
New Hampshire 2010-11 Land Use Law in Review

Statutes and Cases



Spring Planning & Zoning Conference

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Today's Roadmap

- Finding the Law
- Recent NH Statutory Changes
- Current and Proposed NH Statutory Changes
- NH Cases
- A Touch of Federal Issues



PART I

Finding the Law

Finding the Law

NH Supreme Court Decisions

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

NH Statutes and Bills

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

For Other Jurisdictions

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

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

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

Legislative Tracking

- Legislature's website
 - http://www.gencourt.state.nh.us/bill_Status/
- Local Government Center (NHMA) Bulletins
 - www.nhlgc.org
- New Hampshire Planners Association (NHPA)
 - www.nhplanners.org

2011 Session Pending Legislation																		
Bill	Oppose	Notice	Place Title relative to the New Hampshire Constitution	Jud	Hearing	WkSess	WkSess	ExSess	ITL	P&MA	Hearing	Passed w/amend	11:30	LOB	11:30	LOB	11:30	LOB
HB94	Watch	Tholl	relative to public access to advisory committee meetings under the right-to-know law	Jud	Hearing	1/11	1:30	208 LOB										
					WkSess	1/18	1:30	208 LOB										
					WkSess	1/20	1:30	208 LOB										
					ExSess	2/1	11:00	208 LOB										
					ITL	2/9												
HB109	Oppose	Hunt	relative to residential fire sprinklers.	M&CG	Hearing	1/20	1:30	301 LOB		P&MA	Hearing	4/12	9:55	101 LOB				
					ExSess	2/8	1:00	301 LOB			Passed w/amend	5/11						
					Recom-mitted	2/16												
					ExSess	3/1	11:00	301 LOB										
					Passed w/amend	3/16												
					Concurs	5/25												
HB137	Watch	Hawkins	relative to the state fire code and the state building code	ED&A	Hearing	1/25	1:30	306 LOB										
					WkSess	2/10	3:00	306 LOB										
					WkSess	3/1	2:00	306 LOB										
					ExSess	3/9	1:00	306 LOB										
					Retained WkSess	3/9												
					WkSess	4/14	2:00	306 LOB										
HB144	Watch	C.McGuire	(New Title) relative to energy efficiency and clean energy districts	M&CG	Hearing	1/25	11:15	301 LOB		E&NR	Hearing	4/14	9:30	102 LOB				
					ExSess	1/27	1:00	301 LOB			Passed	4/20						
					ExSess	2/24	1:00	301 LOB										
					Passed w/amend	3/16											Signed 5/16/11; Effective 7/15/11; Ch. 68	

Other Sources

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

"An ounce of prevention..."



PART II

Recent Statutory Changes

Brand New Laws in 2010!

- Workforce housing affordability covenants, Ch. 150 (HB 1395)
- Terms of office and land use board def'n, Ch. 226 (HB 1174)
- Role of alternate members, Ch. 448 (SB 448)
- ZBA fees for third party review, Ch. 303 (HB 1380)
- Planning board acceptance and other permits, Ch. 39 (SB 328)
- Involuntary mergers prohibited, Ch. 345 (SB 406)
- Sprinkler requirement moratorium, Ch. 282 (HB 1486)
- Community Revitalization Tax Relief Incentive, Ch. 329 (SB 128)
- School siting (and funding) policy, Ch. 327 (SB 59)
- Special meetings for zoning in SB2 towns, Ch. 69 (HB 1211)
- Property Assessed Clean Energy (PACE), Ch. 215 (HB 1554)

- *But first, a trip down zoning memory lane...*

Zoning Variance Standards (1 of 3)

2009 Ch. 307 (SB 147)

■ RSA 674:33, I(b)

- A rough codification of *Simplex v. Newington*, 145 N.H. 727 (2001), incorporation of the test in *Governor's Island Club v. Gilford*, 124 N.H. 126 (1983), and a rejection of the distinction between use and area variances in *Boccia v. Portsmouth*, 151 N.H. 85 (2004)
- But see legislative purpose statement for treatment of post-*Simplex* cases, including *Boccia*.

Boards of adjustment may grant a variance if they find—

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and
- ...

Zoning Variance Standards (2 of 3)

- RSA 674:33, I(b) (cont'd)
 - (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
 - (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - (ii) The proposed use is a reasonable one.
 - (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Zoning Variance Standards (3 of 3)

- RSA 674:33, I(b) (cont'd)
 - The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance
 - This shall apply to any application or appeal for a variance that is filed on or after the effective date of this act
- Eliminates the distinction between “use” and “area” variances
- Roughly codifies the language of Simplex; codifies the stricter Governor’s Island test if Simplex can’t be met
- Boccia’s economic analysis language is still good law!

