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



16th Annual

Spring Planning and Zoning Conference

Manchester, NH

May 2, 2009



PART I

Recent Court Decisions

Planning Cases

- *Green Crow Corp. v. Town of New Ipswich*, ___ N.H. ___ (2008)
- *Auger v. Town of Strafford*, 156 N.H. 64 (2007)
- *Auger v. Town of Strafford*, ___ N.H. ___ (2009)
- *Derry Senior Development, LLC v. Town of Derry*, ___ N.H. ___ (2008)
- *Dovaro 12 Atlantic, LLC v. Town of Hampton*, ___ N.H. ___ (2009)

Planning and Road Reclassifications

- *Green Crow Corp. v. Town of New Ipswich, ___ N.H. ___ (2008)*
 - Owner seeks Selectboard reclassification of road from Class VI to Class V; owner plans 130 homes in 3 phases; will upgrade 4,100 feet of road to town's standards
 - Petitioned road "layout" per RSA 231:28—includes betterment assessments, incorporates the "occasion" requirement of RSA 231:8
 - Interlocutory appeal from trial court: as part of its occasion analysis may the Selectmen consider anticipated impact associated with development that may result from road upgrade? Impacts such as "increased burden on the town's schools, fire, emergency, and police systems; environmental impacts; and noncompliance with the Town's Master Plan."
 - Supremes: No.
 - Thorough examination of planning and zoning statutes reveal that it is a comprehensive land use regulatory scheme that vests such authority in, among others, the Planning Board—but not the Board of Selectmen

Planning—Waiver of Regulations

- *Auger (I) v. Town of Strafford*, 156 N.H. 64 (2007)
 - Read cases carefully—this one is **not** about conservation design subdivisions and yield plans
 - Zoning variances and regulatory waivers are not the same
 - RSA 674:36, II(n) authorizes waivers where “strict conformity would pose an unnecessary hardship” and waiver would not be contrary to the spirit of the ordinance
 - No hardship demonstrated for waivers
 - Maximum number of lots on a dead-end—planning board preferred cul-de-sac to a loop road—remanded
 - Road width reduced in yield plan to lessen wetland impact—reversed
 - So is some level of hardship to be expected?
 - What would qualify for a waiver is probably not what would be needed for a variance—“practical difficulty” in RSA 674:41

Planning—Waiver of Regulations

- *Auger (II) v. Town of Strafford*, ___ N.H. ___ (2009)
 - Read cases carefully, part 2
 - Reciting history of Auger I, Court says board should have required “evidence of undue hardship or injustice...”
 - This is not the language of the statute! But it is the language of the Town’s subdivision regulations, which the Court had found to be consistent with the statute
 - On remand, trial court summarily reversed board’s grant of waiver of maximum 10 lots on a dead end; Supreme Court held that it should have been remanded, because applicant had never had the chance to present evidence of hardship
 - Appellant argued that remand was pointless because the conservation design subdivision couldn’t be approved without a yield plan, which was reversed by Supremes
 - Here, Supremes observe that the yield plan is optional in the town’s regulations (“may require a yield plan”), and could be waived on remand
 - So back to the planning board...

Planning—Preemption (sort of...)

- *Derry Senior Development, LLC v. Town of Derry*, ___ N.H. ___ (2008)
 - Site plan for “independent adult community development” of 36 2BR detached units—35 on new private road, one accessed from existing town road; community septic with 4-inch pipes
 - DES subsurface approval obtained; but based on past systems’ failures, DPW opposes development ; wants system built to town standards for public sewer (8-inch mains, 6-inch collectors)
 - Town engineer calls for 6-inch pipes; plans revised to reflect engineer’s concerns, but submitted too late for board to review at hearing
 - Plan denied because it didn’t have the bigger pipes, 4 homes down-gradient from a community system, internal road not wide enough, revised plans were not available; trial court affirms for first two reasons
 - Supremes cite Derry site plan regs, which state that on-site sewage disposal may be used as long as it complies with state stds; towns may impose higher standards (Derry didn’t)
 - DES approval creates a rebuttable presumption of safety
 - Vague concerns insufficient; nothing in the record supports the assertions of the DPW or the Asst. DPW Director/Board member, or that the 4 down-gradient homes were at risk

