

GRANDFATHERED – The Law of Nonconforming Uses and Vested Rights (2009 Ed).

**H. Bernard Waugh, Jr.
Gardner Fulton & Waugh, P.L.L.C.
78 Bank Street, Lebanon, NH 03766
(603) 448-2221
<bernie.waugh@gardner-fulton.com>**

[NOTE: This article was first written in 1989 by H. Bernard Waugh, Jr. for the Municipal Law Lecture Series, and later printed in the NH Bar Journal, March 1990, and cited by the N.H. Supreme Court in *Cohen v. Town of Henniker* (1991). It was revised 1994 by Timothy Bates and H. Bernard Waugh, Jr., revised again in 2002 by H. Bernard Waugh, Jr., and has now been revised and updated again in 2009 by H. Bernard Waugh, Jr. The general structure of the original has been maintained, despite the fact that the attempts at humor may now seem stale to those who've seen prior versions!]

Table of Contents

1. INTRODUCTION: THE CONSTITUTIONAL ROOTS OF GRANDFATHERING.	2
1-A. Case Law Foundations.	2
1-B. The Property Rights Paradox.	3
2. SUMMARY - THE ELEMENTS OF GRANDFATHERING.	4
2-A. A Hypothetical Example.	4
2-B. Who Gets the Benefit of the Doubt?	6
2-C. The Statute.	7
3. WHEN DO GRANDFATHERED RIGHTS VEST?	8
3-A. The Relevant Time.	8
3-B. No “Grandfathering” Where Owner Takes Knowing Risk or Violates Ordinance.	8
3-C. A Back-shift in the Relevant Time – How a Restriction can <i>Have</i> an Effect Before it <i>Takes</i> Effect.	12
3-D. How Much Investment Does It Take To Be <i>Vested</i> ?	14
4. CHANGES AND EXPANSIONS OF GRANDFATHERED USES.	16
4-A. The New London Land Use Case.	16
4-B. Further Case Examples Of Changes Or Expansions.	18
5. THE PUBLIC HARMS EXCEPTION TO GRANDFATHERING.	21
6. PROCEDURE – WHO DECIDES WHAT’S GRANDFATHERED?	24
6-A. Appeals to the Board of Adjustment.	24
6-B. Where Do "Grandfathered" Rights Fit In With Special Exceptions?	25
6-C. Zoning Clauses Which Regulate Nonconforming Uses – Do They Supersede The Common Law?	26
6-D. How Do "Grandfathered" Rights Fit In With Variances?	27
6-E. How Do “Grandfathered” Rights Fit In With Site Plan Review?	29
7. TERMINATION OF GRANDFATHERED RIGHTS.	30
7-A. Abandonment.	30
7-B. Zoning Ordinance "Use It or Lose It" Clauses.	31
7-C. Amortization Clauses.	32
8. STRUCTURES, DIMENSIONS, LOT LINES AND SUBDIVISIONS.	33
8-A. The Problem of Add-ons to Nonconforming Structures.	33
8-B. Same Structure, New Use? – A Prediction.	35
8-C. Substandard Lots	36
8-D. Vested Subdivisions – How Far Does The Exemption Go?	39
8-E. The ‘Merger’ Problem – When Do 2 Lots In Common Ownership Become One?	41
8-F. Can There Be a “Grandfathered” Right to Subdivide?	45

1. INTRODUCTION: The Constitutional Roots of Grandfathering. [or: 'An Ancestor of High Birth']

I-A. CASE LAW FOUNDATIONS.

“Despite the fact that nonconforming uses violate the letter and the spirit of zoning laws, they have evolved for the purpose of protecting property rights that antedated the existence of an ordinance from what might be an unconstitutional taking.” (*Surry v. Starkey*, 115 N.H. 31 (1975), citing Powell, *Real Property*, Sec 869; Rathkopf, *Law of Zoning and Planning*, 58-1; Anderson, *American Law of Zoning*, Sec. 6.01.)

* * *

“In this State, the common-law rule is that an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.” (*Henry & Murphy, Inc. v. Town of Allenstown*, 120 N.H. 910 (1980).

* * *

“The State Constitution provides that all persons have the right of acquiring, possessing and protecting property. N.H. Const. pt. I, arts. 2, 12. These provisions also apply to nonconforming uses... As a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use.” (*Loundsbury v. City of Keene*, 122 N.H. 1006 (1982), citations omitted.)

* * *

1-B. THE PROPERTY RIGHTS PARADOX.

“Property” isn’t the land itself. It’s the bundle of rights that people forming social groups divvy among themselves when they agree not to fight over the use of that land (and form a government to enforce that agreement). It’s not what you keep behind your castle wall – it’s what keeps you from having to build a castle wall.

Even though some rule prohibiting people from violating each other’s property rights – “***YOU SHALL NOT STEAL***” – is a basic moral rule which all rational people agree on (at least those living in societies with a concept of property), nevertheless it’s a rule which takes different forms in different cultures, and in different eras of history. Concepts of “property” vary, and change over time. After all, our own American Constitution once protected the rights of some of us to own others of us as slaves!

But just because “property” concepts change over time does not mean that “property” consists only of what the majority thinks it consists of, at any point in time. On the contrary, even in our democracy, a property “right” is something which the constitution requires to be ***defended, using the threat of violence*** (under Court control), ***even against the majority’s will!*** The paradox is that even though what rights constitute “property” changes over time, the very idea of “property” embodies permanence. It implies rights that must be protected even when society wants to change the rules, and even when there are legitimate, important reasons for changing those rules. That’s the paradox of “property”: it’s a continually changing concept whose very meaning implies protection against change.

From the womb of this paradox was born the doctrine of “grandfathered” rights, or nonconforming uses. “Grandfathering” strikes a balance by protecting the permanence while allowing for the change. It protects landowners from rules which change in the middle of the game, but it only protects those who, by their investments, have hazarded a stake in that game. The heart of the doctrine is ***justified investment-backed expectations.***

* * *

2. SUMMARY - THE ELEMENTS OF GRANDFATHERING. [or: 'The Old Man's Family Tree'].

2-A. A HYPOTHETICAL EXAMPLE.

Jane "Oilcan" McClintock just bought some land, and wants to run a gas station, in an area of town which is part of a residential zoning district, where a gas station is a prohibited use. She says she's "grandfathered," and you need to decide whether the claim is justified. Here's an amalgamated summary of the doctrine of nonconforming uses:

A use of land which, at the time a restriction on that use went into effect, was established (or "vested"), and has not been discontinued or abandoned, can continue indefinitely, unless it includes activity which is a nuisance or harmful to the public health and welfare; but the use cannot be changed or substantially expanded without being brought into compliance.

[This summary, after appearing in the first version of this article in the N.H. Bar Journal, Vol. 31, p. 17 (1990), was cited with approval by the N.H. Supreme Court in *Cohen v. Town of Henniker*, 134 N.H. 425, 427 (1991), *infra*.]

Let's apply this doctrine to "Oilcan" Jane:

I. A USE OF LAND...

All "grandfathered" rights run with the land, not with the person. (a) If "Oilcan" Jane ran a gas station somewhere else, that's irrelevant. (b) A sale of property is also irrelevant – Jane has exactly the same rights as the guy who sold her the place.

II. ...WHICH, AT THE TIME A RESTRICTION ON THAT USE WENT INTO EFFECT,

What you need to know is what was happening on the property when the zoning restriction was first enacted. That's the *only* relevant time. It makes no difference that there was a gas station there in the '20's and '30's, if it was discontinued before your town's zoning took effect in the '60's. And even if there's been a gas station there for 10 years, that's irrelevant (at least to this doctrine) if the restriction has been in effect for 11 years. Furthermore, it makes no difference that your zoning ordinance has been amended and re-adopted several times, as long as gas stations have continuously been prohibited. If they weren't prohibited until a later amendment, then the date of that later amendment is the relevant date to ask about.

III. ...WAS ESTABLISHED (OR “VESTED”)...

A gas station which is just a gleam in Jane’s eye has no rights. Even if she had bought the lot and hired an architect to draw up plans, all before the restriction went into effect, that’s not enough. There must be substantial construction (investment towards establishment of the use) before a use is “vested”.

IV. ...AND HAS NOT BEEN DISCONTINUED OR ABANDONED,...

Even if the gas station was in business when the town passed its zoning ordinance, the “grandfathered” right is lost if, say, the former owner converted the gas station to apartments, or if the station had gone out of business and stayed that way for a substantial time with no objective manifestations of any intent to start up again.

V. ...CAN CONTINUE INDEFINITELY,...

The town can’t say, “Sorry Jane, you can only pump gas another three years.”

VI. ...UNLESS IT INCLUDES ACTIVITY WHICH IS A NUISANCE OR HARMFUL TO THE PUBLIC HEALTH AND WELFARE,...

No one can have a “grandfathered” right to injure neighbors or the public by creating a nuisance. Jane of course has to comply with all requirements aimed at preventing oil spills, and with state requirements for replacement of underground fuel tanks to prevent leaks. If she’s in an aquifer area, the town could impose conditions to make sure the aquifer isn’t damaged.

VII. ...BUT THE USE CANNOT BE CHANGED OR SUBSTANTIALLY EXPANDED WITHOUT BEING BROUGHT INTO COMPLIANCE.

(a) Even if “Oilcan” Jane has a right to run a gas station, that *doesn’t* mean she has a right to *any* commercial use. Being “grandfathered” is not the same as being in a less restrictive zoning district. (b) She can make changes which arise naturally out of the evolution of the business (e.g. taking out old pumps and putting in more modern ones). (c) But she can’t add on a new auto repair garage that wasn’t there when the zoning ordinance passed.

All these elements of “grandfathering” will be discussed in greater detail in what follows.

* * *

2-B. WHO GETS THE BENEFIT OF THE DOUBT?

As far back as 1958, the N.H. Supreme Court said that:

“Since zoning by its very nature restricts and regulates the use of land and buildings to specified uses, provisions which permit the expansion, extension and enlargement of nonconforming uses are generally strictly construed.” *Keene v. Blood*, 101 N.H. 466, (citations omitted).

As recently as 1988, the Court said that provisions allowing *continuation* of nonconforming uses are also “strictly construed.” (*New London Land Use Assoc. v. Zoning Board*, 130 N.H. 510 at 518 (1988).) As you might expect from the words “strictly construed,” the Court has said that the burden of proof is on the landowner who claims a “grandfathered” use, to prove all the necessary elements establishing that right, (*New London v. Leskiewicz*, 110 N.H. 462, 467 (1970)), or to show that an expansion of use is “not a new and impermissible one.” (*Hampton v. Brust*, 122 N.H. 463, 470 (1982)). In *Bio Energy LLC v. Town of Hopkinton*, 153 N.H. 145, 155 (2006), the Court reiterated that “(t)he burden of establishing that the use in question is fundamentally the same use [as the ‘grandfathered’ use] and not a new and impermissible one is on the party asserting it.”

Note on Trend: In prior versions of this article, I cautioned towns against putting too much reliance on this burden of proof. I cited *Dugas v. Town of Conway*, 125 N.H. 175 (1984), where the N.H. Supreme Court required the Town to pay the landowner’s attorney’s fees when the Town applied literally the Town’s one-year “use it or lose it” clause and refused to allow the restoration of a nonconforming sign that had been down for over a year.

That caution no longer applies, and the trend over the last 20 years has been to truly give towns more of the benefit of the doubt on ‘grandfathering’ issues. In fact, virtually every aspect of the *Dugas* case has been reversed by later case law: (a) “Use it or lose it” clauses are presumed valid (*see McKenzie v. Town of Eaton*, 154 NH 773 (2006)). (b) Furthermore the Court said in *Taber v. Town of Westmoreland*, 140 N.H. 613 (1996) that in the case of quasi-judicial officials such as a Zoning Board, principles of judicial immunity prevent attorney’s fees from being awarded in the absence of a showing of bad faith.