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- What is the purpose of zoning? Is it mainly to keep incompatible uses separate?
 - Has it grown to be something more than that?
(much more?)

Workforce Housing (1 of 2)

2008 Ch. 299 (SB 342)

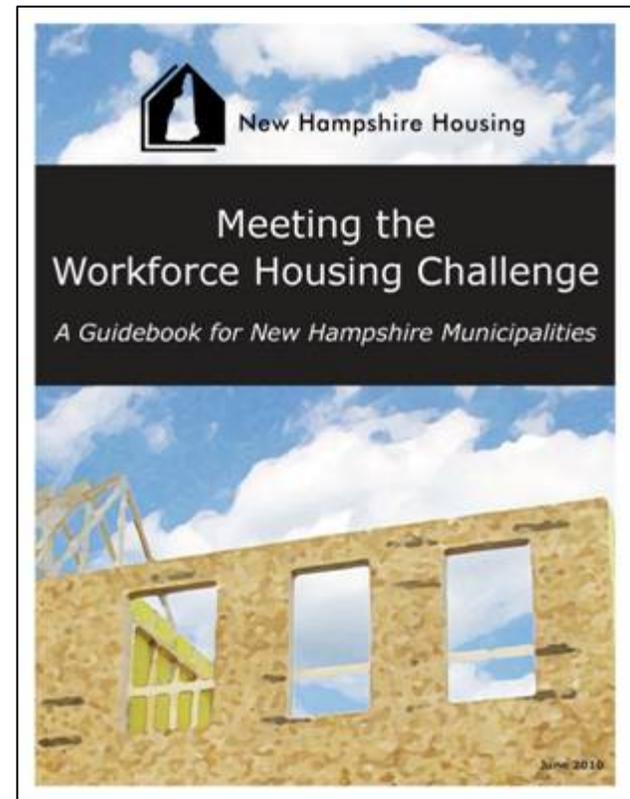
- RSA 674:58 - :61
 - All communities must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable”, and including rental multi-family housing
 - Also adds a series of definitions as a means of providing greater guidance than the Court’s opinion
 - Affordable: 30% of gross income
 - Renter household at 60% area median income
 - Owner household at 100% area median income
 - Opportunity for WH development must exist in a majority of residentially zoned area in a municipality
 - 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
 - Effective January 1, 2010 (extended from 7/1/09 by Ch. 157 ‘09)

Workforce Housing (2 of 2) 2010 Ch. 150 (HB 1395)

- RSA 674:60, IV
 - Explicitly allows planning boards to require long-term affordability restrictions as a condition of approval of workforce housing

***Workforce Housing guidebook
now available –***

www.nhhfa.org/rl_WHguide.cfm



Terms of Office; Land Use Board Def'n 2010 Ch. 226 (HB 1174)

■ RSA 673:5, III

- For appointed land use board members, if upon expiration of term no successor has been appointed, provides for continuation until such appointment is made – “holdover” status

■ RSA 672:7

- Amends definition of “local land use board” to include any board or commission authorized under RSA 673
 - Formerly only planning board, zoning board of adjustment, building code board of appeals, historic district commission, building inspector
 - Now also includes heritage commission, agriculture commission, housing commission and anything else the Legislature might subsequently include in RSA 673

■ Pay attention to statutes that refer to “land use boards”

Role of Alternate Board Members

2010 Ch. 270 (SB 448)

- RSA 673:6, V
 - “An alternate member of a local land use board may participate in meetings of the board as a nonvoting member pursuant to rules adopted under RSA 676:1.”
- RSA 676:1
 - “... The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.”
- Amend your rules of procedure to address this!

ZBA May Charge for Consultant Review 2010 Ch. 303 (HB 1380)

- RSA 676:5
 - IV. ZBA “may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.” (Identical to planning board’s authority in RSA 676:4, II(g)).
 - V.(a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, *provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.* (Italicized text also now required of planning board in RSA 676:4-b, I.)
 - (b) Detailed invoices and accounting of costs required.
- Addresses a long-standing question of law, which played an important part behind the scenes in Continental Paving v. Litchfield, 158 NH 570 (2009).

