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## Local Land Use Boards and Their Members

**Local land use board definition – 2010 Ch. 226 (HB 1174).** What is a local land use board? Until recently it didn't include a variety of local boards and commissions that actually deal with land use. This change broadens the definition to include any board or commission authorized under RSA 673, but *still* doesn't include conservation commissions! Pay attention to statutes that refer to "local land use boards." [Effective August 27, 2010]

- RSA 672:7

**Terms of office – 2010 Ch. 226 (HB 1174).** Adds a new paragraph to RSA 673:5 providing that for an appointed land use board member, if upon expiration of his/her term no successor has been appointed, then that member may continue to serve until such other appointment is made – "holdover" status. [Effective August 27, 2010]

- RSA 673:5, III. "The term of office for an appointed local land use board member shall begin on a date established by the appointing authority, or as soon thereafter as the member is qualified, and shall end 3 years after the date so established. If no successor has been appointed and qualified at the expiration of an appointed member's term, the member shall be entitled to remain in office until a successor has been appointed and qualified."

**Designation of Alternates – 2009 Ch. 114 (HB 44).** A local land use board chairperson may designate an alternate to fill a vacancy temporarily until the vacancy is filled by the appointing authority. Previously, RSA 673:11 only addressed the appointment of alternates when a regular member was absent or disqualified, not if the regular member resigned or died in office. [Effective August 21, 2009]

- RSA 673:12, III. "The chairperson of the local land use board may designate an alternate member of the board to fill the vacancy temporarily until the vacancy is filled in the manner set forth in paragraph I or II. If the vacancy is for an ex officio member, the chairperson may only designate the person who has been appointed to serve as the alternate for the ex officio member."

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### Practice Pointer: "Ex Officio"

Generally, the term *ex officio* does not mean that the member so designated cannot vote or make motions. It only means that the member serves by virtue of his or her office (Latin, "from the office").

Specifically regarding NH land use statutes, an *ex officio* member of the planning board may not serve as its chair (RSA 673:9, II). *Ex officio* members only include those specifically authorized by statute. So for example, a town's selectboard cannot appoint a selectperson as an *ex officio* member of the town's board of adjustment (the statutes don't provide for this), but a selectperson could be appointed as a

regular member of that board (but this might not be a good idea for other legal reasons).

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**Role of alternate members – 2010 Ch. 270 (SB 448).** Responding to a long-standing administrative question, the Legislature determined that alternate members of a land use board can participate in the board’s meetings, but also that this is a local decision subject to the determination of the board. Amend your board’s rules of procedure to address this! [Effective July 6, 2010]

- RSA 673:6, V “An alternate member of a local land use board may participate in meetings of the board as a nonvoting member pursuant to rules adopted under RSA 676:1.”
- RSA 676:1 “...The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.”

**Special meeting for zoning in official ballot towns (so-called “SB 2”) – 2010 Ch. 69 (HB 1211).** If the sole purpose of the special town meeting is for adoption, amendment or repeal of zoning, historic district ordinance, or building code, no deliberative session is required. Why not? Because zoning amendments can’t be amended at the deliberative session – one session, only for voting. [Effective July 18, 2010]

- RSA 40:13, XVII

**Planning board members serving on other boards – 2011 Ch. 190 (HB 409).** Previously, the law prohibited more than one planning board member from serving on *any* other local board and commission. **New law:** now up to two (2) planning board members may serve on other local boards or commissions, except that only one (1) planning board member may serve on the local governing body (this is the governing body’s *ex officio* member on the planning board), conservation commission, or other local land use board. [Effective August 13, 2011]

- RSA 673:7

**Minutes available – 2009 Ch. 266 (SB 189).** Minutes of local land use boards must be available for inspection no later than 5 business days after the meeting or vote (formerly 144 hours). This is now consistent with RSA 91-A, the right-to-know law. [Effective September 14, 2009]

- RSA 676:3, II; RSA 677:4; RSA 677:15, I

**Conditions of approval available and recorded– 2009 Ch. 266 (SB 189).** At the same time that the Legislature was addressing the availability of minutes, it also modified the requirements for boards that make conditional approvals. This is to help eliminate disputes over what conditions might have been attached to an approval by putting the onus fully on the board to make clear decisions. [Effective September 14, 2009]

- RSA 676:3, I “The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit **and make a copy of the decision available to the applicant.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. **If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.”**
- RSA 676:3, III “Whenever a plat is recorded to memorialize an approval issued by a local land use board, the final written decision, including all conditions of approval, shall be recorded with or on the plat.”

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### Practice Pointer: Statements of Conditions

Many local boards, planning boards in particular, are now in the practice of creating multi-page statements of conditions (“development condition agreements”) that outline in detail everything that the board expects the applicant to do in order to maintain final approval (*conditions subsequent*). This should be distinguished from those things that an applicant must do in order to gain final approval (conditions precedent). If a final approval is recorded (subdivision plats, and in some communities site plans), these statements are contemporaneously recorded.