* * *

2-C. THE STATUTE.

“Grandfathered” rights are protected not only by the Constitution, but by RSA 674:19, which says:

“674:19 Applicability of Zoning Ordinance. A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.”

In prior versions of this article, I said this statute could virtually be ignored, because the courts themselves had ignored it (instead concentrating on constitutional principles). *That is no longer true.* The NH Supreme Court now regularly cites RSA 674:19 as the basis for the doctrine of nonconforming uses – see *Guy v. Town of Temple*, 157 N.H. 642 (2007), where the Court’s summary of nonconforming use law was based *solely* on a citation to the statute, not any constitutional principle. The clear trend over the last 20 years has been for the Court to *avoid* constitutional issues except where inescapable.

Another recent court trend is to refuse to consider constitutional issues in court unless the party first raises them at the local level. If an applicant doesn’t raise a constitutional issue before the local land use board, then it cannot be raised later in a court appeal of the local decision. [*Note:* this rule does *not* prevent a “facial” attack on an ordinance – claiming it’s unconstitutional *per se* – from being raised directly in court, without any local process at all. But most ‘grandfathering’ claims don’t attack the ordinance itself, merely whether it applies in the particular case.]

Nonetheless what *is* still true that is the basic rules for handling ‘grandfathered’ uses have been fundamentally the *same*, regardless of whether the courts have cited the statute or the constitutional principle. It is still fair to say the law of ‘grandfathered’ rights has matured well under the common law without much added nurture by the Legislature.

Examples of decisions resting solely on the statute are the sign cases. For example, in *Town of Jackson v. Town and Country Motor Inn, Inc.*, 120 N.H. 699 (1980), Jackson’s ordinance requiring removal of pre-existing signs was held *preempted* by RSA 674:19, because signs are “structures.” The common-law, constitutional nonconforming use doctrine wasn’t even mentioned.

* * *

3. WHEN DO GRANDFATHERED RIGHTS VEST? [Or: ‘The Birth of A Deviant Relative.’]

3-A. THE RELEVANT TIME.

In order to be “grandfathered,” a property right must have been vested at the time the restriction first took effect. Subsequent re-adoptions of the restriction don’t change anything. That’s what the Court said in *Town of Derry v. Simonsen*, 117 N.H. 1010 (1977). Derry had adopted its zoning ordinance in 1970; then, to cure some doubts about its validity, re-adopted it in 1974. Simonsen owned land which, under both ordinances, was zoned to prohibit commercial campgrounds, but he had begun to operate such a campground *between* 1970 and 1974. Simonsen claimed the 1974 re-adoption legalized all uses existing as of that date. The Court disagreed, saying:

“(1) a nonconforming use is only a use which legally exists at the date of adoption of the zoning ordinance; (2) a use in violation of a zoning ordinance, which is repealed by another ordinance provision containing a provision protecting uses in effect at the time that it was enacted, is not entitled to the legal status of a nonconforming use under the new ordinance...” (117 N.H. at 1016, citations omitted.)

Most recently in *Residents Defending Their Homes v. Lone Pine Hunters Club, Inc.*, 155 N.H. 486 (2007), the Court reiterated that:

“The law is well established that a nonconforming use is permissible only where it legally exists at the date of the adoption of the zoning ordinance. This rule of law is based on the principle that provisions which except existing uses are intended to favor uses which were both existing and lawful, not to aid users who have succeeded in evading previous restrictions” (citations omitted).

* * *

3-B. NO GRANDFATHERING WHERE OWNER TAKES KNOWING RISK OR VIOLATES ORDINANCE.

Or: ‘You Become Old Man Only If You Follow Straight And Narrow.’

Charlie Steamroller believes in action. He thinks that if he goes right ahead with his plans, bulldozing through to finish construction in complete disregard of possible restrictions, it’ll all come out OK – nobody can have much to say once the building is

up. Bricks speak louder than words. There's no substitute for the accomplished fact. Right?

Sorry, Charlie. As the *Simonsen* case suggests, there's no magic rule which converts a violation into a vested right. In *Town of Plaistow v. Nadeau*, 126 N.H. 439 (1985), a manufactured housing park developer began construction without any town approval at all. He even finished some of the units and sold them. The court found that all the "investments" were made in bad faith. Nadeau never had *any* reason to believe the plan was legal. The Supreme Court upheld an order permanently preventing him from using the land for the manufactured housing park.

In *Devaney v. Town of Windham*, 123 N.H. 302 (1989), the owner of a nonconforming summer "camp" who had illegally expanded by putting on several additions, without getting any permits, was ordered to tear them all down.

In *Quirk v. Town of New Boston*, 140 N.H. 124 (1995), an owner of a campground had spent \$355,000 toward an expansion of the campground which later was precluded by a 200-foot setback requirement. He claimed the expansion was "grandfathered." But the Court said he had spent all this money without getting *any* required state or local permits, hence the money was not spent in reliance on the absence of regulations.

In *Miner v. A&C Tire Co., Inc.* 146 N.H. 631 (2001), which involved an auto garage that had expanded gradually over time into an illegal commercial use, the owner claimed the neighbors had unreasonably delayed in bringing suit to enforce the ordinance. But the Court held that the owners were not prejudiced by the delay. "*In fact, the defendants benefited by being able to operate an illegal...use in a residential zone for several more years.*"

I. Ignorance of the Law is No Excuse. An owner's ignorance of an ordinance or restriction is not a defense or justification for a violation (*Weare v. Stone*, 114 N.H. 80 (1974)). Therefore ignorance can't serve as a foundation for "grandfathered" rights. See *Town of North Hampton v. Sanderson*, 131 N.H. 614 (1989), in which a gravel pit owner tried to claim that the zoning provision requiring a gravel permit was too vague. But the Court pointed to the fact that, for 10 years, the owner had claimed he didn't need a permit because his operation was "incidental to construction." This (incorrect) claim implied that he understood the permit requirement perfectly well, and if *he* understood it, he couldn't now claim it was too vague.

II. Owner USUALLY Can't Rely on an Official's Mistakes. In *Dumais v. Somersworth*, 101 N.H. 111 (1957), the building inspector had granted a permit to

build a garage for the storage of trucks, a use later found to be a violation of the ordinance. The permit was revoked only after Dumais had spent over \$3000.00 (in 1957 dollars!) in reliance on it. The Court said:

“While it is true that vested rights may be acquired by the expenditure of substantial sums in reliance on a permit properly issued before amendment of an ordinance, this rule does not extend to cases where the issuing official exceeded his authority by issuing a permit in violation of an ordinance then in effect.”

The *Dumais* rule has usually been followed in New Hampshire, until very recently. Here are some cases:

(i) *Hermer v. Dover*, 106 N.H. 534 (1965). The building inspector had told a store owner that no permit was required to convert the business to a children's clothing shop. In reliance of the statement, the conversion was completed, only later to be ordered to close as a violation. The Court upheld the order to close:

“A person is charged with knowledge of the zoning restrictions placed on his property, and thus he obtains no vested rights by a building permit issued under a mistake of fact or in violation of law.” (at 536, citation omitted)

(ii) *Rye Beach Village Dist. v. Beaudoin*, 114 N.H. 2 (1974). An owner who wanted to convert bath houses to residences was assured by the ZBA Chair that he would “never have any trouble from the Village District.” In fact, however, a permit was required. The Court said there couldn’t be a claim to any vested right arising from reliance on the ZBA Chair's unauthorized statement.

(iii) *City of Concord v. Tompkins*, 124 N.H. 463 (1984). Tompkins was told by the building inspector that a sign permit had no time limit, whereas in reality the building code said the permit must be used within 6 months or lost. The Court refused to estop the City from enforcing the 6-month limit, and Tompkins had to get a new permit.

III. Grandfathered-by-Estoppel Cases. The Court in *Tompkins* did warn us, however, that the presumption against municipal estoppel is not inflexible, and that towns might get stuck with the consequences of their official’s erroneous statements if there has been substantial detrimental reliance where **“a person seriously desirous of obeying the law would have accepted the information relied upon as true, and would not have been put on notice to make further inquiries.”** (at p. 473, citation omitted). Since 1990, the Court has made good on this threat to apply estoppel, in

some cases where there was no realistic opportunity for the owner to discover the mistake:

(i) *Aranosian Oil Co. Inc. v. City of Portsmouth*, 136 N.H. 57 (1992). Aranosian had a gas station he wanted to convert to a convenience store. The plans given to the building inspector clearly listed the proposed use as a “C-store” and showed a “convenience store sales area.” Aranosian spent about \$45,000 doing the conversion, only to be told that it was an illegal expansion of the nonconforming use. The Court estopped the City from withdrawing the permit, saying that Aranosian **“could reasonably have assumed that the conversion of the nonconforming use was permitted.”** In other words, (a) the City officials should have known from the plans what the intended use was, and (b) since the test for expansion of nonconforming uses is rather vague (see § 4 below), there was no way, looking at the ordinance itself, that Aranosian could have known his work would be considered a violation.

(ii) *Turco v. Town of Barnstead*, 136 N.H. 256 (1992). The Turcos were told that the road they owned land on was class V (maintained road), and received a building permit without any requirement for the Class VI road “waiver” provision contained in RSA 674:41, I(c). It later turned out, after they’d already spent big bucks putting in a septic system and foundation, that the road was actually Class VI (unmaintained). But the Court, using the law of estoppel, required the Town to do road maintenance, saying that the Turcos had the right to rely on the building permit in the absence of any information anywhere as to the road’s true status. The Town’s own list of road mileage, filed with the DOT for state road aid purposes, listed the road as Class V. Even a diligent search would not have revealed to the Turcos the town officials’ mistake.

(iii) Back in *Alexander v. Town of Hampstead*, 129 N.H. 278 (1987), the Court said it is possible for a town to have “a pattern of nonenforcement” of a restriction, which is so unfair that it is really “a ratification of a pattern of nonenforcement,” such that any town enforcement effort from then on would be struck down as discriminatory in court. [*Alexander* was a case where the building inspector, who was trying to stop construction of a two-story house in a 1 1/2-story zone, was discovered to have previously granted permits to several 2-story houses just like the one he was now trying to stop.]

However the later case of *Hansel v. City of Keene*, 138 N.H. 99 (1993), severely limited the application of the *Alexander* case. In *Hansel*, the Konover Corp. had gotten approval to put a 62-acre shopping mall in the floodplain, and argued that the floodplain zoning ordinance, which required “no increase” in surface water levels, should not be strictly enforced because the Planning Board had applied it in only 4 out of 20 prior cases, and inconsistently even in those 4. Konover argued, citing the

Alexander case, that this constituted “ratification of a policy of nonenforcement.” But the Court pointed out that the *Alexander* doctrine had never actually been applied in any court case. Furthermore, the strong public safety interest in preventing floods weighed heavily against applying estoppel against the City. Thus the rule is clear that the closer a restriction gets to being a nuisance-prevention measure (see the “Nuisance Exception” in § 5 below), the less likely it is that estoppel will be applied to “grandfather” an illegal project. [After all, why should citizens’ health and safety rights be allowed to be infringed merely because their officials have blundered!]