Planning—Non-conforming uses

- *Dovaro 12 Atlantic, LLC v. Town of Hampton, __ N.H. __ (2009)*
 - Condo conversion of seasonal rentals to year-round occupancy; 5000 s.f. lot; 6 units in one building; 3BR cottage in rear; preexisting non-conforming use—inadequate on-site parking (2 per unit required or off-site perpetual easement, size, access to street)
 - Initial denial by planning board for perpetuation of a hazard and nuisance—partially reversed by trial court because “form of ownership” is not a valid concern; but the board could require that “offensive” parking spaces be eliminated (safety & nuisance)
 - Proposal for 8 spaces (3 and 5 stacked); only 2 have direct street access; board finds that 4 spaces constitute a perpetuation of a public nuisance; 4 others must be guaranteed by perpetual off-site easement; trial court affirms the 4 spaces, reverses the off-site spaces—off-site parking had been used, but had always been secured by the tenants themselves, not by the owner as a condition of the lease
 - Town argues that elimination of one non-conformity strips owner of right to continue any other non-conformities; Supremes disagree

Planning—Non-conforming uses

- *Dovaro 12 Atlantic, LLC (cont'd)*
 - Town also argues that seasonal to year-round conversion is a substantial change; zoning ordinance is silent, so turn to common law
 - “Substantial change in the nature or purpose of a preexisting nonconforming use”
 - Does the new use reflect the nature and purpose of the old use?
 - Is the new use merely different in manner, or is it different in character, nature, and kind?
 - Will the new use have a substantially different effect on the neighborhood?
 - Be mindful of RSA 356-B:5 (the NH Condominium Act): “No zoning or other land use ordinance shall prohibit condominiums as such by reason of the form of ownership inherent therein.”
 - Denial appropriate only if the conversion itself would have an actual effect on the use of the land. “A mere change from tenant occupancy to owner occupancy is not an extension of a nonconforming use.”
 - Supremes: parking issues the same for seasonal or year round occupancy; no evidence of substantial impact on the neighborhood. Snow? No evidence on the record.

Zoning Cases

- *Malachy Glen Associates v. Chichester*, 155 N.H. 102 (2007)
- *Daniels v. Londonderry*, ___ N.H. ___ (2008)
- *Nine A, LLC v. Chesterfield*, ___ N.H. ___ (2008)
- *Naser v. Deerfield*, ___ N.H. ___ (2008)
- *Ouellette v. Kingston*, ___ N.H. ___ (2008)
- *Lakeside Lodge, Inc. v. New London*, ___ N.H. ___ (2008)
- *Schroeder v. Windham*, ___ N.H. ___ (2008)
- *Taylor v. Wakefield*, ___ N.H. ___ (2008)
- *Guy v. Temple*, ___ N.H. ___ (2008)
- *Kelsey v. Hanover*, ___ N.H. ___ (2008)
- *Cardinal Development v. Winchester*, _ N.H. _ (2008)
- *Continental Paving, Inc. v Litchfield*, ___ N.H. ___ (2009)

Zoning—What's a Variance? RSA 674:33

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

Zoning—What’s “Unnecessary Hardship”?

- **Use variance - *Simplex* analysis**
 - The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.
 - No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
 - The variance would not injure the public or private rights of others.
- **Area (dimensional) variance - *Boccia* analysis**
 - An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.
 - The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

Zoning—Area Variances

- *Malachy Glen Assoc. v. Chichester, 155 N.H. 102 (2007)*
 - Area variance for wetland buffer encroachment denied
 - Trial court reverses, Supreme Court upholds reversal
 - Hardship: use is presumed reasonable if it is a permitted use
 - Scaled-back alternative uses not relevant without an analysis of the financial impact to the applicant—“the benefit sought”
 - “Not contrary to public interest” related to “spirit of the ordinance”—so what’s the difference? Would it “alter the essential character of the locality” (read: *neighborhood*) or “threaten the public health, safety, or welfare”?
 - Mere conclusory statement by ZBA insufficient in the face of contrary expert evidence (also not noted in ZBA’s findings)
 - Substantial justice: public gain must outweigh private loss
 - Also look at the proposal’s consistency with the area’s present use

