

[Plan-link] Demolition Delay Ordinance

Mon 6/29/2015 3:38 PM

Hello,

We are working on revising our Demolition Delay Ordinance, does anyone have one that they are willing to share with us? If so, how much do you charge for the application fee, and is there any fee for the structure over and above the application fee.

Thank you!

Beth Fenstermacher PLA, LEED AP
Senior Planner
City of Concord

Mon 6/29/2015 3:45 PM

I've written this a number of times and will write it again:

There is no statutory authority for a demolition delay ordinance.

I have asked the proponents of these ordinances to cite the authority, here, a direct email to the state preservation office, and in one or more letters to the editor when it has come up in local situations, and the answer has always been the same: no response.

Curt Springer

Mon 6/29/2015 4:02 PM

On 6/29/2015 3:47 PM, Justin C. Richardson wrote:

I'm sure if you tear down a few structures of significance in an historic district you will get a response with appropriate citations.

All in good fun.

Justin

LOL.

Seriously, there is no question that demolitions are regulated in historic districts per statute with the certificate of appropriateness and all that.

These are efforts to regulate demolitions outside of historic districts.

This came up in Rye not long ago:

<http://www.seacoastonline.com/article/20141111/news/141119809>

My letter to the editor:

<http://www.seacoastonline.com/article/20141114/News/141119555>

I emailed the town directly also, no response as usual.

--- Curt

Mon 6/29/2015 4:11 PM

I respectfully disagree. While there may be no specific authority to enact a “demolition delay ordinance” anywhere in the statutes, a carefully drafted demolition review ordinance such as Keene’s (https://www.municode.com/library/nh/keene/codes/code_of_ordinances?nodid=PTIICOOR_CH18BURE_ARTIVDERE) operates within the authority granted to municipalities to regulate building (and by extension demolition) pursuant to RSA 674:51, and to review matters affecting or potentially affecting cultural and historic resources through their heritage commissions pursuant to RSA 674:44-b.

Leon I. Goodwin III
Assistant Town Manager – Director of Community Affairs
Town of Salem, New Hampshire

Mon 6/29/2015 7:12 PM

Leon,

Thanks for the reply.

You cite RSA 674:51 which pertains to "additional provisions of the state building code for the construction, remodeling, and maintenance of all buildings and structures in the municipality." I don't see how this can apply, not only because it omits the word "demolition", but also if one accepts that it includes "demolition" by implication, these demolition review ordinances have nothing to do with specifying how the demolition is to be done, which would be the purpose of any "code".

You cite RSA 674:44-b which empowers a Heritage Commission to " Conduct research and publish findings, including reports to establish the legal basis for a district and preparation of historic district ordinances within the municipality prior to its adoption or amendment as provided in RSA 675:6. ". There is no authorization to restrain property owners from exercising their rights to give the Heritage Commission time to conduct research. Further, a municipality may not on its own authority delegate power granted by statute from one board to another. For example a Heritage Commission may assume the powers of an Historic District Commission only because that is specifically allowed by statute.

Both of your citations are from Chapter 674 which is entitled "Local Land Use Planning and Regulatory Powers." It lays out the authority of the various land use boards and land use officials such as the building inspector.

The local land use boards that can be created are defined in RSA 673:1. There is no option for a town to create any other land use board beyond those listed:

673:1 Establishment of Local Land Use Boards. –

I. Any local legislative body may establish a planning board, the members of which shall be residents of the municipality.

II. Any local legislative body may establish any or all of the following: a heritage commission, a historic district commission, an agricultural commission, and a housing commission.

III. Any local legislative body may provide for the appointment of an inspector of buildings. The local legislative body may fix the compensation for any inspector who is so appointed.

IV. Every zoning ordinance adopted by a local legislative body shall include provisions for the establishment of a zoning board of adjustment. Members of the zoning board of adjustment shall be either elected or appointed, subject to the provisions of RSA 673:3.

V. Every building code adopted by a local legislative body shall include provisions for the establishment of the position of a building inspector, who shall issue building permits, and for the establishment of a building code board of appeals. If no provision is made to establish a separate building code board of appeals, the ordinance shall designate the zoning board of adjustment to act as the building code board of appeals. If there is no zoning board of adjustment, the board of selectmen shall serve as the building code board of appeals.

--- Curt

Mon 6/29/2015 7:55 PM

What happened, I believe, was that demolition review ordinances were brought in from Massachusetts, which is a home rule state, without consideration of the fact that NH is not a home rule state.

Quoting from a document found at this link:

http://www.bostonpreservation.org/_pdfs/religious-properties-resources/guides-and-compendia/demo-delay.doc

Legal Basis

Demolition delay ordinances or bylaws are created under the municipal home rule authority granted by the Massachusetts Constitution. The Home Rule Amendment to the Massachusetts Constitution, Article 89, empowers cities and towns to enact legislation on a wide range of subjects not pre-empted by state law.

Consequently, demolition delay provisions are a valid and legal exercise of municipal authority and are afforded the same level of recognition as any other regulations affecting municipal affairs. In *City of Cambridge, et al. vs. Cellucci, Cambridge Building Commissioner*, the court found that various city regulations, including a demolition delay ordinance, are not subordinate to, or in conflict with, the State Building Code. Therefore, the building commissioner must comply and conform with the ordinances. Superior Court, Civil Action No. 87-1522 (1988).

