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# **New Hampshire 2010 Land Use Law in Review**

## ***Statutes and Cases***

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**Fall Planning & Zoning Conference**

Whitefield, NH

November 13, 2010

# Finding the Law

## NH Cases

- NH Supreme Court website
  - [www.courts.state.nh.us/supreme/opinions/index.htm](http://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](http://www.gencourt.state.nh.us/rsa/html/indexes/default.html)

## For Other Jurisdictions

- Cornell Law School
  - [www.law.cornell.edu/](http://www.law.cornell.edu/)

## Join Plan-link Nation!

- Confer with over 700 of your best friends
  - [www.nh.gov/oep/programs/MRPA/PlanLink.htm](http://www.nh.gov/oep/programs/MRPA/PlanLink.htm)





# **PART I**

## **Recent Statutory Changes**

# Brand New Laws for 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!

# 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)

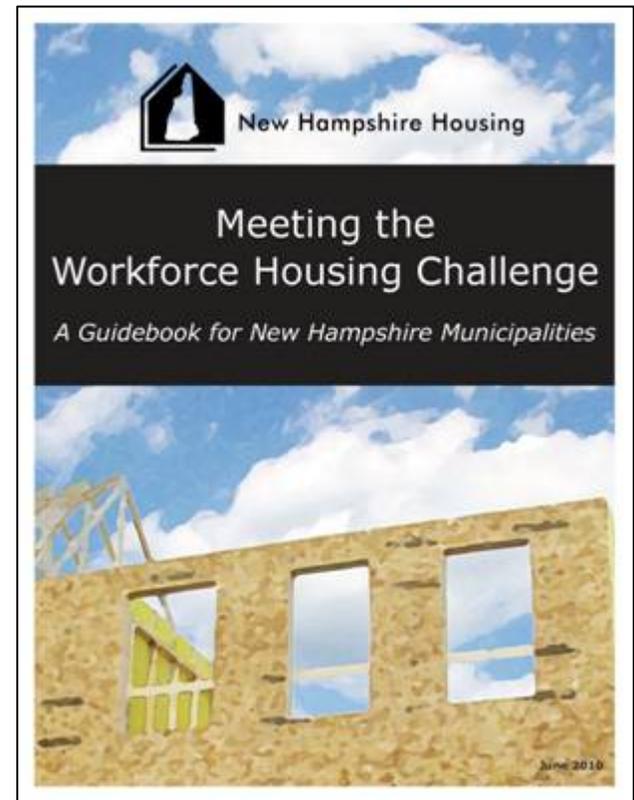
# Workforce Housing (2 of 2)

## 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](http://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 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?

# 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” means *conditions of 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)

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- **Questions on Statutes**
  - **End of *Part I: Recent Statutory Changes***
  - **INTERMISSION (go get some coffee)**
  - **Return at **11:15** for *Part II: Recent Cases***



# **PART II**

## **Recent Court Decisions**

# Planning Cases

## ■ Elderly Housing

- *Ferson-Lake, LLC v. City of Nashua*, 159 N.H. 524 (2009)

## ■ Impact Fees

- *Clare v. Town of Hudson*, 160 N.H. 378 (2010)

## ■ Timing of Appeals

- *Collden Corp. v. Town of Wolfeboro*, 159 N.H. 747 (2010)
- *Atwater v. Town of Plainfield*, 160 N.H. \_\_ (2010)

## ■ Sufficiency of Decision

- *Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95 (2010)

# Planning – Elderly Housing

- *Ferson-Lake, LLC v. City of Nashua* (2009)
  - 5-unit elderly housing development; zoning ordinance requires “certification at the time of application” that a development will comply with the rules of the NH Human Rights Commission. NLUC §16-81(c)(2)
  - Applicant says (1) that it only must certify that it will comply with the rules of the Human Rights Commission if the Commission requires; and (2) enforcement of the rules is vested solely in the Commission
    - Hum 302.03, now expired, mirrored the language in RSA 354-A:15; but its expiration was not raised at trial, so cannot be asserted on appeal; in turn NH statute mirrored 42 U.S.C. 3607(b)(7)—but that’s changed too!