Planning Board Application Acceptance 2010 Ch. 39 (HB 328)

- RSA 676:4, I(b)
 - An application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i).
- RSA 676:4, I(i)
 - **Conditional approvals:** “... Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits.”
- Must a planning board accept an application for something that would obviously violate zoning?
- If so, must it also approve it, subject to ZBA approval?

Community Revitalization Tax Relief Incentive, 2010 Ch. 329 (SB 128)

- RSA 79-E Originally adopted in 2006
 - Last year, expanded to apply to allow incentive to be applied to *replacement* of structures, not just to their rehabilitation
 - May be granted if
 - the structure has no significant historical, cultural, or architectural attributes, and
 - where the statutory public benefit of replacement would exceed that of rehabilitation
 - This year, amended
 - To give municipalities authority to set higher thresholds of cost for rehabilitation, and
 - To allow municipalities to establish stricter standards for identifying “qualifying structures”
- See **handout** for Flow Chart and Fact Sheet

School Siting and Funding Policy

2010 Ch. 327 (SB 59)

- RSA 199:1 Locations of schools
 - Substantial renovation or new construction – at least one public hearing to garner input of municipal boards; school board to consider local zoning and master plan “in order to maximize best planning practices.”
- RSA 198:15-b, VIII
 - Additional land shall not be required except for traffic safety
- RSA 198:15-c
 - Dept of Education shall not fund school construction projects that “conflict with effective statewide planning *pursuant to RSA 9-A or the principles of smart growth pursuant to RSA 9-B.*”
- “Teeth” will be in implementation, especially by DOEd

Special Meetings for Zoning in SB2 Towns 2010 Ch. 69 (HB 1211)

- RSA 40:13, XVII
 - If the sole purpose of the special town meeting is for adoption, amendment or repeal of zoning, historic district ordinance, or building code, no deliberative session required

- Why? Because zoning amendments can't be amended at the deliberative session – one session, only for voting

Property Assessed Clean Energy (PACE) 2010 Ch. 215 (HB 1554)

- RSA Chapter 53-F
 - Enabling legislation – allows municipalities to create districts in which municipal loans may be made to property owners to do energy efficiency and clean energy improvements
 - Improvements must be based on an energy audit by a certified auditor
 - Improvements must be cash-flow positive for property owner
 - Repayment cannot exceed expected life of improvements
 - Repayment made as part of property tax bill, secured by lien in event of delinquency

- PACE is currently held up nationally by Federal questions (FHFA, Fannie Mae, and Freddie Mac are concerned about priority status of municipal liens)

Involuntary Mergers Prohibited

2010 Ch. 345 (SB 406)

- RSA 674:39-a
 - “No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner.”

- Consider abutting substandard lots owned by the same person
 - Does this limit a planning board’s ability to require merger as part of site development? Probably not.
 - Does it limit a ZBA’s ability to require merger instead of granting a variance for development of one lot? Probably yes.
 - Does it apply retroactively to undo previous involuntary mergers? Probably not.

Residential Sprinkler Moratorium

2010 Ch. 282 (HB 1486)

- Session law, not codified; Section 4
 - Detached one- and two-family dwellings; through June 30, 2011
 - No new sprinkler requirements by municipalities or local land use boards by ordinance, regulation, code, or administrative practice
 - OK to require that sprinklers be *offered*
 - This “shall not prevent a planning board from finding that particular subdivision applications are scattered or premature, in accordance with RSA 674:36, II(a), for lack of adequate fire protection. In such cases, applicants may propose, and a planning board may accept, the installation of fire sprinkler systems as a means of addressing the planning board’s findings.”
- For land use boards, “administrative practice” probably means *conditions of approval*

PART III

Current and Proposed Statutory Changes

New or Pending Laws in 2011

- PACE, revisited (HB 144) – signed, Chapter 68, Laws of 2011
- Lot merger, revisited (HB 316 and HB 352)
- Sprinkler requirements prohibited (HB 109 and SB 91)
- Dam owner notification (HB 205)
- Planning board members on other boards (HB 409)
- Agricultural uses (SB 104) – signed, Chapter 85, Laws of 2011
- New vesting periods (SB 144)
- Shoreland protection (SB 154 and HB 2)

Property Assessed Clean Energy (PACE), revisited – HB 144, Ch. 68

- RSA Chapter 53-F
 - Introduced as to repeal PACE; House instead reforms it
 - Limits municipal bonding to revenue bonds (not general obligation bonds that pledge full faith and credit)
 - Eliminates authority to use general municipal revenues, including for loan loss reserve
 - Eliminates provision for priority lien for delinquencies; liens shall be junior to existing liens of record