Furthermore, since demolition provisions only delay the granting of a demolition permit, and the property owners still retain final decision-making authority, a demolition delay bylaw offers a minimally intrusive mechanism for furthering preservation objectives, one that does not conflict with the operation of the State Building Code or any other state statute as required by the Home Rule Amendment.

The office of the Attorney General routinely approves demolition delay bylaws enacted by towns, pursuant to the procedural review required in M.G.L. Chapter 40, § 32. These routine

approvals are indicative of the acceptance of demolition procedures based on local home rule powers and signal a firm legal procedural ground for such measures.

It should be noted that M.G.L. Chapter 143, § 3A, provides that in the event of a conflict between the State Building Code and a statute, ordinance or bylaw regulating any historic district, the legislation governing exterior architectural features will prevail. Moreover, the State Building Code (780 C.M.R. 3409.0 *et seq.*) affords preferential treatment to historic buildings and structures.

Although not directly related to demolition delay regulations, the favorable treatment of historic properties in connection with the provisions of the Building Code is strong evidence of the legislative deference to historically significant buildings and structures.

--- Curt

Mon 6/29/2015 9:05 PM

Hi Curt:

We may end up agreeing to disagree on this one, but I will endeavor to clarify my previous statutory citations.

I cited the whole of RSA 674:44-b, but it would have been clearer to cite RSA 674:44-b, I (d), which gives the Heritage Commission authority to "[a]dvice, upon request, local agencies and other local boards in their review of requests on matters affecting or potentially affecting cultural and historic resources." In my opinion, the chief building official, board of selectmen, or whoever else is the permit granting authority in a particular municipality has the ability to seek the opinion of the Heritage Commission under this provision when confronted with permitting the demolition of a historic resource.

While the legislature certainly could have done us a favor and drafted RSA 674:51 with greater precision (but why would they start now!), building codes including the New Hampshire State Building Code generally include demolition within their scope of review. See RSA 155-A:2, I. In addition, municipalities are specifically authorized to create and administer the permit granting process pursuant to RSA 155-A:4, II. If a municipality elects to add demolition review to its permitting process (much like they incorporate zoning/planning/engineering/health review and sign off), I don't see that as impermissible step in process. What we'll likely agree on is that demolition review must be just that, a step in the process, and cannot unreasonably delay or stop the demolition permitting process.

-Leon

Tue 6/30/2015 1:28 AM

(I inserted my Massachusetts home rule follow-up below to have it in the right order and to be able to quote from it)

Leon,

I guess we will have to agree to disagree.

You seem to want to give wide latitude to the definition of a "locally defined process" as mentioned in

RSA 155-A:4, II. I would call your attention to RSA 155-A:3, III which defines the elements of the locally defined process:

- III. At a minimum, the municipality shall ensure that implementation and enforcement includes:
- (a) Review and acceptance of appropriate plans.
 - (b) Issuance of building permits.
 - (c) Inspection of the work authorized by the building permits.
 - (d) Issuance of appropriate use and occupancy certificates.

Yes, I realize it says "At a minimum". But I believe the provisions of a building code are to regulate the technical aspects of how a building is to be constructed, modified, or demolished for reasons of safety. That is a separate process and subsequent to any sort of zoning or site plan review. A building code is about how to do it safely, not whether it is good public policy to do so.

If you say that the municipality can, under the heading of a building code, assemble a group of local worthies to delay an otherwise lawful demolition while they lobby the property owner not to do it, then I say they could equally well assemble a group of local worthies to review the plans of any to be constructed building for aesthetic purposes, and lobby the property owner to change the architectural style or the color or whatever other visual aspect displeases them, and hold his or her permit in abeyance until either he or she complies with their wishes or some number of days have passed. After all, the building will be there and visible to all for decades so why wouldn't it be a good idea to see if we could get the best possible look even though at the end of the day we can't make the property owner do it the way we would prefer.

My position that demolition review and building code definition are two completely things are supported by the court ruling in Massachusetts:

Consequently, demolition delay provisions are a valid and legal exercise of municipal authority and are afforded the same level of recognition as any other regulations affecting municipal affairs. In City of Cambridge, et al. vs. Cellucci, Cambridge Building Commissioner, the court found that various city regulations, including a demolition delay ordinance, are not subordinate to, or in conflict with, the State Building Code. Therefore, the building commissioner must comply and conform with the ordinances. Superior Court, Civil Action No. 87-1522 (1988).

Furthermore, since demolition provisions only delay the granting of a demolition permit, and the property owners still retain final decision-making authority, a demolition delay bylaw offers a minimally intrusive mechanism for furthering preservation objectives, one that does not conflict with the operation of the State Building Code or any other state statute as required by the Home Rule Amendment.

If demolition review had anything to do with building codes that would have imperiled the home rule rights of Massachusetts municipalities to enact demolition review, as demolition review could then be pre-empted by state law. I think the relation of demolition review and the administration of building codes is the same in both states: there is none.

--- Curt