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## Planning Board Procedure

**Design review vesting – 2008 Ch. 229 (HB 331).** In 2006 the Legislature created a “peculiar” form of vesting by allowing *pre-application design review* submissions to planning boards to gain protection from local regulatory changes for up to a year (see the final sentence of RSA 676:12, V). In an effort to provide some procedural clarity to how this is supposed to work, in 2008 the Legislature specifically allowed planning boards to identify when the design review period ends (and when the vesting period *begins*) by establishing reasonable regulations, including submission requirements. This authorization probably was unnecessary, but it should prompt some planning boards to take notice of their obligations and opportunities under the law. [Effective August 19, 2008]

- RSA 676:4, II(b) “Design review phase. The board or its designee may engage in nonbinding discussions with the applicant beyond conceptual and general discussions which involve more specific design and engineering details; provided, however, that the design review phase may proceed only after identification of and notice to abutters, holders of conservation, preservation, or agricultural preservation restrictions, and the general public as required by subparagraph I(d). **The board may establish reasonable rules of procedure relating to the design review process, including submission requirements. At a public meeting, the board may determine that the design review process of an application has ended and shall inform the applicant in writing within 10 days of such determination.** Statements made by planning board members shall not be the basis for disqualifying said members or invalidating any action taken.”

### Practice Pointer: Pre-application Review and Vesting

First, recognize the distinction in RSA 676:4, II between “preliminary conceptual consultation” and “design review.” Only the latter requires abutter notification and is subject to the preliminary vesting rule. If a planning board has concerns about the possibility of a plan vesting prior to an actual application, it can simply refuse to engage in the design review process, and instead focus on preliminary conceptual consultation. Alternatively, the planning board can dispense with pre-application review altogether and concentrate its review in the formal application process.

If a planning board still wants to use the design review process, which it can either require (if authorized by the local legislative body) or offer as an option to the applicant, it should be careful to follow the necessary notification requirements. In this respect, design review is no different than a formal application—abutters, easement holders, professionals who stamp the plans, and the general public all are entitled to formal notification that design review will occur. Differences are that a public hearing is not required, much of the information needed in a formal application is not required, and the comments of the planning board are not generally binding.

The key to applying the preliminary vesting rule is for the planning board to determine when the design review process ends, because that marks the beginning of the twelve-month safe harbor period during which the applicant’s proposal is protected from local regulatory changes. If a planning board conducts a design review meeting that has been properly noticed, then at the end of that meeting the planning board should formally declare the design review process to have ended, or it should continue its discussion to a specific time, date, and place (care should be exercised here to call it a discussion, and not to use the words “deliberate” or “hearing”). RSA 676:4, II is a bit ambiguous relative to design review, but it suggests that the failure of the planning board to continue its design review discussion would also mark the end of the process.

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**Planning board waivers – 2009 Ch. 292 (HB 43).** This law is a response to a decision of the NH Supreme Court (Auger v. Strafford, 156 NH 64 (2007)) that had the effect of limiting the authority of planning boards to grant waivers to its own regulations, and the law restores planning board flexibility roughly to where it was under a different court decision (Frisella v. Farmington, 131 NH 78 (1988)). [Effective September 29, 2009]

- RSA 674:36, II(n) – subdivision regulations – and 674:44, III(e) – site plan regulations
  - Waivers may be granted if
    1. (old law) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations, **OR**
    2. (add new law) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.
  - The basis for any waiver is to be recorded in the board’s minutes

**Third party review – 2009 Ch. 73 (HB 156).** Here the Legislature created new RSA 676:4-b, which establishes reporting requirements for planning boards to meet when they hire consultants to help them to review applications and to monitor post-approval construction compliance. [Effective August 8, 2009]

- RSA 676:4-b
  - Review billing must be accompanied by detailed invoices with reasonable task descriptions for services rendered
  - Construction defects or deviations from approval that are observed by a third party inspector must be promptly reported to planning board and applicant
    - Failure to report defects or deviations may subject the inspector to a complaint with the Joint Board of Licensure

**Dam owner/bureau notification – 2011 Ch. 164 (HB 205).** In 2009 the Legislature enacted a law requiring planning boards to notify the NH Dam Bureau (DES) and the owners of upstream dams whenever they had an application for a subdivision or site plan “near streams or rivers.” The purpose of this requirement was to assist the Dam Bureau to properly determine the hazard classification of licensed dams in the state, but its vagueness made it confusing. In 2011 the Legislature saw the error of its ways and repealed the 2009 enactment, replacing it instead with a new statute with clearer standards. [Effective August 13, 2011]

- RSA 676:4, l(d)(2) *“For those proposals in which any structure or proposed building site will be **within 500 feet of the top of the bank** of any lake, pond, river, or stream, the planning board shall also notify the department of environmental services by **first class mail** at the same time that notice is provided to abutters, cost to be paid in advance by the applicant consistent with subparagraph (d)(1). **The sole purpose of notification to the department shall be to provide information to the department for dam hazard classification. This requirement shall not confer upon the department the status of an abutter. Failure by the municipality to notify the department shall not be considered a defect of notice.**”* (emphasis added)

**Impact of other permits on application acceptance and approval – 2010 Ch. 39 (HB 328).** In this law requested by the development community, the Legislature attempted to address another long-standing legal question: can the planning board require an applicant to get other necessary permits for a proposal prior to submitting a subdivision or site plan application. This enactment unfortunately leaves some ambiguity. [Effective July 17, 2010]

- RSA 676:4, l(b) “An application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i).” [Emphasis added]
- RSA 676:4, l(i) Conditional approvals: “... Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits.” [Emphasis added]

Must a planning board accept an application for something that would obviously violate zoning? Reading the first section above in isolation suggests that the answer might be no.

Wouldn't "other governmental bodies" refer to other units of government (e.g., state agencies)? But reading the two sections together suggests otherwise. Given that the Legislature chose the different term "state or federal permits" in the second section dealing with conditions of approval, one would logically infer that the difference has meaning (and courts typically recognize such distinctions). Also, the board of adjustment (and some other boards) is recognized as having independent legal standing, capable of acting in quasi-judicial capacity to resolve appeals to disputed questions of local zoning law. So the answer may well be yes, that a planning board cannot refuse an application simply because a trip to the ZBA will clearly be necessary.