# Planning – Elderly Housing

- *Ferson-Lake, LLC v. City of Nashua (cont'd)*
  - Supremes: look at the whole ordinance—context is important!
    - NLUC 16-81 “Housing developed in this section must be established and maintained in compliance with all applicable state and federal laws with respect to such housing and/or medical care...”
    - This demands proof that a project will comply with the rules
  - Supremes: Requiring that an applicant meet the standards included in rules enforced by another entity is not the same as enforcement of those rules:
    - “...the board applied Hum 302.03 in determining whether the petitioner’s site plan should be approved. In contrast, it is the responsibility of the human rights commission to enforce Hum 302.03 to prevent age discrimination.”
  - Human Rights Commission is not a regulatory body—they won’t review development applications for compliance with statute
  - It’s OK to use another’s standards (but be sure they’re in effect!)

# Planning – 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?

# Planning – Timing of Appeals

- *Collden Corp. v. Town of Wolfeboro* (2010)
  - 1993 subdivision approval—condition that all improvements be completed within six years; several phases; planning board exempts development from changes to subdivision regulations
    - Deadline extended to 2000, and phase one completed in 2000
  - Subdivision regulations amended in 2000 and 2003
  - 2004 letter indicating intention to complete remaining phases; planning board decides that its approval had expired
  - 2007 Collden files with court for declaratory judgment that it has vested rights or that town was barred by estoppel; court dismisses
    - RSA 677:15, I—30 days to appeal an approval or disapproval; claims 2004 decision was neither an “approval” or “disapproval”
    - Supremes: planning boards make many decisions—“Collden’s interpretation of the statute would impede finality for those whose interests are affected by planning board decisions.” Same reasoning applies to estoppel claim; 17 years from approval and 3 years from board decision weighs heavily

# Planning – 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

# Planning – Sufficiency of Decision

- *Motorsports Holdings, LLC v. Town of Tamworth (2010)*
  - Private “motorsports facility” proposed on 250 acres; permits received for dredge & fill of 14,759 s.f. of wetlands and impact on 16,952 s.f. of intermittent streams; 16 distinct wetland areas affected; also Alteration of Terrain, ACOE, and others
  - Town has a Wetlands Conservation Ordinance adopted under RSA 674:16, but court refuses to call it zoning (because it doesn’t affect the “use” of land)
  - Planning board denies WCO special permit; trial court vacates and remands; intervenors appeal to Supreme Court

# Planning – Sufficiency of Decision

- *Motorsports Holdings v. Town of Tamworth* (cont'd)
  - Supremes: No written notice of decision—minutes are not alone sufficient; DVDs will not be reviewed absent a transcript
  - Inadequate grounds for decision: which wetland impacts are problematic? Which WCO criteria are applied to which impacts (different criteria for driveways)? “...it is the planning board’s duty to consider the evidence and provide an adequate statement of grounds for disapproval.”
  - Too complex? Applicant actually argues that the board has the authority to hire an expert and make the applicant pay!
  - Applicant argues that remand is no longer available, as too few of the original board members remain. Supremes:
    - “This argument is premised on the notion that Motorsports is entitled to the same planning board members to decide the matter on remand, a novel notion which it fails to provide adequately developed legal argument and legal support.”
  - Remanded for yet more litigation...

# Zoning Cases

## ■ Takings

- *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529 (2009)

## ■ Excavations

- *Batchelder v. Town of Plymouth ZBA*, 160 N.H. 253 (2010)

## ■ Non-conforming Uses: Merger

- *Sutton v. Town of Gilford*, 160 N.H. 43 (2010)

## ■ Non-conforming Uses: Abandonment

- *Pike Industries, Inc. v. Brian Woodward*, 160 N.H. 259 (2010)
- *Huard v. Town of Pelham*, 159 N.H. 567 (2009)

## ■ Variances

- *Farrar v. Keene*, 158 N.H. 684 (2009)

## ■ Taxpayer Standing

- *Baer v. Department of Education*, \_\_\_ N.H. \_\_\_ (2010)

# Zoning – Takings

- *Hill-Grant Living Trust v. Kearsarge Lighting Precinct* (2009)
  - Village district with the power to zone! Prohibits building of any structure more than 900 feet above sea level
  - 31-acre parcel, mostly above 900 feet; building permit denied by precinct commissioners; variance request to ZBA; denied
  - No appeal; separate action in court—claim of inverse condemnation by regulatory taking, seeking just compensation under NH Constitution and damages under 42 U.S.C. §1983
  - Precinct rescinds ordinance and moves to dismiss claim as moot
  - Supremes: no, because takings may be temporary in nature

# Zoning – Takings

## ■ *Hill-Grant Living Trust* (cont'd)

- Regulatory Takings: “...arbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire Constitution requiring the payment of just compensation.”
- The owner need not be deprived of all valuable use of the property: “a taking occurs ‘[i]f the denial of use is substantial and is especially onerous.’” Citing *Burrows v. City of Keene*, 121 N.H. 590, 598 (1981)
- No set test—case-by-case determination; but there must be a final decision by the governmental entity charged with implementing the regulations
- Was the ZBA’s denial of the variance a final decision?