(iv) Most recently in *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) the Court laid great emphasis on how rarely estoppel is to be applied against municipalities:

“Although municipal corporations may be subject to estoppel, the law does not favor its application against municipalities. This is especially true when a valuable public interest may be jeopardized by applying the doctrine of estoppel against the municipality. The party asserting estoppel bears the burden of proof. Even assuming without deciding that the petitioners [in the case] could meet their burden of demonstrating the four essential elements of municipal estoppel... they cannot demonstrate, under these facts, that the public interest in preventing the government from capriciously dealing with its citizens [outweighs] the risk, posed by estoppel, of undermining important government interests” (citations omitted)

Assuming the *Hounsell* case is followed in the future, the Court has in essence added a *fifth* requirement for applying municipal estoppel – viz., the person asserting estoppel must prove that the “valuable public interest” balancing test favors estoppel in the particular circumstances of the case.

* * *

3-C. A BACK-SHIFT IN THE RELEVANT TIME – HOW A RESTRICTION CAN HAVE AN EFFECT BEFORE IT TAKES EFFECT.

I. No Vested Rights From Actions Taken With Knowledge of Likely Future Restriction. The case of *Piper v. Meredith*, 110 N.H. 291 (1970) involved a building height ordinance which the town meeting voted for twice (the second time because of doubt over the validity of the first vote). Piper, who, between the two votes, had spent money towards construction of a building in excess of the restricted height, claimed a vested right. The Court, without deciding whether the first town meeting vote was

valid, nevertheless said that none of the money spent by the owners, after they found out about that first vote, could count towards the “vesting” of a right:

“...the Plaintiffs took a ‘calculated risk’ in proceeding with the project, that is, ...they were not relying in good faith on the non-adoption of the ordinance.” (at p. 300)

And in *Bosse v. Portsmouth*, 107 N.H. 523 (1967), an owner began industrial construction *under a validly granted building permit*, but still was held to have acquired no vested rights, because at the time the construction was going on, the owner knew the ordinance allowing the industrial use was under court challenge as “spot zoning” (a challenge which later proved successful). Also see *Navin v. Exeter*, 115 N.H. 248 (1975), which said that an owner couldn’t get a variance to an existing ordinance while a new, more restrictive ordinance was pending.

LESSON: Someone who sees a restriction coming down the road can’t rush to acquire a vested right before it arrives. In order for an “investment-backed expectation” to be protected as “vested” (or grandfathered) it must be good-faith expectation, not only that the project is now legal, but also that it will *continue* to be legal. To put it another way, the type of good-faith reliance which leads to grandfathering has to be more than just reliance on the ability to be grandfathered.

II. The Reach-back Statute – RSA 676:12. The rule that someone with notice of proposed changes can’t get a vested right to violate those changes, is reflected in RSA 676:12, I, which says:

“I. The building inspector shall not issue any building permit within the 120 days prior to the annual or special town or district meeting if... (a) application for such permit is made after the first legal notice of proposed changes in the building code or the zoning ordinance has been posted pursuant to the provisions of RSA 675:7; and... (b) if the proposed changes in the building code or the zoning ordinance would, if adopted, justify refusal of such a permit.”

This statute was upheld by the Court in *Socha v. Manchester*, 126 N.H. 289 (1985), against a claim that it violated the constitutional prohibition against retrospective laws. The Court said that even though a law is retrospective and unconstitutional if it takes away vested rights, nevertheless if an owner needs a permit to begin a project, and that permit is never issued, s/he can’t legally have done enough construction (investment) to have gotten a vested right to finish that project. Therefore the statute is constitutional.

Note that the current version of this law allows for no more than 120 days during which building permits can be suspended under the above statute. It is also essential to understand that planning board applications which are exempt from new regulations by virtue of RSA 674:39, the Four-Year Exemption statute, *cannot* be denied permits under RSA 676:12.

* * *

3-D. HOW MUCH INVESTMENT DOES IT TAKE TO BE VESTED?

How many steps towards completing the project does the owner have to take, prior to the restriction, in order to have that project “grandfathered”?

“(The relevant thing) is ...the amount of money spent on improvements to change the use of the land in a tangible way which if substantial enough and done in good faith will create a vested right which cannot be affected by the enactment of a restrictive ordinance... (E)ach case presents a question of fact peculiar to its own set of circumstances. The ultimate objective is fairness both to the public and to the individual property owners.” (*Piper*, supra at 299-300, citations omitted.)

Anyone for nailing jello to a wall? The only way to get a handle on when that magic “vesting” occurs is to look at specific examples the Court has decided:

(i) In the *Piper* case itself (above), the court said that: (a) The purchase of the land itself doesn't count, since that's not an investment made in furtherance of the actual change of the use; (b) The net money spent by Piper (after taking out land cost) was \$28,000, compared to a total project value of 1.7 million. That wasn't enough to vest the right to complete.

(ii) The rule that buying the land doesn't count towards “vesting” may seem fair when the zoning change involved is a height restriction (as in the *Piper* case itself), which doesn't affect the market value of raw land too much. But what about a substantial market value loss? Answer: it still doesn't count. In *Gosselin v. Nashua*, 114 N.H. 447 (1974), zoning had been changed to prevent shopping centers, after the owner had spent \$330,000 on the land and \$100,000 on planning, architecture and engineering fees for a shopping center. Held: These types of costs still don't lead to vested rights.

[Unfortunately this rule is clouded by the case of *Batakis v. Town of Belmont*, 135 N.H. 595 (1992). Based solely on the Planning Board's “preliminary approval” (part of what's now called “design review phase” – see RSA 676:4,

II(b)), the applicant spent \$290,000 purchasing land for a mobile home park. The Court held that the Board was bound by its "preliminary" vote, and could **not** deny final approval. The Court weaseled out of examining the legal standards for either "estoppel" or "vested rights," relying instead on its ability to overturn a planning board decision which it believes is "unreasonable" (RSA 677:15)]

(iii) *Amherst v. Cadorette*, 113 N.H. 13 (1973). At the time the restriction against mobile homes was enacted, Cadorette had 28 homes actually in place on his land out of a planned 60-unit park, only part of which had been developed. He later got a variance to increase to forty. Held: There's no vested right to more than the forty sites, because nothing had been spent to develop the other sites prior to the restriction.

(iv) But compare *Grondin v. Hinsdale*, 122 N.H. 882 (1982). After Grondin had already developed sites for 156 mobile homes, the town set a limit of 350 on the total number of mobile homes in town. Held: Grondin's park was vested, and was thus exempt from any numerical limit. The difference between this case and *Cadorette* is the difference between raw land and developed mobile home sites.

(v) The latest and best case on how much investment it takes to obtain vested rights is *AWL Power, Inc. v. City of Rochester*, 148 N.H. 603 (2002). AWL got approval in 1987 for 18 homes and 59 condo units. It had built 70% of the roads and utilities (only 10% of the total project) in 1990 when the market went south. Ten years later, ordinances had changed, and the planning board revoked the approval

The Court emphasized that the rationale for vested rights is that a developer has spent money in good faith reliance on the absence of restrictions (***again, good-faith investment-backed expectations***). It said "substantial construction" could not mean the same thing as "substantial completion" (the term used in RSA 674:39, the 4-year Exemption), but instead only requires a substantial ***beginning*** on the project:

"The correct standard for "substantial construction" vesting considers not only construction measured against the entire plan, but also whether the amount of completed construction is *per se* substantial in amount, value or worth."

Important: The Court said this "per se substantial" standard ***does*** also apply to the 4-year Exemption statute. Therefore the language of "substantial completion" in that statute cannot be applied literally, but must instead be read consistent with the *AWL Power* case.

* * *

4. CHANGES AND EXPANSIONS OF GRANDFATHERED USES. [or: 'Old Man, New Tricks']

Here's where the rubber really hits the road. Deciding whether a use or structure is 'grandfathered' or not, complex though it is, is fairly easy, compared with having to decide whether 'grandfathered' rights can be carried over to a new or expanded use. It's in the area of changes or expansions that the toughest legal questions arise.

4-A. THE NEW LONDON LAND USE CASE.

The case of *New London Land Use Assn. v. New London ZBA*, 130 N.H. 510 (1988) still provides the best example our NH Supreme Court has given us of the legal rules for when a nonconforming use can be changed or expanded. Lakeside Lodge owned a motel consisting of 17 housekeeping cottages. This density was roughly double the density permitted by zoning and therefore was a nonconforming use. The motel was also a nonconforming commercial use in a residential district. Lakeside wanted a special exception to construct a 17-unit condominium development, consisting of entirely new buildings with about double the total floorspace of the existing motel. The issue was whether Lakeside could use its nonconforming density (17 units) for the new development. The Court said no.

“Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance... However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate...”

“We must also consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood...” (130 N.H. 516-17, citations omitted)

Runs With The Land: The Court also said nonconforming uses may be passed to subsequent owners, and that a change from tenant occupancy to owner occupancy is not, in and of itself, an extension or expansion of a nonconforming use.

WHAT IS THE NONCONFORMING USE? *Dissent's view:* C.J. Brock, in his dissent in the New London case, said there were two nonconforming uses: the commercial nonconformity and the density nonconformity. In his view, Lakeside had a vested right to continue with the nonconforming density, even in the new project, since the number of units wasn't going to expand. *Majority view:* To the majority, however, the relevant question was this: At the time of the adoption of the ordinance, what did the owner have an investment-backed expectation of? The answer is "a seventeen-unit motel on a seventeen-acre parcel," not an abstract interest in the number seventeen:

"Absent a willing relinquishment of its nonconforming use, Lakeside may not substantially change the way in which the motel units were situated on the seventeen-acre parcel when the nonconforming use was created... The changes which Lakeside proposes are not required for, nor are they reasonably related to, the continuation of the use that existed at the time the zoning ordinance was passed." (130 N.H. at 517, emphasis added)

In other words, a "nonconforming use" is the use *as a whole*, and the effect of that use as a whole can't be adequately analyzed by dividing it into its constituent elements.

SUMMARY OF NEW LONDON CONSIDERATIONS FOR LEGALITY OF CHANGES IN NONCONFORMING USES:

(A). Does the proposed change arise "naturally" (through evolution, such as new and better technology) out of the "grandfathered" use; In *Hurley v. Town of Hollis*, 143 N.H. 567 (1999), this prong was expressed as **"the extent to which the use in question reflects the nature and purpose of the prevailing nonconforming use."**

(B) Is it required for the purpose of making the existing use more available to the owner; or does it constitute a new and different use? In *Hurley*, this prong was phrased as **"whether the use at issue is merely a different manner of utilizing the same use, or constitutes a use different in character, nature and kind."**

(C). Will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of the ordinance? [This is an especially important test for dimensional nonconformities; see § 8 below.]

(D) Will the change or expansion have a substantially different effect impact on abutting property or the neighborhood?

The owner must carry the burden on *all* of these questions in order for any change or expansion of a “grandfathered” use to occur. [Note that after the *Hurley* case our Supreme Court has, alas, referred to the above as “the 3-part test” (having entirely left out Test C). However in my view Test C is still a valid one when dimensional nonconformities are involved.]

Remember The Purpose Of These Tests! The tests for changes and expansions of nonconforming uses, as set forth in the *New London* case, are *not* to gauge the community impact of the nonconforming use or structure. On the contrary, the test is based on the assumption that *all* nonconformities have a negative impact because they violate the Ordinance. The Court said: **“The ultimate purpose of zoning regulations contemplates that nonconforming uses should be reduced to conformity as completely and rapidly as possible.”** Instead, the purpose of the tests is to determine whether, despite that presumed negative impact, the proposed change or expansion is constitutionally protected because it is within the vested rights (investment-backed reliance) represented by what existed before the ordinance took effect. That takes looking at the pre-existing use *as a whole*, and not just at the portion actually violating the Ordinance.