- Effective July 15, 2011

Involuntary Mergers Undone

HB 316, pending

■ RSA 674:39-aa

- Lots involuntarily merged (for zoning, assessing, or taxation purposes) prior to Sept. 18, 2010 shall be restored to their pre-merger status at the request of the owner, ***provided***
 - Request is made prior to Dec. 31, 2016
 - No owner in chain of title voluntarily merged the lots; all subsequent owners estopped from requesting restoration. Municipality has the burden to prove voluntary merger
- Requests made to local governing body, whose decisions may be appealed pursuant to RSA 676
- Municipalities may adopt more liberal ordinances
- Municipalities must post notice that lots may be restored; public place (no later than Jan. 1, 2012 and in 2011 – 2015 annual reports)
- Bill passed by both House and Senate

Sprinkler Requirements Prohibited

HB 109 and SB 91, pending

- [HB 109] RSA 674:36 (subdivisions)
 - Planning boards shall not require as a condition of approval, or adopt regulations requiring, fire suppression sprinklers in proposed 1- and 2-family structures exclusively used for residential purposes
 - Other conditions and requirements OK – cisterns, fire ponds, etc.
 - Passed both House and Senate
- [SB 91] RSA 674:51 (building codes)
 - No municipality or local land use board shall adopt [or enforce] any ordinance, regulation, code, or administrative practice requiring sprinklers in 1- and 2-family structures used only for residential purposes
 - House removed “or enforce” over concerns from fire chiefs about ability to enforce previously adopted regulations and conditions
 - In conference committee between Senate and House; categorical exemption for mobile homes also being considered

Dam Owner Notification, revisited

HB 205, pending

- RSA 676:4, I(b) and (d)
 - Introduced as a repeal of 2009 legislation; House changed to reform
 - Removes 2009 language from RSA 676:4, I(b) and (d)
 - Adds new subparagraph to RSA 676:4, I(d)
 - *(2) For those proposals in which any structure or proposed building site will be **within 500 feet of the top of the bank** of any lake, pond, river, or stream, the planning board shall also notify the department of environmental services by **first class mail** at the same time that notice is provided to abutters, cost to be paid in advance by the applicant consistent with subparagraph (d)(1). **The sole purpose of notification to the department shall be to provide information to the department for dam hazard classification. This requirement shall not confer upon the department the status of an abutter. Failure by the municipality to notify the department shall not be considered a defect of notice.***
- Passed by both House and Senate

Planning board members on other boards – HB 409, pending

- RSA 673:7
 - Current law prohibits more than one planning board member from serving on other local boards and commissions
 - **New:** 2 planning board members may serve on other boards or commissions, except that only 1 planning board member may serve on
 - Local governing body
 - Conservation commission
 - Other local land use board
 - Passed by both House and Senate

Agriculture and Timber Harvesting

SB 104, Ch. 85

- RSA 674:1, VI (Planning board duties)
 - Powers ***“shall not include regulating timber harvesting operations that are not part of a subdivision application or a development project subject to site plan review under this chapter.”***
 - Means that boards can’t address pre-application logging
- RSA 674:17, I(i) (Zoning enabling statute)
 - To encourage the preservation of agricultural lands and buildings ***and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings***
- Signed, effective July 15, 2011

New “Vesting” Periods

SB 144, pending

■ RSA 674:39 – Four-Year Exemption

- “**Vesting**” is protection against changes to land use regulations
- Existing par. V, adopted in 2009: “Notwithstanding the time limits established in paragraph I, every subdivision plat and site plan approved by the planning board on or after January 1, 2007 and prior to July 1, 2009 shall be allowed 36 months after the date of approval to achieve active and substantial development or building as described in subparagraph I(a) and every subdivision plat and site plan approved by the planning board on or after July 1, 2005 and prior to July 1, 2009 shall be allowed 6 years after the date of approval to achieve substantial completion of the improvements as described in paragraph II.”
- Delete V and change to a **FIVE-year** exemption for projects to achieve substantial completion; with 24 months in which to undertake “active and substantial development or building”
- Passed by both the Senate and the House