# Zoning – Takings

- *Hill-Grant Living Trust (cont'd)*
  - Petitioner: futile to return to ZBA, because the plan was for the “lowest point on the property that would support both vehicular access and state septic”; and ZBA could not legally accept another application without a change of circumstance
  - Supremes review the plan itself and identify other alternatives—insufficient facts on record to support notion of “futility”—no clear demonstration that there’s only one site on which to build; only conclusive statements
  - “Material change of circumstances” required (*Fisher v. City of Dover*, 120 N.H. 187 (1980)); here, ZBA members indicated a willingness to consider alternatives that had not been presented—effectively an *invitation* to submit a new variance application
    - But don’t “oppressively require a landowner to submit multiple successive applications” to avoid a final decision
  - Court’s conclusion: takings claim is premature (“unripe”)

# Zoning – Excavations

- *Batchelder v. Town of Plymouth ZBA (2010)*
  - Planning board approved site plan for Lowe's—77-½ acres in floodplain (FP), partly in “environmentally sensitive zone” (ESZ)(w/in 500' of Baker River); construction in FP requires structures to be above 100-year flood level—fill required to raise structures; 1-to-1 FP mitigation required under Federal law; “removal of fill” approved for ESZ site area; removal of 200K cu.yds.
  - Appeal to ZBA--“excavations” not allowed in ESZ. Prohibited:
    - Disturbance for which an Earth Excavation permit issued under RSA 155-E (soil and gravel) is required
    - Placement or removal of fill excepting that which is *incidental to the lawful construction or alteration of a building or structure* or the lawful construction or alteration of a parking lot including a driveway on a portion of the premises where removal occurs
    - Any placement or removal of fill excepting that which is incidental to agricultural or silvicultural activities, normal landscaping or *minor topographical adjustment*

# Zoning – Excavations

- *Batchelder v. Town of Plymouth ZBA* (cont'd)
  - ZBA denies administrative appeal, finds excavation is “incidental to the approved and permitted construction plans”; is “incidental” to a permitted retail use; and parking lots and driveways are related to the primary use (“normally and regularly associated...”)
  - Supremes focus on first exemption: “Incidental” requires an examination of the relationship between the excavation activity and the primary use for which the removed earth will be used. Not defined in ordinance (or in statute)
  - Plaintiff: “incidental” = minor in quantity and directly related to the construction; see use elsewhere (“minor topographical adjustment”)
  - Supremes: having a minor role, subordinate; use of word “minor” elsewhere in ordinance actually disproves the argument that quantity is limited

# Zoning – Excavations

- *Batchelder v. Town of Plymouth ZBA* (cont'd)
  - Plaintiff: project not “lawful” because it couldn’t be approved without the excavation; defeats purpose of overlay district (here, protection of Baker River)
  - Supremes: no evidence that developer was building as a pretext to removing fill; not a commercial excavation
    - For project to be “lawful” under the ordinance, building must be raised; one-to-one flood plain compensation requires removal of fill elsewhere; therefore, incidental
    - Development not prohibited in ESZ

## Building Provides Mooring Masts for Zepps



NEW YORKERS may soon become accustomed to the sight of giant lighter-than-air liners moored to the tops of downtown skyscrapers, for the Empire State Building, now under construction at 34th Street and Fifth Avenue, when completed will be topped by a mooring mast of the latest type.

