WORKFORCE HOUSING LAW

CHAPTER 299, LAWS OF 2008 (SB 342)

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	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

create a system of statewide land use regulation or a statewide zoning process.	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	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 temporary development moratoria), as well as historic district ordinances, building

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.	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 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.	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. 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	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

economically unviable.	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 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.	Even with the enactment of this law, 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 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.	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 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	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)

viability within the period directed by the board, which shall not be less than 30 days.	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 without further action under this paragraph.	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 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	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

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.	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 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.	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. 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 effect July 1, 2009.	* This has been extended to **January 1, 2010** by Chapter 157, Laws of 2009 (HB 321). This new effective date gives municipalities an additional town meeting cycle in which to make necessary changes to their zoning ordinances.