Zoning—Variances & Federal Preemption

- *Daniels v. Town of Londonderry, __ N.H. __ (2008)*
 - Telecommunications Act of 1996—“preservation of local authority” balanced against a need for uniformity for creation of a national wireless telecommunications network
 - 1 use and 2 area variances sought for tower in residential zone; ZBA grants, with conditions: 146 feet, no lights, located farthest on site from abutting residences, preservation of existing tree canopy, planning board review, screening, etc.
 - Abutters appeal, arguing that ZBA allowed TCA to replace its own judgment; trial court upholds—adequate evidence on all five criteria
 - ZBA characterized TCA as an “umbrella”—preemption in certain circumstances
 - Hardship “uniqueness”—specific conditions of the property, and not the area in general; Court: uniqueness and the TCA—broader and more inclusive view of hardship required
 - Tower on a site needed to fill a significant geographic gap in service
 - Factors that ***may*** make a site unique under the umbrella of the TCA
 - Central within the gap, correct topography, or is of an adequate size to eliminate the gap

Zoning—Variances & Nonconformities

- *Nine A, LLC v. Town of Chesterfield, ___ N.H. ___ (2008)*
 - 86 acres (6 in Spofford Lake District on lake)
 - Existing 90K s.f. vacant institutional building, formerly rehab facility; proposal to demo and subdivide—7 detached single family residences—cluster using the 80 acres across the road; 2 area and 1 use variances denied (ZBA said it would consider 6 on the lake & 3 on the 80 acres): septic, aesthetic, density issues of concern
 - Trial court affirms on public interest and spirit of ordinance criteria: Supremes affirm, distinguishing Malachy Glen.
 - Here, even though proposal is consistent with other existing (nonconforming) uses around the lake in use, size and density, the subsequently adopted ordinance is specifically targeted at reducing density
 - “...the current character of the neighborhood does not necessarily preclude a town from enacting an ordinance targeted at altering the neighborhood’s character when a sufficient basis exists to do so.”
 - “The purpose of the variance is to allow for a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose.”

Zoning—Variances & Yield Plans

- *Naser v. Town of Deering ZBA, ___ N.H. ___ (2008)*
 - 77 acres; 1989 approval for 26 duplexes; 1990 previous owners convey 50-acre conservation easement to town—no conditions on completion of development or reservation of right of reverter; improvements started but not completed, property sold in 1994
 - New proposal for 14-lot open space development on remainder, including 50 acres as part of yield plan; planning board declines jurisdiction; administrative appeal to ZBA, plus alternative variance request; ZBA denies, trial court affirms
 - Unlike *Auger v. Strafford*, Deering ordinance requires yield plans; conceptual in nature, but realistic—no building where buildings cannot legally go
 - Denial of administrative appeal upheld by Supremes
 - Variance: ZBA found first four criteria not met; trial court affirms denial on public interest and spirit of the ordinance
 - Supremes: “We fail to see how permitting the plaintiff to use the conservation land in this manner would ‘unduly, and in a marked degree conflict with the ordinance.’”
 - “The plaintiff...is not seeking a variance to increase the density on his property without preserving open space, but rather he seeks a variance to include that portion of his land burdened by a conservation easement as satisfying the open space requirement.”

Zoning—Historic District Comm’n Appeal

- *Ouellette v. Town of Kingston, __ N.H. __ (2008)*
 - 36K s.f. supermarket proposed for historic district; HDC denies as inconsistent with historic district ordinance, characterized as predominantly residential with small retail to serve local residents; negative impact to walkable nature of district, traffic, noise, and would “detract from the character and quiet dignity” of the district
 - Appeal to ZBA pursuant to RSA 676:5—standard of review at issue; plaintiff argues that ZBA should give deference to HDC decision and apply a “clear error” standard
 - RSA 674:33, I(a), administrative appeals for ‘alleged error’
 - RSA 674:33 II: “In exercising its power under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.”
 - Supremes: ZBA conducts a de novo review of administrative appeals taken to decisions of the HDC