If that is the case, then must the planning board also approve the application, subject to ZBA approval (assuming that the application is otherwise suitable for approval)? The language in the second section above only refers to necessary *state and federal permits* as insufficient basis for denial. But if a planning board must accept an application that requires ZBA review, it probably doesn't make sense for it to be able to deny the same application because such review is necessary. So the answer is probably yes.

These questions doubtless will provide fodder for litigation.

**Agriculture and timber harvesting – 2011 Ch. 85 (SB 104).** Planning boards are periodically faced with development proposals for land that was recently denuded of timber, and are asked to "do something about it." This recent legislative enactment makes it clear that these concerns are not one of the duties of the planning board. At the same time, the zoning enabling statute now includes among its purposes preservation of "agricultural operations." [Effective July 15, 2011]

- RSA 674:1, VI (Planning board duties) Powers "shall not include regulating timber harvesting operations that are not part of a subdivision application or a development project subject to site plan review under this chapter."
- RSA 674:17, I(i) (Zoning enabling statute) To encourage the preservation of agricultural lands and buildings *and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings.*

## ZBA Procedure

**Member Selection – 2009 Ch. 286 (HB 534).** A municipality may now legally switch from an appointed to an elected ZBA—the law previously only provided for a change from an elected to an appointed board. [Effective January 1, 2010]

- RSA 673:3

**Variance standards – 2009 Ch. 307 (SB 147).** This enactment was the culmination of a multi-year project of the Legislature, ending a series of failed bills and study committees. It partly rewrote the existing variance standards in RSA 674:33, I(b) and also is a rough codification of the NH Supreme Court's decision in Simplex v. Newington, 145 N.H. 727 (2001). However, it also incorporates the hardship test of Governor's Island Club v.

Gilford, 124 N.H. 126 (1983), and rejects the Court’s distinction between use and area variances in Boccia v. Portsmouth, 151 N.H. 85 (2004). But also see the legislative purpose statement for treatment of post-Simplex cases, including Boccia. See *MLLS 20 #* for more complete treatment of this issue. [Effective January 1, 2010]

RSA 674:33, I(b) Boards of adjustment may grant a variance if they find—

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
- (ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

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### **Practice Pointer: The Constitution, Variances, and Economic Impact**

Remember what the purpose is of the variance – it is the zoning ordinance’s constitutional safety valve, protecting the rights of individual property owners against application of governmental regulation that unreasonably infringes their rights to use their property. It is a power of the board of adjustment to judge such questions; but some boards have come to view themselves exclusively as “protectors of the public” and “defenders of the interests of the abutters.” Although these are considerations that a board of adjustment must weigh in the balance, they should not be the board’s first and foremost concern. Proper application and enforcement of the zoning ordinance by duly authorized municipal agents should address those concerns in many circumstances; overall, a board of adjustment must consider whether such application and enforcement will result in an unconstitutional “taking” of an individual’s private property.

In Boccia v. Portsmouth, 151 N.H. 85 (2004), the Supreme Court identified economic impact as an important consideration in variances. Here’s what the Court said:

Financial considerations, while not expressly mentioned in Simplex, have always been a part of variance determinations in New Hampshire. There must be a showing of an adverse effect amounting to more than mere inconvenience. However, a landowner need not show that without the

variance the land will be rendered valueless or incapable of producing a reasonable return. Instead, in deciding whether to grant an area variance, courts and zoning boards must examine the financial burden on the landowner, including the relative expense of available alternatives. *Id.*, at 93 (citations and quotation omitted).

Even though the Legislature rejected the Court's distinction between use and area variances in *Boccia*, the Court's economic analysis language is still good law! It's not enough for a ZBA to conclude that the property could be utilized for a permitted use other than the one proposed for which the variance is sought. It must determine that the permitted use could be *reasonably* achieved, and this may include an analysis of potential costs to the owner.

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**Charging for consultant review – 2010 Ch. 303 (HB 1380).** This law addresses yet another long-standing question of law: can a ZBA require an applicant to pay for the cost of the board's independent consultants? While some authorities have held that they can, until the Legislature enacted this law there was no statute clearly authorizing such an action. [Effective September 11, 2010]

- RSA 676:5, IV. The ZBA “may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.” This is identical to the planning board's authority in RSA 676:4, II(g)).
- RSA 676:5, V(a) “A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, *provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.*” (Italicized text also now required of planning board relative to the ZBA in RSA 676:4-b, I.)
- RSA 676:5, V(b) Detailed invoices and accounting of costs required.

## Enforcement

**Fines for continuing violations – 2009 Ch. 173 (HB 106).** Responding to the NH Supreme Court's opinion in *Amherst v. Gilroy*, 157 N.H. 275 (2008) that continuing offenses are not separate violations, the Legislature adopted the language below. Addressing these as individual violations avoids accumulation of a single fine and escapes the district court's jurisdictional limit of \$25,000 (RSA 502-A:14, II), making enforcement actions in that court easier to pursue. [Effective September 11, 2009]

- RSA 676:17, I New sentence: “Each day that a violation continues shall be a separate offense.”