Notice also that the last prong of the test is only whether the change or expansion will have “a substantially different impact. *It doesn’t really matter whether that impact is better or worse.* The word “adverse” appears nowhere in the test! Again, the purpose of the test is not to measure adversity or impact. The purpose is instead to measure how *different* the new proposal is from the vested, pre-existing use. **“A substantial change in the nature and purpose...will be prohibited, even if the proposed use is less offensive than the original use.”** (Peter Loughlin: 15 N.H. PRACTICE, LAND USE PLANNING AND ZONING at Section 8.06, quoting *Stevens v. Town of Rye*, 122 N.H. 688 (1982)). Again, your mindset should be that *all* nonconformities are adverse and should be eliminated. The *New London* tests only protect those uses or structures which must nevertheless be allowed, because they are part of a justified investment-backed expectation pre-dating the ordinance.

* * *

4-B. FURTHER CASE EXAMPLES OF CHANGES OR EXPANSIONS.

The Court’s test in the *New London* case, using words like “substantial” and “a natural activity,” may seem about as easy to grab hold of as a greased pig. The best approach is to look at the decided cases:

(i) *McKinney v. Riley*, 105 N.H. 249 (1964). A junkyard owner whose operation had been part-time, with only 5 or 6 cars at a time, was held **not “grandfathered”** for a full-time operation with 100 cars. [Note: Junkyards are now controlled by statute, RSA 236:90 et seq., but the case is still good law on the expanding a nonconforming uses.]

(ii) ***New And Better Technology Allowed:*** In *New London v. Leskiewicz*, 110 N.H. 462 (1970), the nonconforming use was for picnicking and tent camping, and the court said it could legally be expanded to include camper-trailers without a substantially different impact on the neighborhood:

“The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not in itself preclude the use made from being a continuation of the prior nonconforming use, provided such means are ordinarily and reasonably adapted to make the established use available to the owners and the original nature and purpose of the undertaking remain unchanged.” (at 467, citations omitted)

(iii) ***Increased Intensity Ok, But No Expansion In Area:*** *Hampton v. Brust*, 122 N.H. 463 (1982) tells us that a nonconforming video arcade could replace its old pin-ball machines with video games (again, new technology for same use), and could increase the number of machines in the same room, but could not expand them into another room in the same building, which had previously been a conforming gift shop:

“(W)here there is no substantial change in the use’s effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use. For example, a law firm in a building constituting a nonconforming use could increase its numbers of lawyers or clients, its internal and external use of its premises or amount of work activity. Similarly, a nonconforming restaurant could add more tables and chairs or serve more dinners.” (at 469, emphasis added.)

(iv) ***Condominium Conversion Cannot Be Denied Unless There Ts Change in Use.*** In *Cohen v. Town of Henniker*, 134 N.H. 425 (1991) it was held that the conversion of a “grandfathered apartment complex to a condominium form of ownership, when the conversion entails no actual change in the *use* of the property, is part of its “grandfathered” rights, and is not an illegal expansion. This same ruling was reiterated in *Town of Rye Selectmen v. Town of Rye ZBA*, 155 N.H. 622 (2007), except that there is was based upon the prohibition of discrimination found in the Condominium Act (RSA 356-B). *Also see Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H.222 (2009).

Again a condominium conversion must be permitted only *if the use does not change*. In my view there may be cases where, despite the lack of *physical* changes, the conversion itself *does* constitute a change in use. Consider, for example, the conversion of a campground serving transient guests to condominium units where each site becomes an individually-owned unit. In the *Dovaro 12* case (above) the Court said:

“While a municipality may require a special use permit, special exception or variance for the [condo conversion] project, such a requirement may be denied only if the conversion *itself* would have an actual effect on the use of land... To determine whether the conversion would have an actual effect on the use of land, we examine the same factors that determine whether there has been a substantial change to a preexisting nonconforming use.”

(v) **No Brand-New Buildings.** In *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992), a nonconforming marina wanted to build a brand-new boat storage building, claiming that it was a “natural expansion” of their marina business. Justice Johnson wrote:

“We have never permitted an expansion of a nonconforming use that involved more than the internal expansion of a business within a pre-existing structure... (Here) the new building clearly has a greater aesthetic impact on the abutting property than the other five buildings... (hence) will have a “substantially different impact on the neighborhood.” (citing *New London*)

(vi) **“Appropriateness” Is Irrelevant.** In *Stevens v. Town of Rye*, 122 N.H. 688 (1982), the Supreme Court said a “grandfathered” auto garage couldn’t change into a plumbing and bath supply shop, because that would be a substantial change in the nature and purpose of the use. The trial judge's finding that the bath shop was “better suited” to the neighborhood than the garage was held irrelevant.

(vii) *Ray’s Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995). Ray’s was a nonconforming convenience store in a residential district, with a coffee counter inside already. The new proposal was to relocate the coffee counter, without expanding the building, and also to replace an existing sign advertising Pepsi with a Dunkin’ Donuts sign of the same dimensions. The ZBA said this was an illegal expansion, but the Court overturned the Board, and called this a “natural” expansion, citing the *New London* test and *Hampton v. Brust*. (**Query:** Would the result have been the same if an abutter had produced evidence that the switch to Dunkin’ Donuts had caused a 4-fold increase in traffic and illegal parking?)

[I guess a donut is a donut. I dare you to find holes in that argument!]

(viii) *Conforti v. City of Manchester*, 141 N.H. 78 (1996). The owner of a “grandfathered” movie house in a residential neighborhood started having live entertainment (rock concerts). The Court applied the *New London* test and found that the live entertainment was an illegal expansion of the use because it had a “substantially different effect on the neighborhood,” due to the noise.

(ix) **“Grandfathered” Accessory Use Unlikely To Be Allowed To Become Primary Use.** *Town of Salem v. Wickson*, 146 N.H. 328 (2001) Wickson’s land had been a nonconforming farm. As part of the farm, chicken and pig manure had been stored, mixed with sand trucked onto the property, and sold as fertilizer. Later the farm operation ceased, but the owner kept trucking sand and other earth materials onto the property to stockpile it for sale. The question was whether the continuation of this use, without the underlying farm use, was an illegal change in the nonconforming use. The Court said it was.

Here the change flunked two parts of the *New London* test. The present earth stockpiling was no longer subordinate and incidental to farming. Again, the heart of nonconforming uses is *investment-backed expectations*. The original use, in which there was such an expectation, was farming, not stockpiling earth. There was also evidence of an much different impact on neighbors.

* * *

5. THE PUBLIC HARM EXCEPTION TO GRANDFATHERING. [Or: ‘Keeping Out Polluted Progenitors’]

Under “takings” law, even a vested right or “investment-backed expectation” can be “taken” without compensation if it is an activity which causes public harm. Just common sense tells us that if somebody has an expectation of being injure the vested rights of others, or of the public, that expectation can’t be justified, and therefore isn’t be constitutionally protected. If this weren’t true, most of our twentieth century environmental laws couldn’t be effective. The best New Hampshire cases discussing this issue are the wetlands cases. See *Sibson v. State*, 115 N.H. 124 (1975); reaffirmed even after *Burrows* in *Claridge v. Wetlands Board* 125 N.H. 745 (1984); and *Rowe v. Town of North Hampton*, 131 N.H. 424 (1989).

In the famous *Keystone* case, the United States Supreme Court upheld Pennsylvania's “anti-subsidence” mining law requiring 2% of all coal to be left in the ground in order to hold up the world (like the mythical Atlas) so that houses, trees, streets etc. don’t go crashing down into the mine. The Court said:

“Long ago it was recognized that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community...and the Takings Clause did not transform that principal...” (*Keystone Bituminous Coal Assn v DeBenedictis*, 107 S.Ct. 1232, 1245 (1987).)

This “nuisance exception” to the “taking” doctrine in general, and to “grandfathering” in particular, was recognized in New Hampshire in the case of *LaChapelle v. Goffstown*, 107 N.H. 485 (1967), where our New Hampshire Supreme Court upheld an ordinance requiring termination of junkyards, even when they have the status of a nonconforming use, because they are such a health and safety hazard and create neighborhood blight. Later, in *L. Grossman & Sons, Inc v. Town of Gilford*, 118 N.H. 180 (1978), the Court took great pains to distinguish a “harmful” junkyard from a non-“harmful” advertising sign, which, as we saw in *Dugas* (above), is protected:

“The sign in question here is located in a commercial area among several other signs of similar size and nature. A reduction in the size of the sign would have no appreciable effect on the neighborhood. Its existence in no way diminishes the value of other property. It is not a health or safety hazard. No fumes, smoke, or noise is generated by the sign to the detriment of the neighborhood. The case thus differs greatly from...” (*Lachapelle*, 118 N.H. at 483)

The *lesson* here is that uses which aren’t harmful to the public can’t be required by the town to be terminated. The lesson is *not* that signs can never be harmful. That’s a factual issue which depends on evidence. The result of this case may have been much different if the sign had been located on a dangerous curve, and evidence showed that several auto accidents had occurred because drivers were distracted by the sign.

The LUCAS Case - What Is a Nuisance?

There was some concern in 1992 when the U.S. Supreme Court attempted to narrow the public harm exception in the case of *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886. Lucas had bought two half-million dollar beachfront residential lots only to see them later zoned as part of a “critical area” designation where no buildings at all were allowed. The Court held that if regulations have the effect of “taking” *all* of the economic value of the property rights, compensation is required unless the activities sought to be prevented were not part of the owner’s title in the first place – that is, unless the restrictions merely incorporate **"background principles of the State's (common) law of property and nuisance..."**

It is now clear, in my view, that the *Lucas* case did *not* ring the death-knell of the public harms exception, as it applies to strip protection from “grandfathered” uses. It’s true that zoning ordinances enacted after a use is established would not *seem* to be part of the “background” principles of common-law nuisance. But it’s not so easy to divorce the common law from new legislation. In *Triesman v. Kamen*, 126 N.H. 372 (1985), the court said (at 375) that **“ordinances as highly persuasive indications of what society considers reasonable in the use of property,”** and thus the fact that an owner’s use violates an ordinance is relevant, though not conclusive, on the issue of whether it’s also a nuisance.

Our New Hampshire Supreme Court’s references to the *Lucas* case have been in the context of *upholding* the validity of the ordinances and the nuisance doctrine. In *Smith v. Town of Wolfeboro*, 136 N.H. 337 (1992), the Planning Board had disapproved a portion of Smith’s subdivision because of “exceptional danger to health.” The Court cited *Lucas* in holding that there was *not* a “taking”:

“We find no constitutional defect in a regulation that seeks to prevent development which poses an ‘exceptional danger to health.’ Such a regulation would not exceed tort and property law restrictions even if it were applied to deprive an owner of all economically viable use of his or her land (Citing Lucas). Even in the absence of State regulation, no landowner has the right to use his or her property so as to injure others...”

Thus, there is still reason to believe that *nobody* is “grandfathered” from a regulation whose only aim is to prevent ‘public harm’ activities which violate the rights of others. The most recent case on ‘public harm’ is *Fischer v. Building Code Review Board*, 154 N.H. 585 (2006). Fisher owned buildings in Durham that had for years been treated as duplexes. Since the reality was that each duplex was rented to 4-6 unrelated college students, the Fire Chief decided they were rooming houses and needed improved fire escapes. Fisher claimed he had a ‘grandfathered’ right to the duplex designation, but the Supreme Court said **“There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.”**

In my view it’s fair to say that, at least in N.H., this statement *does* represent one of the ‘background principles’ of property law, for purposes of the *Lucas* decision.

* * *

6. PROCEDURE – WHO DECIDES WHAT’S GRANDFATHERED? [Or: ‘How to Determine the Old Man’s Pedigree.’]

6-A. APPEALS TO THE BOARD OF ADJUSTMENT.