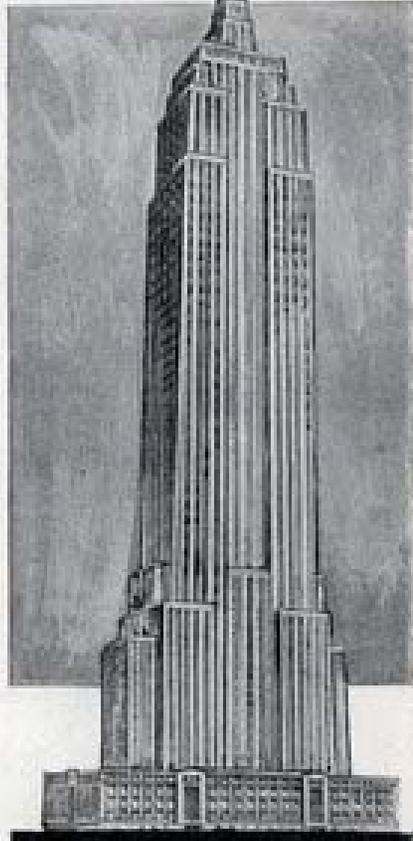
This new building, which will rise to a height of 1100 feet will top the Eiffel Tower of Paris by 174 feet and will be the tallest structure in the world. It is planned to make this building the western terminal of trans-Atlantic airships.

### Fast Burning Tear Gas Candle

THE successful use of tear gas in quelling prison riots has resulted in great interest by prison authorities in this chemical agent which does its work without causing injury. The Chemical Warfare Service of the army, as a result of requests for a tear gas device that will produce a gas cloud immediately of high concentration, recently has shipped to Governors Island, New York, two dozen of the new universal fast burning tear gas candles for test there.

These candles were developed in order to meet the demand for a tear gas weapon that will produce an effective gas concentration so quickly that a rioter will be made helpless immediately. The fast burning candles are used in the same manner as a grenade but differ from the latter in that they have a larger capacity, and the tear gas is generated with almost explosive violence. Thus the gas gets into the air with no delay and in great volume.

The older grenades were somewhat slow in ignition and the gas was generated slowly. The fast burning candle ignites so rapidly after leaving the hand that by the time it hits the ground it is giving off its fumes in great quantities. The test of these candles will be watched with great interest not only by the army but by civil authorities, who agree that tear gas is a most effective and humane method of quelling disturbances.



This composite photograph shows how the Graf Zeppelin compares with Empire State building.

### Oval Auto Cylinders Cut Length

AN automobile engine has been built in England with elliptical cylinders, the idea being to save length, the narrow way of the cylinders being placed in a fore and aft position. Thus a  $3 \times 2\frac{1}{4}$  cylinder would be equivalent to a  $3\frac{1}{4}$  round cylinder but take no more length than one 3 inches in diameter.

*Is the Empire State Building "incidental" to its mooring mast?*

1. Quantity probably does matter—it's just that it's relative to the overall project, not absolute.
2. Remember, for words to have meaning, they require definitions...

# Zoning – Non-Conforming Uses: Merger

- *Sutton v. Town of Gilford* (2010)
  - Non-conforming contiguous lots in common ownership merged by zoning ordinance in 1980s: 0.6 ac. (garage and guest house) and 0.5 ac. (house); 1-acre zone
  - January 2007, Planning Director to Aichinger (owner): the courts threw out the merger provision and “this property was not the subject of a bona fide merger” (1/15/07)
  - Plans proceed to demolish buildings and replace with two single family residences; septic design, driveway permit, building permit to replace existing residence
  - May 2007, Planning Director to Aichinger: error—only one lot
  - June 2007, ZBA administrative appeal; but settles with town instead
  - July 2007, abutter (Sutton) sues in superior court to stop plans
  - October 2007, permit issued for construction of second home; amended to “replace” existing structure; Aichinger informs Sutton
  - March 2008, motion to dismiss, as permit was not appealed

# Zoning – Non-Conforming Uses: Merger

- *Sutton v. Town of Gilford* (cont'd)
  - Trial court: parcels were merged 20 years ago; town not estopped from treating property as one lot; replacement of guest house OK
  - Supremes: Aichinger's motion to dismiss is good only to Sutton's complaint on the building permits (because Sutton didn't appeal those—"failure to exhaust administrative remedies"); the building permit was not predicated upon Aichinger's owning two lots
    - Local appeals: "give a local zoning board the first opportunity to pass upon any alleged errors in its decisions so that the superior court may have the benefit of the zoning board's judgment in hearing the matter." Issues are agency autonomy and judicial efficiency.
  - Sutton can still assert that Aichinger owns only one lot
    - Her interests are not barred by the settlement agreement between the town and Aichinger