**Public buildings and accessibility – 2009 Ch. 285 (HB 530).** This legislation provides for certification and enforcement of accessibility standards for public buildings. [Effective January 1, 2010]

- RSA 155-A:5
  - ❑ New construction, rehabilitation, alteration of public buildings must comply with accessibility standards of state building code
  - ❑ Contractors must certify (and be qualified to certify) that accessibility standards will be met; or a qualified local building inspector may certify
  - ❑ Enforceable by NH Disability Rights Center (a federally recognized non-profit organization) or by disabled individuals; includes costs and fees if they prevail
  - ❑ Not limited to *publicly-owned* buildings, but to also to those buildings to which the public is typically invited (e.g., retail uses)
  - ❑ Applies to work commenced on or after July 1, 2010

## Vesting and Growth Management

*Note: In this context “vesting” is legal protection of an approved development against changes to land use regulations. It may be for a limited period of time or permanent, depending on the circumstances.*

**Temporary extended vesting – 2009 Ch. 93 (SB 93).** Recognizing that many property owners had unwittingly been caught up in the current recession with approved developments that they couldn’t move forward until the economy improved, the Legislature adopted this temporary extension of the “four-year exemption” in RSA 674:39. This is a session law, and was not codified in the Revised Statutes Annotated. [Effective June 12, 2009].

- RSA 674:39, V
  - ❑ For any subdivision or site plan approved by a planning board between January 1, 2007 and July 1, 2009
    - Three years (not 12 months) in which to undertake active and substantial development or construction
  - ❑ For any subdivision or site plan approved by a planning board between January 1, 2005 and July 1, 2009
    - Six years (not four) in which to achieve substantial completion (after which vesting is permanent)

**Five-year exemption – 2011 Ch. 215 (SB 144).** Recognizing that the economy still hadn’t recovered (see “temporary extended vesting,” above), the Legislature decided to stop playing with date combinations that are hard to follow and harder to implement, and simply changed the four-year exemption to a five-year exemption. [Effective June 27, 2011]

- Delete RSA 674:39, V and change the statute to a **FIVE-year** exemption for projects to achieve substantial completion; with 24 months in which to undertake “active and substantial development or building” (instead of 12 months)

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**Practice Pointer: Vesting Periods**

Confused by vesting? Use this chart to help guide your understanding of how these recent changes to the law weave together.

Approval Date	“Active and Substantial” Period	“Substantial Completion” Period
Past – 12/31/2004	12 months	4 years
1/1/2005 – 12/31/2006	12 months	6 years
1/1/2007 – 6/30/2009	36 months	6 years
7/1/2009 – present	24 months	5 years

To make this just a little more complex, it could be construed that the new 24-month/5-year vesting periods apply only as of the effective date of the law (June 27, 2011). If that were the case, then the old 12-month/4-year periods would apply to projects approved between 7/1/2009 and 6/26/2011. This question may be more fodder for litigation in the future.

**Vesting Rules of the Road –**

1. All development approvals are exempt from changes to most local land use regulations made during the initial vesting period (above: 12, 24, or 36 months, as appropriate) after approval.
2. If a developer performs “active and substantial development or building” within the initial vesting period, then the development is protected against most local regulatory changes (including changes to impact fees) for an additional period (above: 4, 5, or 6 years, as appropriate).
3. **If a planning board fails to identify** what is meant by “active and substantial development or building,” then the approved development **automatically** gets the full multi-year exemption.
4. If the developer performs “substantial completion of the improvements” shown on the plat at any time (even after the multi-year exemption period is complete), then the development vests against **any** future changes to local regulations with the exception of impact fees, which may be changed at any time (after the multi-year exemption is complete). If the developer fails to substantially complete the development within the multi-year period, then the development will be subject to regulatory changes until it is substantially complete.
5. The planning board is not required to define the terms “active and substantial” and “substantial completion,” but doing so will help avoid the problem faced in the AWL Power case (see AWL Power v. Rochester, 148 N.H. 603 (2002)).

**Growth management reform – 2008 Ch. 360 (HB 1260).** With this enactment, the Legislature sought to “tidy up” the growth management statutes (RSA 674:22 and :23) by reorganizing them and by incorporating several holdings made by the NH Supreme Court

over the past couple decades that have largely served to limit how municipalities may engage in growth control. [Effective July 18, 2008]

- Growth Management Ordinance: RSA 674:22
  - Demonstrated need to regulate timing of development, based on a study by or for the planning board or governing body, or submitted by petition, and showing a lack of capacity to meet anticipated growth; study based on competent evidence
  - Specific termination date required (how long? 5 years is probably safe)
  - Directs the planning board (or CIP committee) to promptly develop plan for orderly and rational development of services needed to accommodate anticipated normal growth; annual confirmation of reasonable progress presented by planning board to local legislative body
  - For municipalities with GMOs, effective date delayed to July 1, 2010
- Temporary Moratoria or Development Limits (formerly “Interim Growth Management”): RSA 674:23
  - May only be proposed by planning board
  - Unusual circumstances that affect the ability of the municipality to provide adequate services or that require prompt attention
  - Ordinance must contain
    - Statement of circumstances giving rise to the need
    - Planning board’s written findings
    - List of types of development to which the ordinance applies
    - Term—one year maximum; additional moratoria may be adopted for different circumstances
  - Planning board’s findings: describe the circumstances and recommend a course of action to alleviate them
  - Exemptions or special exceptions may be provided for development that has minimal impact on the circumstances

## Mergers

**Involuntary mergers prohibited – 2010 Ch. 345 (SB 406).** Part of the fallout from the NH Supreme Court’s decision in Sutton v. Gilford, 160 N.H. 43 (2010), has been two years of legislative activity. Last year, the Legislature listened to property owners’ stories of injustice at the hands of municipalities that had merged abutting non-conforming lots under common ownership, without the consent of the owner. Sometimes these mergers had been done quietly by companies that created the municipalities’ tax maps, in others the assessor had merged the lots for convenience, and in some cases the local zoning ordinance contained a provision that decreed that such lots would be merged as of a particular date. The Legislature heard these pleas, and determined that involuntary mergers should no longer occur. Lacking a better place to insert this new law, the Legislature appended it to the existing “voluntary merger” statute. [Effective September 8, 2010]

- RSA 674:39-a New sentence: “No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner.”