Under RSA 674:33, the Zoning Board of Adjustment has the authority to:

"Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by the administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16."

Thus the final decision at the local level, on a claim of being ‘grandfathered’ under a *zoning ordinance*, should be made by the Zoning Board of Adjustment. ‘Grandfathered’ rights could come up as an issue by several pathways, as follows:

(i) The owner, assuming s/he’s ‘grandfathered,’ just goes ahead and begins expanding the use. A neighbor or some other citizen complains to the zoning administrator (building inspector, selectmen, or whoever administers the ordinance in the town). The administrative officer then decides whether the owner’s activity is or is not ‘grandfathered.’ If the administrative officer decides in favor of the owner, the complainer can appeal to the ZBA. If the administrative officer decides that there’s a violation (i.e. not grandfathered), the *owner* can appeal to the ZBA. (See RSA 676:5.)

Note: ZBA Can Attach Conditions: Peabody v. Town of Windham, 142 N.H. 488 (1997) was a case about whether a ‘grandfathered’ well-drilling business, in a residential district, could be converted to a road-paving business. The ZBA said “yes,” but attached three conditions (1) no paving materials or vehicles on site; (2) Equipment on site limited to 10 pieces; (3) No vehicles larger than cars or pickups to use the access road. The Court looked at the *New London* tests, and held that the ZBA **could** attach conditions that might be necessary to prevent the property from violating the parameters of that test.

(ii) The owner comes to get a building permit, claiming his/her building is ‘grandfathered.’ The permit administrator makes the initial decision on that issue, which is, as before, appealable to the ZBA.

(iii) The owner comes to the ZBA for a special exception or variance, claiming a “grandfathered” right to the exception or variance. What happens now?

* * *

6-B. WHERE DO GRANDFATHERED RIGHTS FIT IN WITH SPECIAL EXCEPTIONS?

The simple answer is that they don't. A landowner cannot use a nonconforming use as a basis for a special exception. This rule was made clear in the *New London Land Use* case (above). New London's ordinance required compliance with zoning density standards as a condition of getting a special exception to construct a "planned unit development." The Court said:

"Absent a willing relinquishment of its nonconforming use, Lakeside may not substantially change the way in which the motel units were situated on the seventeen-acre parcel when the nonconforming use was created."

"(I)n considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements as set forth within the zoning ordinance." (130 N.H. at 517-8)

Therefore nonconforming aspects of an existing use can't be used to satisfy special exception standards. The owner must "fish or cut bait." If a proposal represents only an insubstantial change, within the vested right of the nonconforming use (under the 3-part test in § 4-A above), then that right exists *without* the special exception. On the other hand, if the change of use is so substantial as to require a special exception, then all aspects of the nonconforming use must be treated as having been relinquished by the owner. [***But*** see § 8-B, below, about separating the nonconforming structural aspects from the nonconforming use aspects.]

EXAMPLE: Dennis "Jaws" Overbight is a dentist who has worked in his home since long before zoning was adopted. He's always had three employees, but now wants to add a fourth. Your zoning ordinance (which, of course, has real teeth in it!) allows a home office only by special exception, with a limit of two employees.

There are several wrong ways to think about this example:

(i) First response: "Dr. Overbight is already in violation of the Zoning Ordinance because he doesn't have a special exception." ***WRONG.*** If he's "grandfathered," he doesn't need a special exception, at least not for his existing operation.

(ii) Second response: "OK, so he doesn't need one now. But he does need one in order to add a fourth employee." ***WRONG.*** Forget the special exception for now. You've first got to decide whether the fourth employee might be a "natural" expansion

(under the *New London* standards described in Section 4-A above – the *Brust* case, for example), and thus allowable as part of the “grandfathered” right. Also ask whether the addition of another employee is going to make the property “proportionally less adequate”; and whether there’s a substantially different impact on the neighborhood. If not, he can do it even *without* a special exception. If so, he can’t do it at all without a variance, since he’s already over the 2-employee limit.

* * *

6-C. ZONING CLAUSES WHICH REGULATE NONCONFORMING USES – DO THEY SUPERSEDE THE COMMON LAW?

Many zoning ordinances contain clauses which deal directly with nonconforming uses. If so, these clauses may supersede the common law standards discussed above, *as long as they are not more restrictive*. For example, the ordinance might say: “A nonconforming use may be expanded up to 10 percent by special exception.” If an ordinance says this, then of course the “grandfather” issue and the special exception issue *are* related, and the extent to which a “grandfathered” use can expand *is* controlled by the special exception criteria.

For illustration, in *Bois v. Manchester*, 105 N.H. 300 (1964), the zoning ordinance allowed any nonconforming use in part of a building to be extended throughout the building, and furthermore allowed any nonconforming use to be changed to any other use which would be permitted in a district where the original use would be permitted, so long as it was not more objectionable or detrimental to the neighborhood. The Court applied these standards and allowed a nonconforming auto body shop in part of a building to be changed to a plumbing supply store in the whole building. This certainly would not have been permitted under the *New London* tests for expansion of “grandfathered” uses (Section 4-A above).

Court Preference For Construing Local Clause Consistent with the New London Test On the other hand in *Hurley v. Hollis*, 143 N.H. 567 (1999), the local ordinance contained a special exception clause containing criteria which were very close to, but not quite the same as, the *New London* tests (§ 4 above). The Court, based on the history of the provision in question, ruled that the local clause was intended to incorporate the *New London* test, and then decided the case based on that test. Other cases where a local nonconforming use was construed by applying the *New London Land Use Assn.* test include:

– *Ray’s Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995) The local clause allowed a nonconforming use to be “changed or extended” but the

Court said “we construe Article V, section 307-26 of the Pelham Zoning Ordinance to be consistent with RSA 674:19, which we have interpreted, along with its predecessor statutes, as limiting any “extension,” “expansion,” or “enlargement” of a nonconforming use and prohibiting its change to a “substantially different” nonconforming use.”

– *Kelsea v. Town of Pembroke*, 146 N.H. 320 (2001) was a case about increasing the height of a telecommunications tower, already nonconforming as to use. The local ordinance had two nonconformity clauses, one governing nonconforming structures, the other governing nonconforming uses. Nevertheless the Court sent the case back to the Trial Court for a decision under the *New London* test.

* * *

6-D. HOW DO "GRANDFATHERED" RIGHTS FIT IN WITH VARIANCES?

Answer: A nonconforming use and a variance, even though of different origins, are legally the same, namely a legalized violation of the ordinance:

“Since the extension or enlargement of a nonconforming use may be more detrimental to zoning than a variance, it has generally been held that a nonconforming use stands in no preferred position. (Therefore) the extension or enlargement of a nonconforming use is to be treated as a variance.... A variance has been defined as authority granted to the owner to use his property in a manner otherwise violative of the zoning regulations... (A variance) granted ... result(s) in a nonconforming use.” (*New London v. Leskiewicz*, 110 N.H. 462, 465-6 (1970), citations omitted.)

Both nonconforming uses and variances are legal animals born of the same mother, namely the constitutional protections on property rights. But whereas the law of nonconforming uses came out of the constitutional protection of investment-backed expectations, variance law developed out of the constitutional protection against depriving property of its economically viable use. Different branches of the same tree. Different forks of the same river. (Different tired metaphors...)

“Variances are provided for by zoning statutes so that litigation of constitutional questions may be avoided and a ‘speedy and adequate remedy afforded.’” *Bouley v. Nashua*, 106 N.H. 79, 84 (1964).

Since the two types of rights are legally the same, any use which is “grandfathered” doesn’t need a variance too; in essence it already has one.

THEREFORE, IF AN OWNER WISHES TO EXPAND OR CHANGE A NONCONFORMING USE: s/he can EITHER:

(a) Argue that the expansion is a “natural” expansion which doesn’t change the nature of the use, doesn’t make the property proportionally less adequate, and doesn’t have a substantially different impact on the neighborhood (the standards for expansion or change of use discussed above in Section 4). ***If this is true, no variance is required*** for the expansion. **OR:**

(b) S/he can apply for a variance and satisfy ***all*** of the five normal variance criteria...***for the use as a whole, not just for the expansion.*** (See, e.g., *Margate Motel v. Gilford*, 130 N.H. 91 (1987).)

What s/he ***cannot*** do is “bootstrap” his/her way into a variance by claiming that the nonconforming use constitutes “hardship.” Remember that under the *New London Land Use* case, in order to go beyond the limited “natural” expansion of a nonconforming use, as set forth in that case, the owner must ***willingly relinquish*** the nonconforming use. (Also see *Stevens v. Rye*, 122 N.H. 688 (1982), which says that a nonconforming use can’t serve as a shortcut to establishing the variance criteria.)

The complete irrelevance of “grandfathered” rights to the hardship standard is shown by *Crossley v. Town of Pelham*, 133 N.H. 215 (1990). The owners lived on a lot which met only 1/3 the required lot area and 1/2 the required frontage. They wanted to replace their 1-car garage with a 2-car garage, and applied for a variance. The Court (Justice Souter) said their lot’s nonconforming size did ***not*** constitute “unnecessary hardship,” because over 200 lots in the area had the same problem:

“(I)t is difficult to imagine an set of facts less apt to satisfy the condition that hardship be unique to the applicant’s parcel, distinguishing it from others in the area....” (133 N.H. at 217)

And in *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992, cited above in § 4-B), the Hebron ZBA had tried to justify a variance to expand a nonconforming marina on the ground it was the only marina in Hebron, and that this constituted a “unique condition of the land” causing unnecessary hardship. But the Court (Justice Johnson) said that ***“A nonconforming use... may not form the basis for a finding of uniqueness to satisfy the hardship test.”***

In short, the owner can’t have it both ways. If s/he can’t do what s/he wants to do within the confines of allowable “evolution” of the nonconforming use, then s/he must qualify for a variance the same way as if there ***were no*** nonconforming use.

Question: Is this still true after SIMPLEX? The case of *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001) created a new standard for “unnecessary hardship”:

“Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.”

In light of this, the question naturally arises whether the nonconforming use counts as part of the “unique setting of the property in its environment,” so as to, in a sense, allow a “bootstrap” from a nonconforming use into a variance. **Answer:** The fact that a use is nonconforming still does *not, per se*, count as “hardship.” That use *does*, however, count as part of the “unique setting” of the property, for purposes of applying the variance standards. (*see Farrar v. City of Keene*, 158 N.H.684 (May 2009).) **BUT... the fact that something is “grandfathered” does not by itself make the “fair and substantial” test any more or less likely to be met!** Thus there still is no legal “bootstrapping” involved.

No Right To Violate Variance Conditions. The one clear way in which a variance is *not* like a nonconforming use is that the holder of a variance is required to comply with any *conditions* (express or implied) which the ZBA originally attached to that variance. This is true *even if* the owner would arguably have a right to violate those conditions under the *New London* test for “natural” expansions. *See Pope v. Little Boar’s Head District*, 145 N.H. 531 (2000).

* * *

6-E. HOW DO “GRANDFATHERED” RIGHTS FIT IN WITH SITE PLAN REVIEW?

In *Town of Seabrook v. Vachon Mgt. Inc.*, 144 N.H. 660 (2000), an adult business called “Leather and Lace” had had adult books and video booths in one store unit, but tried to expand into an adjoining Unit #2, which had been a computer store. The expansion began with some nude mud wrestling shows back in 1991. The building inspector at that time told the owner site plan review was required. None was applied for. The Town passed an adult business zoning restriction in 1994. But in 1996 live nude dancing “fantasy booths” were installed in Unit #2. (Not exactly Tolkienesque!)