# Zoning – Non-Conforming Uses: Merger

- *Sutton v. Town of Gilford* (cont'd)
  - Merger: Aichinger asserts conflict with RSA 674:39-a “voluntary merger” and refers to legislative history
    - Court: If a statute’s meaning is clear, “we will not consider what the legislature might have said, or add language that the legislature did not see fit to include.” Meaning of that statute is clear—does not preclude automatic mergers (i.e. involuntary)
    - Town did not err: long history of being treated as one parcel, including in *Governor’s Island* case; exception in local ordinance for parcels each with a “lawful and preexisting principal use”
    - Guest house is not a principal use—not a single family residence, but accessory used in conjunction with a single family residence; “shelter, used primarily by occupants in the main building” (zoning ordinance)

# Zoning – Non-Conforming Uses: Merger

## ■ *Sutton v. Town of Gilford* (cont'd)

- Municipal estoppel:
  1. False representation or concealment of material facts made with knowledge of those facts
  2. Party to whom representation is made must be ignorant of the truth
  3. Representation made with intention of inducing the other party
  4. Reliance by other party induced by representation
- Aichinger was aware of the *Governor's Island* case and could have investigated and read the decision
- Representation by Planning Director—no longer on the books: Go read the book (zoning ordinance); provision is still in there
- Aichinger's reliance on Planning Director's assertions was unreasonable; town is not estopped from enforcing the merger provision
- **Harsh reality of reliance on representations of town agents**

# Non-Conforming Uses: Abandonment

- *Pike Industries, Inc. v. Brian Woodward (2010)*
  - Madbury asphalt plant operated since before 1960; 1960s zoning ordinance designates zone as Res-Ag; hence, non-conforming
  - Seasonal asphalt production; no asphalt produced in 2006, but maintenance and repair (\$24K), staff emissions training, continued advertising and bidding (but work was better suited to other plants owned), plant-specific “mix plans”, site plan reports to state filed
  - Prepared to produce at any time, but no actual production between October 2005 and August 2007
  - Planning board reviews plans to convert plant to concrete batch facility; lack of production raised
    - Ordinance: “[w]henver a non-conforming use has been discontinued for more than one year for any reason, such non-conforming use shall not thereafter be re-established, and the future use of the property shall be in conformity with the provisions of this Ordinance.”
    - Planning board: use was not discontinued; abutters appeal

# Non-Conforming Uses: Abandonment

- *Pike Industries, Inc. v. Brian Woodward* (cont'd)
  - ZBA: production of asphalt is the “use” at issue; therefore non-conforming use was abandoned; intention to continue use was irrelevant; spirit of the ordinance important (as well as the “townspeople’s point of view”) [Q: what’s the ZBA’s role?]
  - Trial court reverses—use is broader, intention should be considered
  - Supremes:
    - Spirit of the ordinance is relevant, but the language of the ordinance dealing with abandonment is what controls
    - “Use”: asphalt is produced when customers order it; other activities necessary to maintain a “state of readiness” to produce; Pike continued to use the plant, even without actual production
    - Intent: owner’s subjective intention to continue (i.e., not to abandon) a non-conforming use irrelevant where the ordinance defines what constitutes discontinuance. Ordinance: “for any reason”—negates intention (trial court opinion reversed on this point, but otherwise affirmed)

# Non-Conforming Uses: Abandonment

- *Huard v. Town of Pelham* (2010)
  - Zoning provision: “[V]ariiances not used for one (1) year or longer shall expire by operation of law at the end of said one year period.”
  - 1985 variance for auto repair; 2006 enforcement against new owner (transmission repair and abandonment of use); 2007 repeal of ordinance provision; local officials determine that variance is in force; abutters appeal
  - ZBA: provision was appealed in 2007, but variance expired under the old ordinance in 1989 as a result of foreclosure; owner doesn’t appeal, but later files a declaratory judgment action and takings claim
  - Supremes: failure to exhaust administrative remedies (absent a showing of futility)

# Non-Conforming Uses: Abandonment

## ■ *Huard v. Town of Pelham* (cont'd)

### □ Takings

- Part I, Article 12, NH Constitution: “No part of a man’s property shall be taken from him, or applied to public uses, without his consent.”
- “A governmental regulation can be a taking, even if the land is not physically taken, if it is an arbitrary or unreasonable restriction which substantially deprives the owner of the economically viable use of his land.” Citing *Burrows v. City of Keene*, 121 N.H. 590, 597-98 (1981)
- Limitations on use create a taking if they are so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the property and preventing the private owner from enjoying worthwhile rights or benefits in the property.” Quoting *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 733-34 (2005)
- “Expiration of a use variance is not equivalent to the prohibition of all normal private development.”