Questions remain: consider abutting substandard lots owned by the same person:

1. Does this limit a planning board's ability to require merger as part of site development? Probably not, as long as both lots are necessary for and part of the proposal.
2. Does it limit a ZBA's ability to require merger instead of granting a variance for development of one lot? Probably yes, but there may be other appropriate reasons to deny such a variance.

**Involuntary merger optional retroactive restoration – 2011 Ch. 206 (HB 316).** The second part of this tale deals with ambiguity over whether the first part (above) was to be applied retroactively to “un-merge” lots that had been merged by the municipality without the consent of the owner. Apparently recognizing that retroactive application was not the intention of the 2010 enactment, and after considerable work on developing compromise language, the Legislature created a process by which an owner could petition the municipality to restore merged lots to their separate and distinct condition. [Effective July 24, 2011]

- RSA 674:39-aa “Restoration of Involuntarily Merged Lots.”
  - Lots that involuntarily merged by a municipality (for zoning, assessing, or taxation purposes) prior to Sept. 18, 2010 shall be restored to their pre-merger status at the request of the owner, **provided**
    - Request is made prior to Dec. 31, 2016; and
    - No owner in chain of title voluntarily merged the lots; all subsequent owners estopped from requesting restoration. The municipality shall have the burden of proof to show that any previous owner voluntarily merged his or her lots.
  - Requests for “un-merger” to be made to the local governing body, whose decisions may be appealed pursuant to RSA 676
  - Municipalities may adopt more liberal ordinances
  - No later than January 1, 2012, municipalities must post notice in a public place that lots may be restored and publish notice in the annual reports for 2011 – 2015

## Residential Sprinklers

**Moratorium on residential sprinkler requirements – 2010 Ch. 282 (HB 1486).** In this uncodified session law (not part of the RSAs), the Legislature established a moratorium through June 30, 2011 on requirements for fire suppression sprinkler systems in new 1- and 2- family structures used exclusively for residential purposes. This was the Legislature's response to a discussion by the State Building Code Review Board about a broader inclusion of the 2009 International Building Code in the statewide building code (RSA 155-A). The 2009 IBC does include a provision requiring installation of such systems. [Effective July 8, 2010]

- No new sprinkler requirements by municipalities or local land use boards by ordinance, regulation, code, or administrative practice
- OK to require that sprinklers be *offered*
- This “shall not prevent a planning board from finding that particular subdivision applications are scattered or premature, in accordance with RSA 674:36, II(a), for lack of adequate fire protection. In such cases, applicants may propose, and a planning board

may accept, the installation of fire sprinkler systems as a means of addressing the planning board's findings."

- For land use boards, "administrative practice" probably means *conditions of approval*

**Prohibition on residential sprinkler requirements – (SB 91).** The Legislature followed up on last year's temporary moratorium on 1- and 2-family dwelling sprinkler requirements (above) by permanently engraving the prohibition in stone. But language was removed in the process that had implied that municipalities couldn't enforce previously adopted regulations requiring sprinklers or those that allowed sprinklers to be required by the planning board, and that development approvals with conditions requiring sprinklers made pursuant to such regulations also could not be enforced.

The language that was ultimately adopted by the Legislature does not clearly address all questions of enforceability, but the bill's amendment and statements made on the House floor addressing the amendment support the following:

- (1) that local board approvals and building permits made or issued before July 1, 2011 with sprinkler requirements can be enforced (see also HB 109 below), and
- (2) that zoning ordinances and local building codes containing sprinkler requirements can also be enforced, provided they were adopted prior to July 8, 2010 (the beginning of last year's sprinkler moratorium).

Note also that sprinklers cannot be required to be installed in manufactured housing under any circumstances. This final exception was made out of a concern over the disproportionate cost burden to install a system in manufactured housing relative to the overall value of the unit, and because such units are constructed in compliance with Federal standards, not state or local standards. *[As of this writing, the bill been vetoed by Governor. It is anticipated that the House and Senate will override the veto, as they did with HB 109. If that happens, the bill's effective date will be July 1, 2011.]*

- RSA 674:51, V. "No municipality or local land use board as defined in RSA 672:7 shall adopt any ordinance, regulation, code, or administrative practice requiring the installation of automatic fire suppression sprinklers in any new or existing detached one- or 2-family dwelling unit in a structure used only for residential purposes. Notwithstanding any provision of law to the contrary, no municipality or local land use board shall enforce any existing ordinance, regulation, code, or administrative practice requiring the installation or use of automatic fire suppression sprinklers in any manufactured housing unit as defined in RSA 674:31 situated in a manufactured housing park as defined in RSA 205-A:1, II."