Site Plan Jurisdiction Versus Grandfathering. RSA 674:43 allows towns to require site plan review for “the development or *change or expansion of use*” for non-residential and multi-family uses. The Court said the change in use of Unit #2 from a computer store to live entertainment was a “change of use” which required site plan review. Since the change of use didn’t get the required site plan approval, it was not legal when it began, hence was not “grandfathered” as a nonconforming use. The owner tried to claim that going from video booths to live nude dancing booths was merely a “natural expansion.” (Ahem!) But the Court said the test for a change-of-use under *New London* was different from the change-of-use test for site plan jurisdiction:

“The requirement that an expansion of a nonconforming use be ‘substantially different’ before a land use regulation will apply provides a check on the town’s authority to regulate out of existence a vested property right. By contrast, the purpose of requiring site plan approval is to assure that sites will be developed in a safe and attractive manner and in a way that will not involved danger or injury to the health, safety, or prosperity of abutting property owners or the general public.”

[Besides, any “grandfather” that gets caught in a business like this ought to be ashamed of himself!]

LESSONS:

(1) Note here, just as in *Hampton v. Brust*, 122 N.H. 463 (1982) and *Grey Rocks Land Trust v. Hebron*, 136 N.H. 239 (1992), that the Court is continuing its tradition of not allowing an expansion into a brand new building, or part of building, to count as a “natural expansion” of a nonconforming use.

(2) More importantly, the Court, in distinguishing between two different ‘change-of-use’ standards, appears to be saying that *some changes will require site plan review even if the use itself IS “grandfathered.”* Thus a nonconforming use claim is *not* a ticket for a “free ride” through the planning board.

* * *

7. TERMINATION OF GRANDFATHERED RIGHTS. [Or: ‘But it stopped, short, ne'er to go again, when the old man died.’]

7-A. ABANDONMENT.

A “grandfathered” right can be lost if it is abandoned by the owner. Look at *Lawlor v. Town of Salem*, 116 N.H. 61 (1976). One Mr. Cousins owned a mobile home in an area which was later zoned to prohibit mobile homes. Cousins left town in 1965, and the mortgage bank got the property. The mobile home became vandalized and

uninhabitable, and was taken off the land in 1969. Lawlor bought the land through foreclosure in 1971, and wanted to put in a new mobile home. The Court said he couldn't, because the nonconforming mobile home use had been abandoned:

“Abandonment depends upon the concurrence of two factors: (1) an intention to abandon or relinquish the use, and (2) some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the use... The decisive test is whether the circumstances surrounding such cessation of use are indicative of an intention to abandon the use and the vested rights therein.” (116 N.H. at 62, citations omitted)

In the *Lawlor* case, the “overt act” was the physical vacating of the mobile home, and the “intent” was established by the circumstantial evidence that the property was left unattended for so many years.

* * *

7-B. ZONING ORDINANCE "USE IT OR LOSE IT" CLAUSES.

Some ordinances try to get around proving the intent to abandon and the overt act, by setting a time deadline for any nonconforming use to be restored. A typical provision might say that any nonconforming use which is discontinued may be resumed within 2 years, but no later.

How valid are these clauses? In *McKenzie v. Town of Eaton ZBA*, 154 N.H. 773 (2007), the NH Supreme Court made it clear that these clauses ***must be presumed valid***. The case involved a shed which was ‘grandfathered’ from a lakeshore setback, which had been destroyed in a windstorm. The ordinance said destroyed structures must be built back within one year or lose their nonconforming status. The ZBA (based on advice from Yours Truly, and a prior version of this lecture) held that the 1-year clause didn’t apply, because the owner hadn’t “abandoned” the right to build the shed back (under the *Lawlor* case). But the Court held that the law of “abandonment” didn’t apply. Justice Duggan, in a concurring opinion, suggested that the result might have been different if the owner had specifically raised a constitutional “takings.” Claim.

In light of *McKenzie*, here is my (new) advice on how to handle these clauses: (a) If the owner doesn’t raise any constitutional “taking” claim, the ‘use-it-or-lose-it’ clause should be applied strictly and literally (any constitutional claim that isn’t raised before the Board cannot be raised later in court). (b) If a “taking” claim is raised, the law of abandonment should be applied, ***but*** the failure to build back within the stated period

should be *presumed* to be an abandonment (after all, every citizen has constructive notice of the ‘use-it-or-lose-it’ period). (c) The only kind of case where the failure to abandon should be deemed to control – despite a ‘use-it-or-lose-it’ clause – is where the failure to resume the use (or structure) during the period is due to circumstances truly beyond the control of the owner (for example bureaucratic delay in obtaining a State permit).

* * *

7-C. AMORTIZATION CLAUSES.

An “amortization clause” goes far beyond a “use it or lose it” clause, and requires even an active nonconforming use to be terminated within a specified time.

Current New Hampshire case law is very clear: These clauses are *not valid* unless the activities required to be terminated are injurious to the public health and welfare (the “public harms” test, § 5 above). It wasn’t always so. Back in 1967, Chief Justice Kenison spoke favorably of termination clauses:

“There is a clear, though as yet not decisive, movement to approve legislation requiring the elimination of all non-conformities. The courts are slowly, but persistently, upholding amortization provisions...” (*Lachapelle v. Goffstown*, 107 N.H. 485, 487.)

But in *L. Grossman & Sons, Inc. v. Town of Gilford*, 118 N.H. 480 (1978), the Court turned its back on Kenison, saying that amortization clauses can only apply to nuisances uses like junkyards. And in *Loundsbury v. City of Keene*, 122 N.H. 1006 (1982), another sign case, the statement was even more clear:

“(E)ven when a valid public purpose exists, the application of a zoning provision (requiring the discontinuance of a nonconforming use) which is not directed at harmful activity, and which substantially deprives an owner of the use of his land constitutes a “taking” requiring the payment of just compensation.” (at 1010, citations omitted).

* * *

8. STRUCTURES, DIMENSIONS, LOT LINES AND SUBDIVISIONS. [Or: 'Space – Grandfather's Final Frontier.']

8-A. THE PROBLEM OF ADD-ONS TO NONCONFORMING STRUCTURES.

You know what gives zoning a bad name? It's cases like this:

Helpful Harry owns a house built in 1795 which, under current zoning, is too close to the street to comply with set-backs. He's worried that the rain splash-back from his historic granite doorstep is going to rot his historic hand-hewed sills and bring his house down in history. So he decides to protect the doorstep with a small portico. Harry doesn't think he needs permission to do this, but he's served on the planning board and knows Fred Firewall, the building inspector. Over coffee in the diner one morning, he mentions his plan. To his surprise, Fred says that, since the portico would extend into the setback, he'll have to go to the ZBA for a variance.

Harry loves his town and believes so strongly in good land use regulation that he's willing to put up with the "bothersome formality" of having to go to the ZBA to protect his doorstep. Unfortunately, by a vote of 3 to 2, the ZBA denies the variance. They say the standard of "unnecessary hardship" requires a showing that there exist particular circumstances relating to the uniqueness of the property and its environment which prevent the setback restriction from having a fair or substantial relationship to a valid public purpose, as applied to the particular property (*Simplex Technologies, Inc. v. Town of Newington*, 125 N.H. 721 (2001)). Harry doesn't qualify, since he's already got a reasonable use, and there's nothing unique about his property or its environment, which would diminish the public purpose of a setback. Harry storms out of the room. The two dissenting ZBA members say that if the process can do this to a guy like Harry, they want no part of it, and resign. The town loses three formerly time-generous, caring citizens to cynicism.

WHAT WENT WRONG? Did the Board use the wrong standards for a variance? No. ***What went wrong is that the ZBA should first have applied the tests for a 'natural expansion' of a nonconforming use, to see whether Harry even needed a variance!*** Our Supreme Court has given some guidance for these cases:

(i) *Town of Seabrook v. D'Agata*, 116 N.H. 472 (1976). D'Agata owned a house which was too close to the lot lines, but was "grandfathered." What he wanted to do was (1) enclose a formerly open area underneath the existing second floor, to form a

storage area, and (2) put walls and a cement floor on his existing carport. The Court said the town couldn't prevent the alterations, even though they were located within the required set-back areas:

“[The proposal] does not enlarge the square footage of the dwelling so as to render the lot size proportionally more inadequate.... The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not in itself preclude the use made from being a continuation of the prior nonconforming use provid[ed] such means are ordinarily and reasonably adapted to make the established use available to the owners....” (116 N.H. at 473-4, emphasis added).

(ii) *Town of Hampstead v. Capano*, 122 N.H. 144 (1982). The owner was trying to put front steps and a sun deck in a location which violated the set-back. The Court said the town must allow some form of front stairs even in violation of the set-back, since without them, the only entrance to the house was over boulders or through the side door. (Again, the steps are required “to make the established use available to the owners.”) But the Court said the elaborate sun deck was a new and different use, and couldn't be built in violation of the setback, without a variance.

NOTICE! It appears from the Court's short memorandum opinion that the Capano house was *conforming* in every way! RSA 674:19's protection of “existing structures” was cited to allow even conforming structures which antedate the restriction some very limited “grandfathered” right to expand, even if such expansion renders the structure nonconforming!

(iii) *Colby v. Town of Rye*, 122 N.H. 991 (1982). The owners of a “grandfathered” summer cottage wanted to winterize by enclosing the existing nonconforming porch and adding a new one in violation of the set-back. The Court upheld the town in allowing the enclosure of the old porch, but prohibited the new one because it was not required for the use of any part of the existing structure, and it was an enlargement which rendered the lot size proportionally more inadequate.

(iv) *Devaney v. Town of Windham*, 132 N.H. 302 (1989). Mr. Devaney owned a nonconforming summer camp structure on a 50-foot wide lot, *none* of which met Windham's 30-foot side setback. Over a 6-year period, without getting *any* local permits, Devaney added a second story, attic, new roof and gable, and increased the footprint by pouring a 13 x 18 foot foundation and constructed a 2-story structure above it, ignoring warnings and cease & desist letters from the Town. The Court said it was an “impossible stretch of the imagination” to call Devaney's work a “natural expansion” of the nonconforming use, and made him tear all the new work down.

(v) *Granite State Minerals, Inc., v. City of Portsmouth*, 134 N.H. 408 (1991). Granite State wanted to add 3 stories to the top of its building, which already violated setbacks. It argued (citing *D’Agata*, above) that its “grandfathered” rights included the right to unlimited vertical (“to the moon”!) expansion, as long as it didn’t change the footprint, because the *degree* of setback intrusion would not increase. But the Court rejected this “by the numbers” approach, just as it did in the *New London Land Use* case, saying that the expansion, examined *as a whole*, was clearly a new and different use with a substantially different impact on the neighborhood.

ADVICE: The Court in the *Granite State Minerals* case was swayed by the fact that Portsmouth’s Zoning Ordinance explicitly prohibited *all* expansions of nonconforming buildings, structures or uses. Other ordinances explicitly *allow* (for example by special exception) expansions which do not increase the *degree* of the nonconformity. This issue comes up so often that we highly recommend clear language about it to be put into your ordinance.

So What About Harry? In my view Harry’s portico is like the steps in the *Capano* case. As long as it is of a reasonable size, it is, under the *New London* test, merely for the purpose of “making the existing use (i.e. the established doorway and steps) available to the owners” and is not a new and different use. Fred Firewall (or the ZBA, on appeal of Fred’s administrative decision) could find (depending on the evidence, of course) that the portico was unobtrusive enough that it doesn’t render the premises proportionally less adequate, and that it didn’t have a substantially different impact on the abutters and neighborhood. Therefore Harry probably shouldn’t need a variance.