Zoning and State Preemption

- *Lakeside Lodge, Inc. v. Town of New London*, __ N.H. __ (2008)
 - Private dock on Lake Sunapee since 1980s; 1991 zoning amendment, “shoreland overlay district”: restricts use of waterfront for access by groups of unrelated individuals; review planning board and ZBA (special exception for commercial use)
 - DES-approved substantial dock repairs in 1995 (RSA 482-A)
 - 2002: Town asserts violation of 1991 ordinance because of multiple unrelated users of “common area”; Selectmen refuse exemption; appeal to ZBA (administrative appeal?)
 - ZBA recognizes preexisting nonconforming use, but limits use to no more than 6 users and 6 boats; dock rental deemed beyond scope of “personal use”
 - “...we observe that, by expressly permitting Lakeside to repair its dock in 1995, the State has placed its imprimatur upon the use of Lakeside’s dock for personal boating”
 - Supremes review entire suite of State water regulations and find that ZBA acted “ultra vires”—although the Comprehensive Shoreland Protection Act allows municipalities to adopt more stringent land use regulations, that law doesn’t address docks

Zoning—Equitable Waivers

- *Schroeder v. Town of Windham, __ N.H. __ (2008)*
 - 2003 permit for garage, construction begins; abutters appeal, and ZBA finds that final location was in Wetland & Watershed Protection Overlay District (WWPD)—no buildings allowed; permit withdrawn
 - ZBA grants equitable waiver pursuant to RSA 674:33-a; trial court reverses; Supremes affirm trial court
 - Supremes read the statute: equitable waivers shall only be granted “from physical layout, mathematical or dimensional requirements, and not from use restrictions.” Court turns to the distinction between use and area variances...
 - “The critical distinction between use and area variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction.”
 - “WWPD’s restriction prohibiting permanent buildings was enacted in order to protect the character of the surrounding area, thereby creating a use restriction.”
 - Such a restriction “is not just an incidental deviation from strict compliance with the WWPD regulations; it directly contradicts the regulation’s underlying goal of preserving the area. Thus the prohibition of permanent buildings is a use restriction.”

Zoning—Equitable Waivers

- *Taylor v. Town of Wakefield, ___ N.H. ___ (2008)*
 - 35-foot-wide easement created with property conveyance to allow access to lake; zoning requires 100 feet width; violation notice
 - ZBA grants equitable waiver, applying “legitimate mistake” standard; trial court affirms; Supremes read the statute and reverse
 - RSA 674:33-a, four factors must be met
 - (b) “...a good faith error in measurement or calculation...”
 - ZBA’s instructions to applicants say “legitimate mistake”; OEP’s ZBA Handbook says “honest mistake.”
 - But misinterpretation of a zoning ordinance ≠ error in calculation
 - 2nd issue—disqualification, RSA 673:14
 - Board member bias—juror standard in RSA 500-A:12 “does not disqualify former employees per se, but only those who appear ‘not indifferent.’”

Zoning—Junkyards

- *Guy v. Town of Temple, __ N.H. __ (2008)*
 - Auto repair, body work, junkyard on site since before 1972, the year zoning was adopted, requiring that junkyards abide by state laws, which then required application to town for a one-year permit
 - Zoning also grandfathered uses existing at the time of ordinance adoption
 - April 2006 BOS denies vehicle dealer license—expansion of non-conforming use, needing special exception; May 2006 cease & desist—expanded non-conforming junkyard use; town asserts that failure to license means loss of nonconforming status (expansion is disputed)
 - Supremes: “...failure to obtain a license designed to regulate an activity will not adversely affect the previously determined nonconforming status of the land upon which such an activity is being conducted.”
 - Remand to find on question of illegal expansion; Supremes *suggest* that illegal expansion of a nonconforming use renders the whole use illegal—not just the expanded portion

Zoning—Constitutional Duty to Assist

- *Kelsey v. Town of Hanover, __ N.H. __ (2008)*
 - Existing home on private road that serves three residences; last home sought to be razed and replaced
 - Zoning permit issued recognizing setback from town road, not from private road; building and demo permits issued; ordinance calls for appeals of zoning permits within 15 days; posting of permit notice at least one public place
 - Petitioners claim that zoning administrator told them she would provide them with direct notice of proceedings; zoning administrator testified that “she could not recall ever telling anyone who came to the zoning office that she would send them “something that wasn’t absolutely required...” and that people should contact her instead
 - Also claim that zoning administrator had a duty to provide basic information about the development plan and the permit/appeal process
 - Supremes: NH Constitution, Part I, Article 1—municipalities have a duty to provide assistance to all their citizens; reasonableness is the benchmark; that standard was met here