**Planning boards prohibited from requiring residential sprinklers – 2011 Ch. 203 (HB 109).** Further solidifying its position on the matter, the Legislature limited the planning board's authority over subdivisions, specifically prohibiting planning boards from requiring sprinklers in 1- and 2-family structures through any device at their disposal (regulation or condition of approval). The Governor vetoed this bill out of a concern for public safety, but the House and Senate voted to override the veto. [Effective July 1, 2011]

- RSA 674:36, IV. "The planning board shall not require, or adopt [*or enforce*]\* any regulation requiring, the installation of a fire suppression sprinkler system in proposed

one- or 2-family residences as a condition of approval for a local permit. Nothing in this paragraph shall prohibit a duly adopted regulation mandating a cistern, dry hydrant, fire pond, or other credible water source other than a fire suppression sprinkler system.”

As with SB 91 (above), the Legislature removed language from the original bill (bracketed above and marked with \*) that would have prevented the enforcement of planning board regulations requiring sprinklers in 1- and 2-family structures, but the legislative history behind this amendment to HB 109 is not as clear. Its removal *suggests* that existing planning board regulations adopted prior to July 8, 2010 could continue to be enforced. Planning boards with such regulations in place should consult with legal counsel for advice on how to proceed. What is clearer is that planning boards should be able to enforce subdivision approvals made prior to July 8, 2010 with conditions requiring installation of sprinklers in 1- and 2-family structures.

## Environment and Energy

**Master Plan Energy Chapters – 2008 Ch. 269 (SB 422).** Recognizing that the law specifically enumerates the chapters that a planning board can include in its municipality’s master plan, the Legislature granted this authority specifically to include chapters addressing energy concerns. [Effective August 28, 2008]

- RSA 674:2, III(n)
  - Enables development of master plan chapter on local energy planning
  - “An energy section, which includes an analysis of energy and fuel resources, needs, scarcities, costs, and problems affecting the municipality and a statement of policy on the conservation of energy.”

**Small wind energy systems 2008 Ch. 357 (HB 310).** Although this was characterized as “enabling legislation,” in fact it amounts to a limitation of municipal authority to regulate small wind energy systems. *See MLLS 2008 #1 for more complete treatment of this issue.* [Effective July 11, 2009]

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

**Outdoor wood-fired hydronic heaters – 2008 Ch. 362 (HB 1405).** Here, the Legislature determined that in addition to regulation of these systems by the state, municipalities may also regulate location of such systems through their zoning ordinances. [Effective August 10, 2008]

- RSA 125-R. Establishes emissions standards for any outdoor wood-fired hydronic heater (OWHH) purchased in-State; setback and stack requirements vary depending on the EPA emissions rating of the unit
- RSA 125-R: 7 Municipalities –
  - May impose stricter setback and stack requirements
  - May prohibit OWHH in one or more zoning districts
  - May prohibit continued use of those OWHHs that are a public nuisance or that cause injury to public health
  - May not unreasonably limit the installation or operation of OWHHs

### **Shoreland protection (2008 and 2011)**

– **2008 Ch. 171 (SB 352)**. This enactment significantly changed the shoreland protection act by introducing a grid and point system for determining what vegetative coverage should remain after development, by providing important opportunities for implementation of low impact development technologies to reduce runoff, and by establishing a permit system for development within the protected shoreland. *See MLLS 20\_\_#\_ for more complete treatment of this issue.* [Effective July 1, 2008]

- RSA 483-B (Ch. 171, Laws of 2008)
  - Development within the woodland buffer will require a DES permit
  - 250 feet: 30% maximum impervious surface coverage within protected shoreland area; development constraint, opportunity for deployment of Low Impact Development techniques
  - 150 feet: Natural Woodland Buffer (NWB)
    - ≥0.5 acre within NWB, min 50% unaltered vegetative cover
    - <0.5 acre within NWB, min 25% unaltered vegetative cover
  - 50 feet: Waterfront Buffer
    - Primary building setback; towns may enact a greater setback
    - Tree coverage managed with a grid and points system

– **2011 Ch. 224 (HB 2)**. Further significant changes to this law were passed this year; this was initially introduced as SB 154, but for a variety of political reasons these changes were then appended to HB 2, the “trailer” bill for the biennial state budget. Some of the changes roll back what was passed in 2008, but other changes provide for important streamlining of permits for development. The overall approach of the statute is now more narrowly tailored to protect *water quality*, as opposed to regulating the broader impacts of shorefront development. Watch the Department of Environmental Services webpage for updates on how to navigate the new law ([www.nh.gov/des](http://www.nh.gov/des)). [Effective July 1, 2011]

- Substantial changes to RSA 483-B, the Comprehensive Shoreland Protection Act (becomes “Shoreland Water Quality Protection Act”)
- Eliminates municipal authority to increase the primary building setback beyond 50 feet
- Allows for “permit by notification” for projects that involve
  - Less than 1,500 s.f. of impact and adds no more than 900 s.f. of impervious surface
  - Stormwater management improvements
  - Maintenance of public utilities, roads, and public access
  - Others permitted by DES rules
  - DES will have 5 days to rule on permit by notification applications

- Allows for greater than 30% impervious surface coverage within the protected shoreland (250 feet from reference line) if “a stormwater management system designed and certified by a professional engineer that will not concentrate stormwater runoff or contribute to erosion is implemented.”
- Significantly modifies the point system that governs vegetative coverage within the waterfront buffer (50 feet from reference line); reduces coverage requirements within the natural woodland buffer (150 feet from reference line)
- Waiver (formerly “variance”) standard relates to environmental impact
- Non-conforming lots: construction of single-family dwellings and appurtenant structures permitted, except when otherwise prohibited by law; DES Commissioner may impose conditions that “more nearly meet the intent of this chapter, while still accommodating the applicant’s rights.”
- Non-conforming structures: Expansion of non-conforming structures may be allowed if it is no closer to the reference line and if they will become “more nearly conforming” than the existing structure or conditions

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### **Practice Pointer: Preemption and Shoreland Protection**

Some communities have adopted the standards of the Shoreland Water Quality Protection Act (SWQPA, formerly the Comprehensive Shoreland Protection Act or CSPA) and have sought to enforce the provisions of this state law as an addendum to their local zoning ordinances. Even without a local code adoption the statute does allow municipalities to enforce the SWQPA in their communities, unless the state chooses to intervene in a particular action.

