market there.

d. Location of Development. Although land in outlying areas often is less expensive to purchase, it is not necessarily conducive to affordable housing. Because it is remote, the cost of extending municipal infrastructure there can be considerably higher. Such land also typically requires reliable personal transportation (automobiles) to access it. Conversely, land that is adjacent to existing villages and urban areas is often much better suited to developing affordable housing—it is close to existing municipal infrastructure; it can be within walking distance of many businesses, services, and schools; and it can more easily accommodate higher densities of development without appearing

"out of place." Identifying these areas in the master plan as "residential growth centers" is an important step in promoting affordable housing.

2. <u>Type and Size of Housing</u>.

a. Manufactured Housing. Although manufactured housing often carries a stigma of being low value and poor construction ("trailer parks"), improvements in the standards and practices of construction over the last thirty years have made it a legitimate source of affordable housing. Statutory requirements aside, municipalities should closely examine particularly manufactured housing parks as a reasonable portion of their approach to affordable housing. In a park setting, either cooperatively owned by the residents or owned by a third party, the capacity to provide safe, decent housing to a great number of people is more reasonable because of the ability to develop at higher densities than on single lots, where the controlling cost factor remains the underlying land.

b. Housing Size. The New Hampshire zoning enabling statute provides for regulating the size of housing units (RSA 674:16). While most communities use this statute to support minimum dwelling unit size standards, some are also using it to establish maximum size standards. An increasing problem in more affluent communities is the propensity for new owners to tear down smaller, less expensive homes for the sole purpose of replacing them with much larger and more expensive dwellings. Similarly, this approach could be used in new subdivisions where a developer might wish to build houses only in excess of 3,000 square feet. There, the municipality could require a portion of the housing units to be of smaller size. Deed restrictions could also be required, preventing future owners from subsequently expanding the structures unreasonably. Similarly, a developer could be encouraged to leave a portion of a dwelling unfinished, thereby reducing the initial purchase price and affording the first-time buyer the opportunity to quickly build equity in the property.

c. Housing for the Elderly and Disabled. Both state and federal law provide for special treatment of housing for the elderly and disabled in zoning standards. Recognizing the distinct needs and different demands of elderly and disabled people, increasing density of such development is wholly appropriate. This does not guarantee that the housing units will be affordable, but if developed in concert with federal and state housing subsidy programs, then such assurances can be made. Oftentimes, communities rally around the idea that a local elderly housing complex will provide exclusively for the needs of the local elderly population. It is important to recognize that this cannot be a requirement of the development—once the doors are open all are welcome, regardless of their community of origin.

d. Accessory Dwelling Units. New Hampshire law also provides for accessory dwelling units (ADU) (RSA 674:21, I(l)), commonly called "in-law apartments" (or "granny flats" in Australia!). The latter name is misleading, however, as it is possible that such a requirement would be found illegal under

the terms of the Federal Fair Housing Act, in addition to being impossible to police and enforce. It is better to recognize that such housing provides an important relief valve for shortages in the rental market. ADU's also have the significant added benefit of making the host property more affordable to the owner. Typically, an ADU is attached to a main residence, but this is not a requirement—they can be stand-alone structures. Some important provisions to consider are the proportional size of the ADU and the host structure, and the visual impact of ADU. For example, in a single family neighborhood, the design could be made compatible by requiring the entrance to the ADU to be on the side or rear of the structure, by requiring that the ADU be created in such a manner as not to need an exterior fire escape, and by limiting driveway access to the same as the host dwelling.

e. Inclusionary Zoning. While there are many examples of inclusionary zoning nationwide, little has been done in New Hampshire, despite the specific statutory authorization (RSA 674:21,I(k)), which defines inclusionary zoning as follows:

> **"Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.**

"Voluntary" is the watchword—inclusionary zoning cannot be mandatory in New Hampshire communities. If communities do want to promote affordable housing using inclusionary zoning, then a good approach would be to meet with developers to find out what types of incentives would induce them to build affordable housing. If they would still make a greater profit building "unaffordable" housing without the use of these incentives, then their choice would be clear. This problem has been witnessed in the Town of Salem, which has had affordable housing incentives as part of its zoning ordinance since 1989. The ordinance has never been used by a developer, which is a reflection of the very strong market for higher-end housing units there. The Town of Amherst has a somewhat simpler ordinance containing significant density bonuses for affordable housing. The ordinance has been used by developers on several occasions.