* * *

8-B. SAME STRUCTURE, NEW USE? – A PREDICTION.

The *Granite State Minerals* case, quoted above, involved the expansion of a nonconforming *structure* (nonconforming as to set-backs), but nevertheless held that the case should be decided under the test from the *New London Land Use* case, which asks about whether or not the *use* is the same, or whether it is a new and different use.

EXAMPLE: June “Chop-chop” Cleaver and her husband run a butcher shop that’s been in the family for generations, housed in a historic brick storefront that grossly violates set-backs and height restrictions. They want to retire and sell the building to Phil “The Sprout” Clover, to run a vegetarian restaurant. Phil loves the building, since he’ll be able to put in his eatery with *no* structural renovations. Both old and new uses are permitted, the only nonconformity being in the structure.

Does it Meet the New London Test For Changes Of Use? Not literally. It's a new and different use – a change from retail to restaurant. But the fact is, I suspect virtually every town in N.H. would probably allow this (as long as Phil meets other requirements like parking). Yet I have found no N.H. cases on point. It's a "meaty" question!

I predict (though I'm obviously speculating) that if this kind of case ever does come to the Court, the Court will ***not*** apply the *New London* test literally, and will allow this kind of change in use. Why? Think of the constitutional roots of "grandfathering." The Cleavers' "justified investment-backed expectation" was incorporated, in part, in their ***building***, as well as in their ***use***. When the use changes, the vested use goes away, but the vested building does not. [After all, in the case of *Kelsea v. Town of Pembroke*, 146 N.H. 320 (2001), the Court hinted that the structural aspects of a use were separable from the use aspects.] It would, in my view, be a much different case if Phil Clover were going to demolish the existing building and put up a new one. That would bring the case solidly under the *New London* precedent, and the new building would have to comply with the setback.

Time will tell whether I'm proved right.

* * *

8-C. SUBSTANDARD LOTS.

There is a popular myth that the owner of any substandard lot (lot which is smaller than, but pre-dates, the current zoning lot size or frontage requirement) is "grandfathered" for any and all uses allowed in its zoning district. ***This belief is mistaken.***

Substandard lots are not covered under the doctrine of nonconforming uses. That doctrine protects on ***existing uses***, not hypothetical future uses of a vacant lot. When the term "grandfathered" is applied to a substandard lot, that term is being extended beyond its normal meaning. There are ***three*** types of legal rights which might allow a new use on a substandard lot:

1. Substandard Lots – Issue A: "Lot-of-Record" Savings Clause In Ordinance.

Some zoning ordinances have a clause permitting any substandard lot pre-dating the ordinance to be exempted from frontage or lot size requirements. If so, the ordinance is giving ***more*** protection to these lots than state law necessarily requires. Towns should be very careful in drafting these types of clauses. The decision whether to grant

postage-stamp lots next to a lake, which may only have small cottages on them, an automatic unlimited right to convert to year-round homes, is a serious policy issue. In *Fifield Island, Inc. v. Town of Hampton*, 124 N.H. 828 (1984), a clause exempting lots-of-record from the frontage requirement was held to allow building on a lot which didn't have **any** frontage on a town road. I doubt that's what the drafter's had in mind. (**Note:** Today, the case would probably be decided differently, because State law – RSA 674:41 – requires minimum frontage on some type of road, and states, in Paragraph III of the statute, that it supersedes any less stringent local ordinance.)

Some ordinances exempt pre-existing lots from **some** requirements (say, lot size), but not others (say, water body setbacks). Another variation allows buildings on substandard lots only by special exception. Some towns have a second minimum lot size, such that below that, even lots-of-record can't be built on without a variance. Many others have no substandard lot "grandfathering" at all. ...Which brings us to:

II. Substandard Lots – Issue B: Lots Which Are Part of a Vested Subdivision (RSA 674:39 and 676:12, V).

The second type of case where a substandard lot may be legally immune from a regulation, even where there's no "savings" or "lot-of-record" clause, is when that lot is part of a vested subdivision. A development project which is a subdivision can acquire vested rights to be completed, just as can a project on a single lot. The substantial investment in the subdivision as a whole can confer vested rights on every lot within that subdivision, even though no construction may have occurred on the specific lot you're looking at. *See Navin v. Exeter*, 115 N.H. 248 (1975). *Henry & Murphy v. Town of Allentown*, 120 N.H. 910 (1980). Furthermore such vested rights are protected by the following two statutes:

(a) **RSA 674:39** says that any recorded subdivision plat is exempt from later changes in zoning or subdivision regulations for a period of four years. However:

(i) The exemption doesn't extend to regulations are to protect public health standards; **and**

(ii) There must have been "active and substantial construction" on the site within 12 months of the approval date, **if** the planning board or regulations specify what type of work qualifies as "active and substantial." (Under current law, if the regulations and decision are silent on this issue, the subdivider gets the full 4-year exemption).

(iii) In *Chasse v. Town of Candia*, 132 N.H. 574 (1989), the Supreme Court made it clear that RSA 674:39 does **not** apply to plats which have **not** been recorded.

The Chasses' 1956 plan showed a subdivision of 93 lots, none of which complied with current size requirements. The Court said that since the plan had never been approved or recorded, RSA 674:39 didn't apply. Further, since there had never been any rudimentary road clearing or other construction, there could be no claim of vested rights.

(iv) ***What Should A Town Do If The RSA 674:39 Period Has Expired?*** The smartest thing is for the Planning Board to hold a revocation hearing under RSA 676:4-a, and, unless vested rights have attached (per §3-D of this article, above) to revoke the approval (in whole or in part). That way, it will be clear to the owner and subsequent owners (due to the recorded revocation) that the town no longer considers this a valid plan. Unless formal revocation occurs, there is the possibility that subdivided lots or interests could be sold to innocent purchasers who have no reason to know there is no vesting, since the approved plan is still on record.

(b) ***RSA 676:12, V.*** The second statute giving vested rights to subdivisions is RSA 676:12, V, which, in essence, extends the "vesting" time back to the time the first official notice of the proposed change is posted (up to 120 days before legislative body action). If a plat or application has been accepted as complete by the Planning Board prior to the posting of that proposed change, the change cannot affect that application.

III. Substandard Lots – Issue C: "Takings."

The third legal right protecting a substandard lot is that the owner cannot be deprived of the viable economic use of the property. Yes, even though prospective uses of a substandard lot are not protected by the doctrine of nonconforming uses, they *are* protected against a "taking," even in the absence of any "lot-of-record" clause in the ordinance.

But, contrary to the myth, the "takings" clause does *not* guarantee that every lot, no matter how small or inadequate, has a right to at least one permanent single-family dwelling: For example:

(i) In *Trottier v. City of Lebanon*, 117 N.H. 148 (1977), the owner was denied a building permit for a lot on a Class VI road. The Court said there was no "taking," and that the owner had "carelessly purchased this problem."

(ii) In *Sprague v. Acworth*, 120 N.H. 64 (1980) the Court upheld a variance to build on a substandard lot, which contained a condition that the dwelling would be for seasonal use only.

(iii) In *Carter v. Derry*, 113 N.H. 1 (1973), an owner of a substandard lot fronting a pond was denied the right to build even a seasonal dwelling, because there was no adequate place for a septic system. Held: no “taking.” (Actually, this is an application of the “public harm” doctrine, since an inadequate sewage system may cause danger to health.)

Variance Procedure Constitutionally Adequate. As was said in the *Simplex* case (supra), the variance criteria evolved precisely to guard against possible unconstitutional effects of zoning. Thus the use of a variance procedure is a constitutionally permissible way to protect substandard lots from being deprived of constitutional rights in the use of the property – *if* that lot isn’t ‘grandfathered’ under either I or II above.

* * *

8-D. VESTED SUBDIVISIONS – HOW FAR DOES THE EXEMPTION GO?

Assume that you have a subdivision which is “vested,” either under the common-law doctrine, or under RSA 674:39. Exactly what zoning changes are the lots in that subdivision exempt from? Obviously they need not comply with changed lot size or frontage requirements in order to be subdivided (sold). But what about changes in, say, height restrictions? Or accessory use regulations? Are those lots exempt from *all* of these types of changes *forever*? In my opinion they are not.

In *Henry & Murphy, Inc. v. Allenstown*, 120 N.H. 910 (1980), Chief Justice Grimes said:

“The word ‘project’ [to which vested rights apply] does not... refer to each individual lot or building. Rather it is commonly defined as an undertaking devised to effect the reclamation or improvement of a particular area of land.... [T]he... rule is that when zoning restrictions substantially reduce the value of land for the purpose for which it was purchased, this diminution in value may be considered [in determining vested right].” (120 N.H. at 913)

Thus lots in a vested subdivision are exempt from any changes which would interfere with the “undertaking” represented by the applicant’s approved plans. This is consistent with the constitutional basis of “vesting” as a protection of investment-backed expectations. It *doesn’t* protect unanticipated and purely hypothetical future

improvements on the lots in the subdivision, when those improvements were not part of the expectation embodied in the subdivision application.

In my opinion there may be zoning changes, such as a change in height restriction, which can be applied to the lot without interfering with that vested right, *if* there is no information on the plat indicating that specific building heights were part of the original “undertaking.” The language of RSA 674:39 is consistent with this, stating:

“...once substantial completion of the improvements shown on the plat have occurred... the rights of the owner or his successor in interest shall vest and no subsequent changes in subdivision regulations or zoning ordinances shall operate to affect SUCH IMPROVEMENTS...” (emphasis added)

Thus only the improvements shown on the plat are protected by the statute (in addition to other substantially complete improvements as a protected as common-law vested rights under the *Henry and Murphy* doctrine, *supra*).

It may take some economic analysis to determine exactly what the subdivider’s “undertaking” actually encompasses. Suppose that, subsequent to the approval of a subdivision, a zoning change occurs, limiting to residential uses land where commercial uses were previously allowed. The vested “undertaking” under *Henry & Murphy* in my view would be much different if the details of the subdivision had been carefully designed to accommodate commercial use, than if it were, say a simple 2-lot subdivision allowing a parent to sell a house lot to a child.

“Vested Rights” In a Subdivision Can Be Passed To Subsequent Owners. One thing we do know for sure, in the wake of *Morgenstern v. Town of Rye*, 147 N.H. 558 (2002), is that rights in a vested subdivision can be passed on to subsequent owners. That case involved a substandard lot which was part of an approved subdivision which was mostly complete. The Court upheld the continuing validity of the *Henry & Murphy* case, even for subdivisions which were approved prior to the enactment of RSA 674:39 and 676:12.

* * *

8-E. THE ‘MERGER’ PROBLEM – WHEN DO 2 LOTS IN COMMON OWNERSHIP BECOME ONE?

The substandard lot problem (above) deals with whether the *use* of a subdivision lot is “grandfathered.” The “merger” problem, on the other hand, deals with whether the *separation* of that lot from adjoining property in common ownership is “grandfathered,” so that it can be used separately, and sold separately, without further subdivision approval. Here are the cases:

(i) *Vachon v. Concord*, 112 N.H. 107 (1972). Concord had a “grandfather” clause in its zoning ordinance which said that a substandard lot could be built on *unless* adjoining land was in common ownership, in which case it would be treated as merged. The Court upheld this clause in the case, after finding that there had not been the kind of substantial investment in improvements to create a “vested interest” in the separate lots.

Question: Is the *Vachon* case still good law in light of RSA 674:39 and 676:12, V (both of which were enacted after the *Vachon* case)? **Answer:** In my opinion it is, in cases where those statutes no longer apply.