Zoning—Timeliness and Method of Filing

- *Cardinal Development Corp v. Town of Winchester ZBA, ___ N.H. ___ (2008)*
 - On last day of filing period for rehearing motion, attorney for petitioner calls ZBA's assistant at home after 5:00 p.m. close of business; she supplies fax number and motion is faxed at 5:50 p.m.
 - ZBA rejects motion as untimely and on its merits
 - No ZBA procedural rule that would allow filing by fax; Town cautions that “future parties could simply ‘file’ motions by leaning them against the town hall.”
 - RSA 677:2 is silent as to when or how the window for filing ends, but close of business on the 30th day “is a matter of common sense absent any ZBA procedural rule allowing after-hours filing.”
 - In other contexts, “...the completed act of “filing” includes physical receipt of the document by the relevant authority before the close of business.”
 - But the ZBA may adopt other rules for after-hours filing

Zoning—Expert Opinions and Evidence

- *Continental Paving v. Town of Litchfield, _ N.H. _ (2008)*
 - Special exception sought to infringe Wetland Conservation District (WCD) with a gravel road to access Fish & Game Club property; within 67 feet of a vernal pool
 - Criteria (inter alia): “The burden of proof shall be on the applicant who shall furnish such engineering and hydrological data as is reasonably necessary” and “It can be shown that the proposed use is not in conflict with any and all purposes and intentions listed in Section 1200.01 of this Ordinance.”
 - “Protect unique, ecologically sensitive and unusual areas”,
 - “Protect wildlife habitats, wildlife corridors and maintain ecological balances” and
 - “Protect potential water supplies and existing aquifers (water-bearing stratum) and aquifer recharge areas”
 - WCD: ≥50 feet around wetlands, ≥200 feet around vernal pools

Zoning—Expert Opinions and Evidence

■ *Continental Paving (cont'd)*

- ZBA conducts two hearings and denies SE both times. New evidence introduced at second hearing, including NH Audubon Fact Sheet on vernal pools
 - Findings: “Vernal pool is unique in and of itself”; purpose of ordinance is to protect vernal pools, and road within 60 feet does not do that; “Vernal pool breeders require 300 yards of natural habitat around the pool to survive” citing NHAS Fact Sheet
- Do town’s standards require specialized scientific knowledge? Trial court says yes, Supremes do not address the question
- Continental presented evidence from two scientific experts, one specifically tailored and one general
 - Specific: although there will be wetland and upland impact, “[t]he pool itself will not be impacted by the project, and a sufficient corridor will remain to allow amphibian movement between the pool and the remaining upland habitat.”
 - General: minimal traffic on rainy nights, when amphibians move

Zoning—Expert Opinions and Evidence

■ *Continental Paving (cont'd)*

- “We have previously held that in arriving at a decision, the members of the ZBA can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Thus, ZBA members may base their conclusion upon ‘their own knowledge, experience, and observations,’ in addition to expert testimony. We reject, however, the Town’s contention that information contained in exhibits before the ZBA is transformed into ‘personal knowledge’ through individual ZBA members using such information to ‘educate themselves.’ Rather, the exhibits were simply evidence before the ZBA.”
- So can a ZBA evaluate the applicant’s expert testimony with its own expert paid for by the applicant? RSA 673:16 addresses staff and finances, but not outside experts paid for by the applicant; RSA 676:4, I(g) clearly gives a planning board that authority, but the ZBA is an open question
- Vacated and remanded with order to grant the special exception

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- **Questions on Cases**
 - **End of *Part I: Recent Court Decisions***
 - **INTERMISSION**
 - **Return at 10:30 for *Part II: Recent and Pending Statutory Changes***

PART II

**Recent and Pending Statutory
Changes**

Master Plan Energy Chapters

- RSA 674:2, III(n) (Ch. 269, Laws of 2008)
 - Enables development of master plan chapter on local energy planning
 - “An energy section, which includes an analysis of energy and fuel resources, needs, scarcities, costs, and problems affecting the municipality and a statement of policy on the conservation of energy.”
 - Master plan chapters are limited to those identified in the statute