In adopting shoreland protection provisions relating to the state law, some communities used the 2008 statutory authorization under the old CSPA locally to increase the minimum primary building setback from the state’s 50-foot minimum. RSA 483-B:8, I allows municipalities to adopt standards that are greater than the “minimum standards” of the statute. The 2011 changes to the statute establish that the 50-foot primary building setback is no longer a minimum standard, but an absolute one.

The practical implication of this change is that those communities with a greater setback will not be able to enforce it using the state law (but they could enforce the 50-foot state statutory setback even in the face of a previously adopted higher local standard). Here, the unsettled question of law remains whether a municipality could enforce its own higher standard outside of an action relying on the state law’s enforcement provisions. That is, can a municipality enforce a higher standard as part of its local zoning ordinance? At its core, the question is whether the state law would preempt such higher local standards. The answer is *probably not*, but municipalities should consult with legal counsel if they have adopted standards under the now-expired authority to increase the primary building setback. The municipality probably has authority to enforce it simply as an aspect of local zoning, particularly if the local ordinance is not specifically relying on RSA 483-B as the authorizing statute, but instead relies on the zoning enabling statute, RSA 674:16.

Preemption of local law by state law occurs when, even in the face of a broad delegation of authority by the state to municipalities (e.g., land use generally), the state has chosen to comprehensively regulate a particular issue. Preemption has

been recognized in such matters as the siting of hazardous waste disposal facilities, large energy generation facilities, and others.

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**Fluvial\* erosion hazard zoning – 2009 Ch. 181 (HB 290).** In response to recent destructive flooding events, the Department of Environmental Services is working to identify areas that are especially subject to erosion from such events. The Legislature has recognized the availability of this information with this enabling legislation. [Effective July 13, 2009]

- RSA 674:56, II
  - Enables municipalities to adopt FEHZ as part of zoning or as a separate ordinance (board of adjustment required, either way)
  - Zones to be consistent with DES fluvial erosion hazard protocols
  - Planning board shall submit zone maps to DES, which shall comment within 30 days
  - DES comments shall be advisory only

\* **“Fluvial”** is used in geography and Earth science to refer to the processes associated with rivers and streams and the deposits and landforms created by them. *Wikipedia*

**Dark sky policy – 2009 Ch. 212 (HB 585).** If you like seeing stars at night, you’ll appreciate the standards of this recently adopted state law. [Effective September 13, 2009]

- RSA 9-D
  - State purchasing standards for outdoor luminaires (fully shielded if greater than 1,800 lumens)
  - Maximum illuminance not to exceed the minimum level recommended by the Illuminating Engineering Society of North America or the Federal Highway Administration.
  - The same standards apply to public utility installations or replacement of roadway lighting. The standards may be waived by governing body of municipality.
  - 9-D:3 “It shall be the policy of the state of New Hampshire to encourage municipalities to enact such local ordinances and regulations as they deem appropriate to conserve energy consumed by outdoor lighting; to minimize light pollution and glare; and to preserve dark skies as a feature of rural character wherever practicable.”

**Local energy commissions – 2009 Ch. 275 (HB 189).** After considerable debate over the powers of such bodies, the Legislature adopted this law that enables the creation of local energy commissions. Many communities had already established energy committees to examine energy consumption and opportunities for cost-saving measures. Such committees do not automatically receive the grants of power from this statute – that is a decision of the local legislative body or the local governing body.

- RSA 38-D
  - Enables the appointment of a commission by either the local legislative or the local governing body; 3-10 members, staggered 3-year terms

- ❑ "...for the study, planning, and utilization of energy resources for municipal buildings and built resources of such city or town"
  - Research municipal energy use
  - Recommend to local boards pertaining to municipal energy plans and sustainable practices, such as energy conservation, energy efficiency, energy generation, and zoning practices
  - Non-lapsing energy fund; appropriations and receipt of gifts authorized (either over \$500 requires public hearing and governing body approval)

### **Property Assessed Clean Energy Districts (PACE) (2010 and 2011)**

– **2010 Ch. 215 (HB 1554)**. As part of a broader national movement, the Legislature enacted this law enabling municipalities to raise and appropriate funds which could then be loaned to property owners to make specific energy efficiency and sustainable energy improvements to their properties, with the loans to be repaid on their tax bills. While these initiatives held promise to help property owners who might not otherwise be eligible for home equity loans from banks, Federal banking regulators (as well as Federal and private lenders) objected to the PACE liens that took priority over previously recorded first mortgages. As a result, PACE programs nationally have been in limbo since the summer of 2010. [Effective August 27, 2010]

- RSA Chapter 53-F
  - ❑ Enabling legislation – allows municipalities to create districts in which municipal loans may be made to property owners to do energy efficiency and clean energy improvements
  - ❑ Improvements must be based on an energy audit by a certified auditor
  - ❑ Improvements must be cash-flow positive for property owner
  - ❑ Loans may be made up to \$35,000 (residential) or \$60,000 (commercial), but aggregate debt on the property cannot exceed 85% of its value.
  - ❑ Repayment period cannot exceed expected life of improvements or 20 years, whichever is shorter
  - ❑ Repayment is made as part of property tax bill, secured by lien in event of delinquency