Example: Maxwell Smart applies to subdivide “Undercover Acres” into 10 half-acre lots, all on existing roads. A week after the application is accepted, notice is posted for a zoning amendment changing the required lot size to 1 acre. Under 676:12, this change doesn’t affect Max’s plat, which is then approved and recorded. Max goes abroad on a spy mission, and four years later none of the lots have been sold, and no construction has begun. The protection given by RSA 674:39 is terminated, and the town can now require the lots to be “merged” into 1-acre lots. [“Sorry about that, Chief!”]

Question: How does the town go about requiring this? **Answer:** **Revocation.** The clearest way *procedurally* to make sure Max’s subdivision rights are terminated is to go through a formal revocation of his approval, under the procedures of RSA 676:4-a. Unless the Planning Board does this, it will be difficult if not impossible to prevent Max from selling his ½ acre lots. The Court would be very unlikely to set aside such a conveyance, because the purchasers have no reason to suspect that the approved plan’s rights had lapsed.

(ii) *Keene v. Town of Meredith*, 119 N.H. 379 (1979). Mr. Keene had acquired two parcels of land separately, one on either side of a public road. The two parcels were taxed as separate lots, and the town had previously issued a building permit for a house on one of the lots, knowing there was already a house on the other. There was no evidence that they had ever been used in conjunction with each other. The Court

said they were existing lots which could be sold separately without subdivision approval.

The *Keene* case is often *mistakenly* cited as saying that a public road always constitutes a “grandfathered” lot line. **WRONG!** The road was only one factor. The tax treatment, and, especially, the *use* of the parcels were what made the difference. There are many parcels in N.H. with a house on one side of a road, and a barn on the other, used and taxed as one parcel, where the road would not be a “grandfathered” lot line. Also relevant is RSA 674:54, III(a), which says in part:

“...the erection of a highway or utility easement across a parcel of land, shall not, in and of itself, be deemed to subdivide the remaining land into 2 or more lots or sites for conveyance or development purposes in the absence of subdivision approval under this title....”

(iii) *Robillard v. Hudson*, 120 N.H. 477 (1980). Robillard owned two adjoining lots which were substandard. The lots had always been taxed separately. Robillard’s predecessor got a building permit for a duplex on one of the lots. The proposed location of the duplex was too close to the line separating the two lots to comply with side-yard set-backs, but the permit was issued anyway with the understanding that the two lots would be consolidated for zoning purposes. The Court said:

“The owner of separate contiguous lots which are otherwise entitled to an exemption from the more restrictive requirements of an amendment to which such lots do not conform may lose his advantage by behavior which results in an abandonment or abolition of the individual lot lines... The fact that lots are separately assessed and separately taxed is not conclusive in determining whether separate lots constitute one lot for zoning purposes.... Whether they should be so treated must be determined on a case-by-case basis.” (120 N.H. at 480, citations omitted)

(iv) In *Appeal of Loudon Rod Realty Trust*, 128 N.H. 624 (1986), it was held that two parcels separately acquired should be treated as a single lot for tax valuation purposes, based on evidence that:

“although the preceding owners treated the properties as two units, and the city has accordingly prepared separate tax bills for two units, there was evidence that the zoning ordinance would legally preclude subdivision into two parcels.”

Thus zoning treatment is evidence for determining tax treatment, as well as vice versa.

(v) *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881 (1991). Susan Condodemetraky owned 42.47 acres. 5.5 of those acres contained a 22-unit mobile home park she claimed was “grandfathered” from the ordinance, which now required a density of 1 acre per unit. She claimed she could go ahead and put 22 more units on the remaining 22 developable acres (the rest being wetlands, etc.). **Wrong**, said the Court. The parcel is **not** nonconforming. Since the parcel had **never** been subdivided in the past (it had all been conveyed via one deed since the founding of the town), there was no reason to think there’s any “grandfathered” lot line between the existing mobile home park and the rest of the tract. Thus the undeveloped portion is **already** being “used” to meet the density requirements of the ordinance. Ms. Condodemetraky had been getting two tax bills, but the Court said that fact was “not conclusive.”

(vi) *Merger Across Town Lines Is Voluntary Only*. The case of *Churchill Realty Trust v. City of Dover ZBA*, 156 N.H. 668 (2008) involved an interpretation of RSA 674:53 – a very complex statute which deals with land on a town line. That statute (among other things) allows an owner of a tract straddling a town line to “borrow” land from one town to meet the other town’s density requirements. Here, Churchill owned land in Both Dover and Rollinsford, with a ‘grandfathered’ apartment complex on the Dover side that was too dense for Dover’s regulations. The Dover ZBA held that that the Rollinsford land had **impliedly** been “borrowed” to meet Dover’s requirements. But the Court disagreed, saying that Dover’s regulations could not affect Rollinsford land, except in the limited case where the “borrowing” of land in one town to meet the other town’s regulations is intentional and voluntary.

My Summary of the “Merger” Issue: Although this area of the law is murky, I recommend that, until a court tells us differently, local officials should follow the following set of rough guidelines concerning land in common ownership:

(A) If the parcel(s) in question have been separated as to ownership at some time in the past (that is, if either the current owner **or his/her predecessors** acquired the parcels from separate sources at different times), then you should **presume** that they are still “grandfathered” as separate lots, **unless** you can point to some subsequent act on the part of the owner(s) manifesting an intent to abandon the lot lines (such as joint use of the parcels, building a house too close to the line as in *Robillard*, etc.).

[Although it's a grey area, it's my opinion that the mere fact that an owner has passively allowed the Town to combine the parcels on its tax records, would **not**, standing alone, be enough of a manifestation of intent to abandon.]

(B) On the other hand if the parcel has *never* been separated as to ownership at any time in the past, there is simply *no* basis for claiming “grandfathering” of separate parcels (the *Mudge* case).

(C) If the parcels are substandard, and your zoning ordinance has a “required merger” clause in it (as in *Vachon*), then by all means apply it. But send *notice* to the owner, so that if there is a dispute, the issue will be settled by means of an administrative appeal to the ZBA under RSA 676:5. And ***be sure to change your tax records.*** Given the above cases, it is essential to keep tax treatment consistent with zoning treatment.

(D) If the parcels are substandard, and the zoning ordinance does *not* contain a “required merger” clause, then there is no *automatic* merger. On the other hand, substandard lots may be limited in what they can be used for (*see* § 8-B, above). And someone who owns adjoining land is much less likely to meet the “hardship” requirement for a variance to build on a substandard lot.

(E) ***ABOVE ALL, THE TOWN SHOULD BE PROACTIVE, IN THE FOLLOWING WAYS:*** The key thing is to *try to keep your tax records and zoning records consistent.* I realize that proactive is not the way most land use officials operate – that they are usually in reactive mode. But in order to avoid the proliferation of substandard lots (not to mention lawsuits), it’s worth it.

(1) ***Use Voluntary Merger Statute:*** If there exist adjoining lots in your town which are taxed separately but owned in common, and have never been part of an approved subdivision, officials should ***write to the owner*** to determine whether he/she wants to “voluntarily merge” them under RSA 674:39-a (enacted in 1995). Explain the advantages (reduced tax assessment) versus disadvantages (no further separate sales without subdivision approval).

(2) If the person decides *not* to “voluntarily merge” them, then the zoning administrator should make a decision whether or not they in fact exist separately for zoning purposes. If there is evidence that the owner has abandoned the lot line (as in *Robillard*), write the owner a letter stating that the Town will consider them “merged” for both zoning and tax purposes. The letter should state that this constitutes an administrative decision which can be appealed to the ZBA under RSA 676:5.

(3) *Use the Revocation Statute:* If there is a subdivision plat that no longer meets current requirements, and is not “grandfathered,” then the Planning Board should use RSA 676:4-a to formally *revoke* the approval.

* * *

8-F. CAN THERE BE A “GRANDFATHERED” RIGHT TO SUBDIVIDE?

Answer: In my opinion when the *use* of the land has *already* been “subdivided” (even though the ownership has not) prior to the imposition of restrictions, and where the actual division of ownership would not result in an expansion of the use, or cause harm to public health or safety, then the planning board cannot legally disapprove a subdivision request without interfering with a “grandfathered” nonconforming use.

In *Isabelle v. Town of Newbury*, 114 N.H. 399 (1974), an owner applied for a subdivision of a lot. Even though it had always been a single parcel, nonetheless it had three buildings with three independent, approved septic systems. Two of these buildings had been leased for several years, and now the owner wanted to sell them. The Supreme Court upheld a denial of the subdivision, on the basis that one of the proposed lots would have not frontage. However Justice Grimes (who later as Chief Justice became the architect of New Hampshire’s “taking” doctrine in the *Burrows v. Keene* case) wrote a strong *dissent* in the *Isabelle* case:

“[T]he sale of half the lot in no way represents an extension of [the nonconforming] use.... Authority is overwhelming that a mere change from tenant occupancy to owner occupancy is not an extension of a nonconforming use.... I think the proper approach to this issue is to consider the actual use of the property before and after the subdivision. Petitioner’s land has for the last 20 years in effect been used as two separate lots....” (114 N.H. at 404, citations omitted)

Why quote Grimes? (After all, his opinion didn’t prevail in *Isabelle*.) First, Grimes’ other opinions on nonconforming uses and the “taking” clause have largely become the law today. Grimes’ *dissent* in the *Isabelle* case was quoted in the *majority* opinion in the *New London Land Use Assn.* Case (§ 4 above) for the holding that:

“As a vested right, the nonconforming use may be passed on to subsequent title holders.... A mere change from tenant occupancy to owner occupancy is not an extension of a nonconforming use.” (130 N.H. at 510).

Furthermore, 5 years after *Isabelle*, in the case of *Seabrook v. Tra-Sea Corp.*, 119 N.H. 937 (1979), the Court held that an owner of a “grandfathered” mobile home park, who had previously only rented out lots, had a vested right to sell those same lots. The lots were substandard under the current ordinance, but were protected by a substandard lot clause, even though at the time the restriction was enacted, they were only rental lots.

Both *Tra-Sea* and Grimes’ dissent in *Isabelle* were cited in *Cohen v. Town of Henniker*, 134 N.H. 425 (1991), where it was held that the planning board could not refuse subdivision approval to a nonconforming apartment complex whose owner wanted to change it to the condominium form of ownership, and where no change in the actual use of the property would occur. The *Tra-Sea* result is further supported by the definition of “subdivision” in RSA 672:14, I:

“I. ‘Subdivision’ means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development....”

The implication is clear that if an owner creates 2 or more “sites” for “building development” (for example by building a home on a lot where another home already exists, in a manner which is clearly not “accessory” under the common-law or local ordinance), then *that* point in time is when the “subdivision” occurs, even though any division of ownership is still “future.” Therefore the owner needs subdivision approval prior to constructing such a home. But furthermore, if such a home has been constructed legally, prior to the beginning of subdivision review in the town, then the owner has, in my opinion, a “grandfathered” right to sell that second home separately. Of course RSA 674:37 would still prevent the plat from being recorded without subdivision approval. But if such a “grandfathered” right to subdivide exists, the planning board could not withhold such approval in the absence of an adverse effect on public health or safety.

The cases concerning condominium conversion of existing ‘grandfathered’ uses (*see* § 4-B(iv) above), supports the conclusion in this section.

[**DON'T GET ME WRONG** here. The above discussion concerns a second use on the property, which is “grandfathered” as a subdivision because that use began *before* the enactment of a restrictive ordinance. This discussion does *not* apply to, say, a “mother-in-law apartment” which was built under an ordinance provisions *allowing* that use. If the ordinance (or a controlling ZBA decision) attaches conditions to such a use, preventing future subdivision, then those conditions *are* binding on the owner, and there is *not* a “grandfathered” right to subdivide.]

(*Finis*)