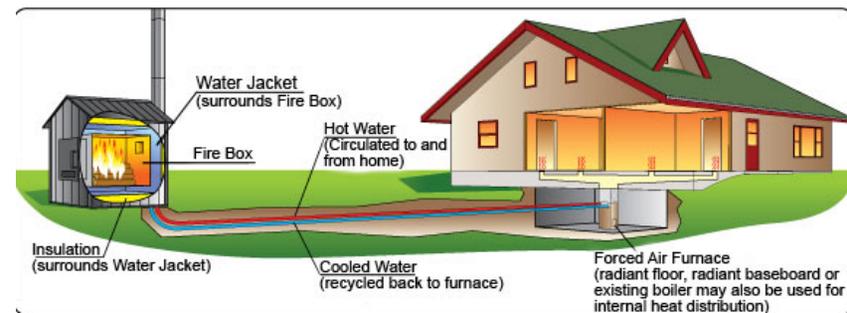
Small Wind Energy Systems

- RSA 674:62 - :66 (Ch. 357, Laws of 2008)
 - Limits how municipalities can regulate turbines used mainly for on-site energy consumption (law title says it “allows” regulation)
 - Notice provisions for abutters and affected neighboring municipalities
 - Maximum local property line setback of 150% of system height
 - In the absence of local regulation, this is also the default minimum setback statewide—but this may be reduced by a ZBA if variance criteria are met (of course, ZBA can also vary a local standard)
 - Minimum property line noise level of 55 decibels in local regulation (“no lower than”)
 - OEP model ordinance:
www.nh.gov/oep/resourcelibrary/swes/index.htm



Outdoor Wood-Fired Hydronic Heaters

- RSA 125-Q (Ch. 362, Laws of 2008)
 - Establishes emissions standards for any outdoor wood-fired hydronic heater (OWHH) purchased in-State; setback and stack requirements that vary depending on the EPA emissions rating
 - Municipalities
 - May impose stricter setback and stack requirements
 - May prohibit OWHH in one or more zoning districts
 - May prohibit continued use of those OWHHs that are a public nuisance or that cause injury to public health
 - May not unreasonably limit the installation or operation of OWHHs
 - Standards effective January 1, 2009, stricter standards effective April 1, 2010



Design Review Vesting (Old and New)

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

But wait! There’s more!

- RSA 676:4, II(b) (Ch. 229, Laws of 2008)
 - Allows planning boards to identify when design review period ends by establishing reasonable regulations, including submission requirements (is this really necessary?)

Building Inspectors and Regional Impact

- RSA 36:57, IV (Ch. 357, Laws of 2008)
 - Part of the Small Wind Energy Law
 - Building Inspectors are defined as a “local land use board” in RSA 672:7; all local land use boards are required to make determinations of the potential for regional impact of an “application for development”
 - RSA 36, 57: IV. “Notwithstanding the foregoing, when the building inspector determines that a use or structure proposed in a building permit application will have the potential for regional impact and no such determination has previously been made by another local land use board, he or she shall notify the local governing body. The building inspector shall also notify by certified mail the regional planning commission and the affected municipalities, who shall be provided 30 days to submit comment to the local governing body and the building inspector prior to the issuance of the building permit.”