Shoreland Protection

SB 154 (and HB 2), pending

- Substantial changes to RSA 483-B, the Comprehensive Shoreland Protection Act (becomes “Shoreland Water Quality Protection Act”)
- Eliminates municipal authority to increase the primary building setback beyond 50 feet
- Allows for “permit by notification” for projects that involve
 - Less than 1,500 s.f. of impact and adds no more than 900 s.f. of impervious surface
 - Stormwater management improvements
 - Maintenance of public utilities, roads, and public access
 - Others permitted by DES rules
- DES will have 5 days to rule on permit by notification applications
- Waiver (formerly “variance”) standard relates to environmental impact
- Expansion of non-conforming structures allowed when they will become “more nearly conforming”

PART IV

Recent Court Decisions

Planning and Zoning Cases

- Impact Fees
 - *Clare v. Town of Hudson*, 160 N.H. 378 (2010)
- Timing of Appeals
 - *Atwater v. Town of Plainfield*, 160 N.H. 503 (2010)
- Standing to Appeal
 - *1808 Corporation v. New Ipswich*, ___ N.H. ___ (2011)
- Expansion of Variances and Special Exceptions
 - *Golf Course Investors of NH v. Jaffrey*, ___ N.H. ___ (2011)

Impact Fees

- *Clare v. Town of Hudson* (2010)
 - RSA 674:21, V – Impact fees
 - Must be used within 6 years of collection
 - May only be used for the purpose for which they were collected
 - Must be directly related & proportional to development's impact
 - Funds must be accounted for separately from town funds
 - Subdivision approved in 2000; \$81,705 performance bond required for off-site road improvements; administered through impact fee ordinance; work scheduled for 2005, but postponed; funds encumbered; Brox hired, and paid \$251,87 in 2007; \$89,154 (incl. interest) from the development account
 - Funds properly encumbered within 6 years
 - Clare contests purpose (“town-wide paving”), but court disagrees
 - Proportionality and accounting: Brox details \$75,438 of costs for relevant portion of work; Town shows \$62,586 of its own costs; but paid account balance entirely to Brox. Court: return \$13,716
 - Different result if the Town had paid itself a portion?

Timing of Appeals

- *Atwater v. Town of Plainfield* (2010)
 - Planning board approves site plan on August 6
 - One condition precedent; three conditions subsequent
 - Zoning administrator sends notice of decision on August 8
 - Board finds that condition precedent is met on August 23
 - Abutters file administrative appeal under RSA 676:5 with ZBA on September 6 (also a superior court appeal filed on Sept. 5)
 - **When does the clock start?** Court: for ZBA appeals, as soon as possible; don't wait for the fulfillment of non-zoning conditions precedent; compare RSA 676:5 with RSA 677:15
 - ZBA rejects appeal: not filed within 15 days, as required by zoning
 - But the timing of RSA 676:5 appeals is “within a reasonable time, as provided by the rules of the board.”
 - Plainfield ZBA's rules say 30 days! But the plaintiffs failed to make this argument in their motion to ZBA for reconsideration. ☹
 - *Saunders v. Kingston*: 3 days after *Atwater*, similar issue, similar result: planning board's zoning determinations immediately appealable to ZBA

Standing to Appeal

- ***Golf Course Investors of NH v. Jaffrey (2011)***
 - Planning board approves a 2-lot subdivision; 7.39 and 1.75 acres (with a building); no appeal; several months pass...
 - GCI seeks subdivision and site plan approval to divide building into 4 residential condo units and to rehab the historic structure; 7 residents appeal to ZBA – should have gone to ZBA for special exception (major development, multi-family, and open space development plan)
 - Standard zoning would have required 6 acres; OSDP, 4.8 acres
 - Appeal: →“...we believe that a revised proposal on at least 4.8 acres of platted land could be readily approved by the Planning Board as an Open Space Development Plan...” →“We are please that the [building], gutted and unused for many years, has been proposed by [GCI] to be redeveloped into attractive housing.” →“We believe the resulting redevelopment ... on a plot of at least 4.8 acres will be a very good reuse of this historic 1912 building.”
 - ***Why did they appeal?***

Standing to Appeal (cont'd)

- *GCI v. Jaffrey* (cont'd)
 - “Aggrieved persons” – owners of land 450’, 900’, 1200’, and 2000’ distant from subject property; none is an abutter, though one was provided notice of the planning board hearing as an abutter
 - At ZBA hearing, town attorney says none meets the RSA 672:3 definition of abutter, but could show that their property would be directly affected by the proposal
 - Residents: ‘too much housing on too little land’
 - Later ZBA deliberations – standing considered
 - Chair: none is an abutter; another member: “...the State has regional impact going as far as Marlborough. The appellants are closer than Marlborough.”
 - Town attorney: definition of abutter is for notice purposes; don’t have to be an abutter to be an aggrieved party; two choices:
 - Deny the appeal agree with the Planning Board; or
 - Grant the appeal return case to the Planning Board
 - **[3rd option: dismiss appeal for lack of standing]**