In cooperation with the Regional Environmental Planning Program of the Department of Environmental Services, the state's regional planning commissions have developed a handbook of model innovative land use controls, part of which is a chapter devoted to inclusionary zoning. See www.des.state.nh.us/repp/ilupth/Inclusionary_Housing.doc.

3. Mixed Uses

a. Home Occupations. The need to provide for home occupations was clear to early drafters of zoning enabling legislation and zoning ordinances, as most people already conducted some sort of business from their homes. This is reflected in the current acceptance of many types of home occupations as "accessory uses" in a home, permitted without enumeration in a zoning ordinance. There are types of home occupations, however, that would tend to go beyond the customary and traditional understanding of the term, yet which a community might still want to promote. This can be done either by enumerating the acceptable home occupations as permitted accessory uses in the zoning ordinance, by developing performance standards for home occupations, or by some combination of the two. The Hollis Zoning Ordinance is a good example of the second type—performance standards, which regulate the impact of the use upon the neighborhood, and do not necessarily regulate the use itself (you can view the ordinance at www.hollis.nh.us).

b. Mixed Use Zoning. Seemingly contrary to the historical precepts of zoning, which was intended to separate incompatible uses, contemporary planning embraces the idea that different uses can coexist, and even benefit from each other. The classic example of this is upper story apartments over commercial establishments in downtown areas. While many of these continue to exist, in areas where there is no longer sufficient demand for all of the commercial storefronts, communities might want to consider allowing them to be converted to additional residences. In areas of new development, builders can be encouraged (or required!) to develop comprehensively planned developments that include office parks, residential clusters, small commercial establishments, and space for institutional uses, such as elementary schools. Planning boards and developers can use old New Hampshire villages as their prototypes when imagining how such developments could be created. Be sure to allow for plenty of pedestrian access, and position various uses to limit the need for automobile use.

4. Directly Influencing Costs

a. Tax Increment Financing (TIF). A TIF district is a portion of a community designated by the municipal legislative body (town meeting or city council) from which a portion of the municipal tax revenues may be specifically dedicated to a capital project within the district. The statute enabling this (RSA 162-K) is complex but flexible, and TIF can be used in a variety of ways to promote affordable housing, among other uses. The New Hampshire Office of Energy and Planning recently issued a Technical Bulletin on TIF, which is available at www.nh.gov/oep/resourcelibrary/documents/13-taxincrementfinancing.pdf or by calling OEP at 271-2155.

b. Public/Private Partnerships. In the past, the role of municipalities in promoting affordable housing development was probably limited to offering encouraging words of advice on how to interpret the zoning ordinance. Now, communities across the country are beginning to take an active role in ensuring the availability of sufficient housing that is affordable to its labor force. Since the beginning of this decade, a series of regional workforce housing coalitions has worked to involve businesses in local decision-making, particularly in advocating for local regulator changes to promote the development of affordable housing. All of these initiatives closely involve and require the active participation of municipalities, and are based upon the recognition that the tight housing supply in New Hampshire poses the principle impediment to continued healthy economic growth. See the website of the NH Workforce Housing Council for more information (www.workforcehousingnh.com).

c. Local Rehabilitation Tax Relief Incentives (RSA 79-E). New Hampshire municipalities may adopt provisions that allow them to exempt properties in downtown areas from increases in taxes that would be caused by higher assessments on the properties because of substantial rehabilitation. This is strictly a local option, and it is up to the voters to decide whether to adopt such a program. If locally adopted, downtown property owners may apply for relief from future increases in taxes for between 5 and 10 years, depending upon the type and use of the structure. Rehabilitation must be substantial—at least $75,000 or 15% of the value of the structure, whichever is less.