Conservation Commissions

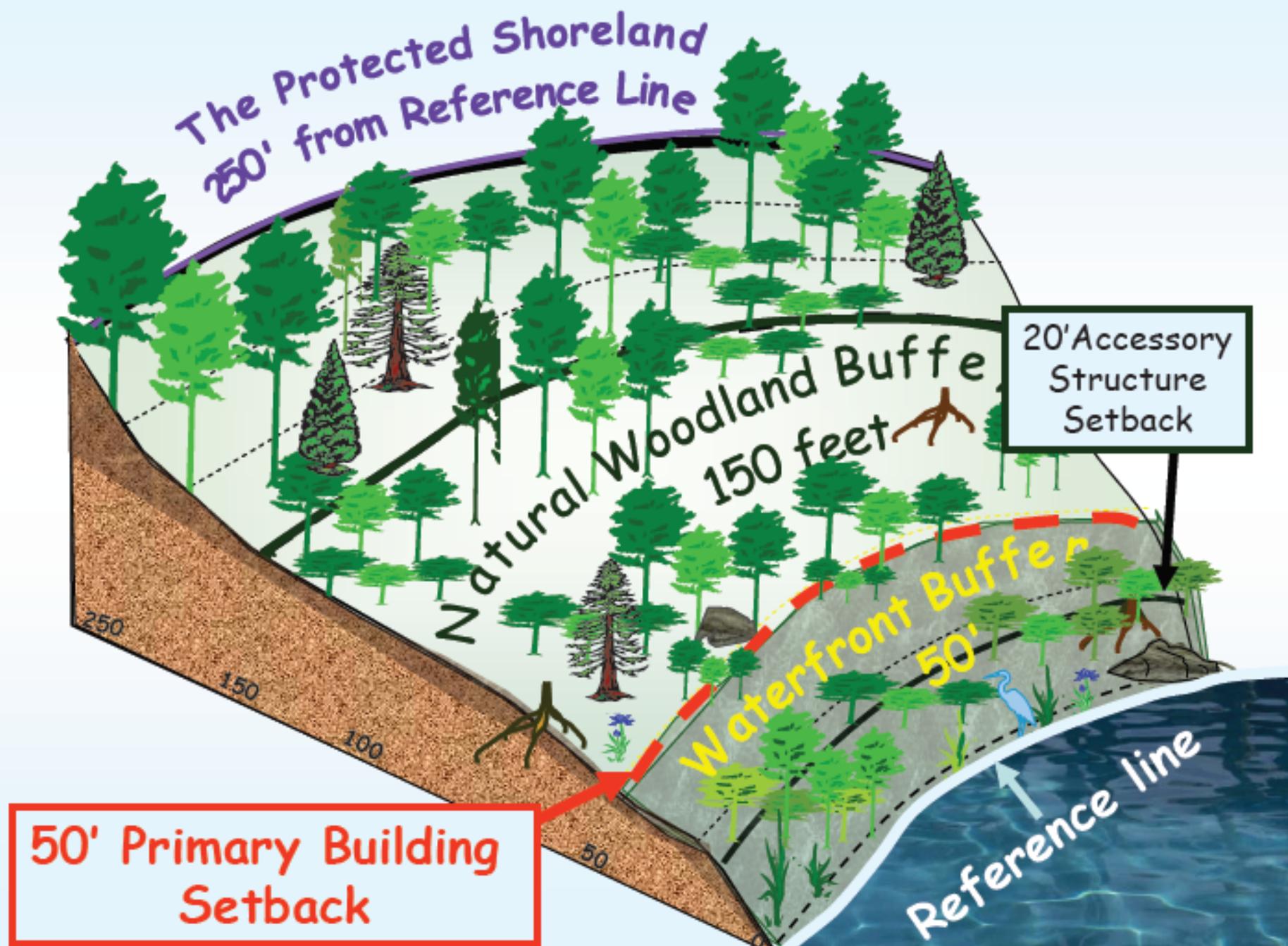
- RSA 36-A (Ch. 317, Laws of 2008)
 - Clarifies RSA 36-A:4, stating that conservation commissions may receive, by gift or otherwise, land within or outside a municipality's boundaries (but not purchase) subject to local governing body approval;
 - Adds RSA 36-A:4-a Optional Powers—Legislative body may authorize Commission to
 - Expend funds for purchase of land outside municipal boundaries, subject to local governing body approval
 - Expend funds for contributions to “qualified organizations” under §170(h)(3) of the Internal Revenue Code, for purchase of property interests or facilitating transactions relative thereto—includes transaction costs without receiving a property interest as a quid pro quo

Questions? Carol Andrews, Executive Director
NH Association of Conservation Commissions
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Shoreland Protection

- RSA 483-B (Ch. 171, Laws of 2008)
 - Statute will require a DES permit
 - 250 feet: 20% maximum impervious surface coverage within protected shoreland area; development constraint, opportunity for deployment of Low Impact Development techniques
 - 150 feet: Natural Woodland Buffer (NWB)
 - ≥ 0.5 acre within NWB, min 50% unaltered vegetative cover
 - < 0.5 acre within NWB, min 25% unaltered vegetative cover
 - 50 feet: Waterfront Buffer
 - Primary building setback; towns may enact a greater setback
 - Tree coverage managed with a grid and points system
 - Effective July 1, 2008

Graphic showing the Protected Shoreland with setbacks and areas of restricted use.