# Zoning – Variances

- *Farrar v. City of Keene* (2009)
  - 0.44 acre lot with historic building on Winter Street—19 rooms, 7K s.f.; located in “office district”
  - Use variance granted for change from single family to mixed use—two residential units and office space; both uses permitted, but mixed use is not expressly permitted; area variance for 14 parking spaces also granted (23 required, 10 sought)
  - Abutters appeal; Superior Court affirms area variance, vacates use variance—first prong under the *Simplex* test had not been met; City and owner appeal, abutters cross-appeal
  
  - **Remember**, this case was before the elimination of the use/area variance distinction! The Court’s discussion of other factors makes it instructive

# Zoning – Variances

- *Farrar v. City of Keene (cont'd)*
  - Unnecessary Hardship, *Simplex* 1<sup>st</sup> Prong: non-dispositive factors
    - Does the zoning restriction as applied interfere with the owner's reasonable use of the property?
    - Does the hardship result from the unique setting of the property?
    - Would the owner's proposed use alter the essential character of the neighborhood?
  - Trial court focused on the first two and found no evidence of "uniqueness"
  - Supremes disagree—record shows: larger building than many others in the area; used as a residence, unlike others in the area; owner—"not usable for a private family" because of location and size, and current use cannot be sustained without more income
  - "Reasonable use" includes consideration of owner's return on investment; minimal evidence presented
  - A "close case"—afford deference to the ZBA (local knowledge)

# Zoning – Variances

- *Farrar v. City of Keene (cont'd)*
  - Unnecessary Hardship, *Simplex* 2<sup>nd</sup> Prong
    - No fair and substantial relationship between the general purposes of the zoning and the specific restriction on the property
    - Mixed uses allowed in adjacent zones
    - Mixed office/residential use would not alter the character of the neighborhood, as both were already permitted uses
  - Unnecessary Hardship, *Simplex* 3<sup>rd</sup> Prong
    - Variance would not injure the public or private rights of others
    - Supreme Court: “We have said that this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance”
    - Then why have it?
      - See Ch. 307, Laws of 2009 (SB 147) for the demise of the 3<sup>rd</sup> prong

# Zoning – Variances

- *Farrar v. City of Keene (cont'd)*
  - Public Interest & Spirit of the Ordinance (criteria 1 & 3) – “related”
    - Public Interest: variance is contrary if it “unduly, and to a marked degree conflicts with the ordinance such that it violates the ordinance’s basic objectives”
    - How is this determined?
      - Would the variance alter the essential character of the neighborhood? or
      - Would the variance threaten public health, safety, or welfare?
    - Office district is for “low intensity” non-commercial professional offices; buffer between Central Business and Residential zones

# Zoning – Variances

- *Farrar v. City of Keene (cont'd)*
  - Substantial Justice
    - “...any loss to the individual that is not outweighed by a gain to the general public is an injustice.”
    - Applicant has made substantial renovations and stated that he is unable to sustain the property as a single family residence without additional income
    - Both office and residential uses are allowed
  - Surrounding Property Values
    - Residential appearance of the property would not change
    - Offices currently on either side of the property
    - Use exclusively as an office would have greater traffic and intensity
    - Therefore, ZBA acted reasonably in finding no impact

# Neither Planning Nor Zoning, Just Interesting: Taxpayer Standing

- *Baer v. Department of Education*, \_\_\_ N.H. \_\_\_ (2010)
  - Concord plans to build new schools and renovate others
  - Lot sizes for two new schools didn't meet minimum standards of NH Dept. of Education; DOE grants city waivers
  - Taxpayers petition court for declaratory judgment, claiming that DOE's waiver rules exceeded its authority; respondents claim petitioners lack standing
  - **Court's question:** has the plaintiff sufficiently demonstrated his right to claim relief?
  - Petitioners say they will be harmed because their taxpayer dollars will be used to finance schools that do not meet minimum lot size standards, creating "substandard" schools
  - Court: "...taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22."
  - Similar considerations for standing in planning and zoning cases, but a sliding scale depending on the level of review

# More Questions?

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