Standing to Appeal (cont'd)

■ *GCI v. Jaffrey* (cont'd)

- ZBA summarily sees residents' standing and grants appeal; GCI appeals
- Who has standing? Supremes: "direct, definite interest in the outcome."
- *Weeks Restaurant Corp. v. Dover* (1979); fact-based inquiry that may include factors such as:
 - Proximity – alone is insufficient
 - Type of change proposed – little change to building footprint
 - Immediacy of the injury claimed – appellants like it! No evidence supporting particularized harm
 - Challenging party's participation in the administrative hearings – one party, *de minimis* involvement
- Standing does not extend to all persons in the community who might feel that they are hurt by the proposal

Standing to Appeal (cont'd)

■ *GCI v. Jaffrey* (cont'd)

- Proximity – Town contended that court had earlier said that abutters to a zoning change are presumed to have standing
- Supremes disagree: “...we did not adopt a bright line rule identifying whether and to what extent physical proximity establishes direct interest sufficient to confer standing.”
- “...while close proximity is relevant, we reject the notion suggested by the Town that a non-abutter necessarily establishes a direct, definite interest by close proximity alone.”
- Is the Court also suggesting that someone could be an abutter, and yet not have standing to appeal?
- ***Probably not***, but intentionally ambiguous language is curious
- Who else could appeal to ZBA, if not the non-abutter neighbors?
 - RSA 676:5 – any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer
- Practice pointer: you can't expand upon the statutory definition of abutter for the purpose of conferring standing, but you can notify more people if you want to have better-attended hearings!

Expansion of Variances and Special Exceptions

- *1808 Corporation v. New Ipswich (2011)*
 - ZBA approvals in 1998: special exception to establish an office use in the Village District, applicant says will be limited to front 3760 s.f. of 7275 s.f. building (rear portion for tenant storage); variance to allow office of more than 1500 s.f.
 - 2008 site plan application to Planning Board to use building entirely for office; applicant argues no further ZBA action necessary; Board disagrees and defers consideration for 180 days to allow ZBA review
 - Administrative appeal to ZBA contesting this decision; ZBA upholds Planning Board, owner appeals to court; superior court upholds ZBA
 - Issue: was further ZBA review necessary? Applicant argues
 - (1) expansion was within the 1998 variance; or
 - (2) expansion represents expansion of nonconforming use

Expansion of Variances and Special Exceptions (cont'd)

- *1808 Corporation v. New Ipswich* (cont'd)
 - Supremes: record is “meager” but supports the idea that variance was limited to the front
 - the scope of a variance is dependent upon the representations of the applicant and the intent of the language of the variance at the time it was issued
 - The doctrine of expansion of nonconforming uses does not apply
 - The use was allowed by special exception, not by variance; the variance only address the area devoted to the office use
 - A couple things to think about:
 - What authority does the Planning Board have to “defer action” on an application it has already accepted? This was not litigated
 - The court focuses on the distinction between use and area variances for no clear reason; the variance in this case pre-dates *Boccia v. Portsmouth* (when area variances were created) and the Court’s consideration of this case came after the Legislature eliminated the distinction between use and area variances

PART V

A Touch of Federal Issues

Telecommunications Act “Shot Clock”

- Telecommunications Act of 1996
 - “Preservation of local authority”
 - Requirement for local boards to act within a “reasonable period”
 - 2009 FCC Order → “reasonable period” =
 - 150 days for a new tower; 90 days for a collocated antenna*; more than that is presumptively unreasonable, applicant may sue in federal or state court
 - 30 days (inclusive) from receipt of application (not “acceptance”) for local boards to request information; doing so tolls the clock until applicant provides information; failure means the clock still ticks
 - Implications:
 - Date stamp materials
 - Develop a means of checklisting applications quickly to identify missing, incomplete, or inadequate material for purpose of requesting within 30 days
 - Denials: must be in writing supported by substantial evidence (more than a scintilla, less than a preponderance); minutes are insufficient
 - Open legal question: FCC order binding on courts?

RLUIPA

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

More Questions?



New Hampshire Housing