Growth Management Reform

- RSA 674:22 and :23 (Ch. 360, Laws of 2008)
 - Codification of judicially-imposed limits to Growth Management and Interim Growth Management Ordinances
- Growth Management Ordinance: RSA 674:22
 - Demonstrated need to regulate timing of development, based on a study by or for the planning board or governing body, or submitted by petition, and showing a lack of capacity to meet anticipated growth; study based on competent evidence
 - Specific termination date required (how long? 5 years probably safe)
 - Directs the planning board (or CIP committee) to promptly develop plan for orderly and rational development of services needed to accommodate anticipated normal growth; annual confirmation of reasonable progress presented by planning board to local legislative body
 - For municipalities with GMOs, effective date delayed to July 1, 2010

Growth Management Reform (cont'd)

- Temporary Moratoria or Development Limits: RSA 674:23
 - May only be proposed by planning board
 - Unusual circumstances that affect the ability of the municipality to provide adequate services or that require prompt attention
 - Ordinance must contain
 - Statement of circumstances giving rise to the need
 - Planning board's written findings
 - List of types of development to which the ordinance applies
 - Term—one year maximum; additional moratoria may be adopted for different circumstances
 - Planning board's findings: describe the circumstances and recommend a course of action to alleviate them
 - Exemptions or special exceptions may be provided for development that has minimal impact on the circumstances

Local Housing Commissions

- RSA 674:44-h (Ch. 391, Laws of 2008)
 - Enables municipalities to establish local housing commissions as a local land use board
 - Advisory only, not regulatory
 - Assist other local boards in the development of housing plans and identifying needs; responding to particular development proposals
 - Establishment of a local affordable housing fund; similar to the conservation fund administered by the conservation commission—may be used to facilitate transactions involving affordable housing
 - As an alternative, the law also enables the creation of affordable housing revolving funds under RSA 31:95-h

Workforce Housing

- RSA 674:58 - :61 (Ch. 299, Laws of 2008)
 - Primary aim is to codify Britton v. Chester (1991)
 - All communities must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable”, 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 July 1, 2009, but HB 321 will extend that to January 1, 2010

More-Than-4-Year Exemption (Pending)

- **SB 93** (passed both Senate and House)
 - Amends RSA 674:39—the Four-Year exemption
 - For any subdivision or site plan approved by a planning board between January 1, 2007 and July 1, 2009
 - Three years (not one) to undertake active and substantial development or construction
 - Six years (not four) to achieve substantial completion (after which vesting is permanent)

Planning Board Waivers (Pending)

- **HB 43** (passed the House; now in the Senate)
 - Addresses the limitation on planning board authority imposed by *Auger v. Strafford* (Auger I)
 - Restores board flexibility approximately to where it was under common law (*Frisella v. Farmington*, 1988)
 - Waivers may be granted if
 - (current law) Hardship is shown and granting would not be contrary to the spirit and intent of the regulation, OR
 - (proposed) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.
 - The basis for any waiver is to be recorded in the board's minutes
 - Provisions for waivers to either subdivision (RSA 674:36, II(n)) or site plan regulations (RSA 674:44, III(e))

Third Party Review (Pending)

- **HB 156** (passed the House; now in the Senate)
 - Adds new RSA 676:4(b), providing detail to planning board practices of hiring consultants during application review process and during project construction
 - Review billing must be accompanied by detailed invoices with reasonable task descriptions for services rendered
 - Perceived construction defects must be promptly reported

Zoning Variance Standards (Pending)

- **HB 446** (passed the House; now in the Senate),
- RSA 674:33, I(b)
 - (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 (Pending)

- **HB 446**, RSA 674:33, I(b) (cont'd)
 - (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. For purposes of this paragraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area, either
 - (i) there is no reasonable and economically viable use that can be made of the property that would be in strict compliance with the ordinance; ***or***
 - (ii) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of the ordinance to the property, and the proposed use is otherwise a reasonable one.
- This definition of “unnecessary hardship” shall apply whether the provision of the ordinance from which a variance sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

Finding the Law

NH Cases

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

NH Statutes

- Revised Statutes Annotated (RSA)
 - www.gencourt.state.nh.us/rsa/html/indexes/default.html

For Other Jurisdictions

- Cornell Law School
 - www.law.cornell.edu/

For More Information:

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