– **2011 Ch. 68 (HB 144)**. This bill was originally introduced as a repeal of last year's PACE legislation, but the Legislature turned it into a reform of the law instead. To date, no municipality in the state has launched a PACE program, and it is unclear what the impact of this year's reform will be on the market performance of such a program. [Effective July 15, 2011]

- RSA Chapter 53-F
  - ❑ Limits municipal bonding to revenue bonds (not general obligation bonds that pledge full faith and credit)
  - ❑ Eliminates authority to use general municipal revenues, including for loan loss reserves
  - ❑ Eliminates provision for priority lien for delinquencies; liens shall be junior to existing liens of record

## **Housing**

**Workforce housing – 2008 Ch. 299 (SB 342).** This law is largely a codification of the holding of the Supreme Court in Britton v. Chester, 134 N.H. 434 (1991), in which the Court determined that every municipality has an obligation to provide reasonable and realistic opportunities for the development of affordable housing, and that communities cannot use their land use regulations to exclude lower income households. But the statute also provides greater guidance for municipalities than the Court’s opinion, both through definitions and a clearer process. *See MLLS 2008 #1 for more complete treatment of this issue.* [Effective January 1, 2010]

- RSA 674:58 - :61
  - Cumulative impact of all local regulations and ordinances adopted under RSA 674 must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable” (read: “profitable”), including rental multi-family housing (this is a *facial* test)
  - Also adds a series of definitions as a means of providing greater guidance than the Court’s Britton opinion
    - Affordable: 30% of gross income
    - Renter household at 60% area median income
    - Owner household at 100% area median income
    - Multi-family housing: 5 or more units in a structure (but a local definition of 3 or more per structure is fine, as long as it doesn’t prevent structures with at least 5 units)
  - Opportunity for WH development must exist in a majority of residentially zoned area in a municipality
  - Exceptions for those communities that can demonstrate that they have provided their “fair share” of current and projected regional needs for affordable housing (view this as an *affirmative defense*)
  - Accelerated appeal – hearing within 6 months, either by judge or by court-appointed referee. Burden of proof is on the applicant to demonstrate that the municipality’s actions violated the law (an *as-applied* test)

**Workforce housing affordability covenants – 2010 Ch. 150 (HB 1395).** This amendment to the workforce housing law explicitly allows planning boards to require long-term affordability restrictions as a condition of approval of a workforce housing development. [Effective June 14, 2010]

- RSA 674:60, IV

**Local housing commissions – 2008 Ch. 391 (HB 1259).** With this enactment, the Legislature has enabled the creation of local housing commissions, which are local land use boards. It provides for them to be advisory only, and to assist other local boards in the development of housing plans, to identify housing needs in the community, and to provide recommendations on specific housing development proposals. The law also enables the establishment of an affordable housing fund that would be administered by the local housing commission, similar to the conservation fund controlled by the conservation commission. The fund has no statutorily identified source of revenues, but if a community allocates money to it, the housing commission may use the funds to facilitate affordable housing transactions. [Effective September 15, 2008]

- RSA 674:44-h

- As part of this legislation see also RSA 31:95-h, affordable housing revolving fund, as an alternative to the creation of a housing commission and affordable housing fund

## School Construction

**School siting and funding – 2010 Ch. 327 (SB 59).** In response to the frustrations of many local land use boards over school district decisions on locations for new schools, the Legislature enacted this law requiring that no state building aid funds to school districts may be used for construction projects that “conflict with effective statewide planning *pursuant to RSA 9-A or the principles of smart growth pursuant to RSA 9-B*” (new language in italics). The law also requires school boards to hold at least one public hearing to garner the input of municipal boards; school boards are to consider local zoning and master plan “in order to maximize best planning practices.” [Effective September 18, 2010]

## Developments of Regional Impact

**Building inspectors and regional impact – 2008 Ch. 357 (HB 310).** Building inspectors are defined as a “local land use board” in RSA 672:7. Because all local land use boards are required to make determinations of the potential for regional impact of an “application for development,” building inspectors also must make such a determination for each building permit they receive. Perhaps recognizing the unusual reasons for which building inspectors were included in the definition of “local land use board,” the Legislature carved out a special DRI process for them with this law. [Effective July 11, 2008]

- RSA 36:57, IV “Notwithstanding the foregoing, when the building inspector determines that a use or structure proposed in a building permit application will have the potential for regional impact and no such determination has previously been made by another local land use board, he or she shall notify the local governing body. The building inspector shall also notify by certified mail the regional planning commission and the affected municipalities, who shall be provided 30 days to submit comment to the local governing body and the building inspector prior to the issuance of the building permit.”

**Regional planning commission DRI guidelines – 2009 Ch. 194 (SB 29).** In what was probably another unnecessary law, here the Legislature enabled regional planning commission to establish non-binding regional impact guidelines to assist local boards in making their DRI determinations. The bill had originally been introduced to allow RPCs to charge for the cost of staff time review of regional impact developments, with municipalities passing that cost along to the developer/applicant. Sometimes the desire of the Legislature to pass *something* only yields laws that are somewhat less than useful. [Effective September 11, 2009]

- RSA 36:56, II

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### **Practice Pointer: Regional Impact Determinations**

Under RSA 36:56, all local land use boards are supposed to determine the potential for regional impact for every development application that comes before them. Where there's doubt, the answer is yes; but in most cases the answer is no.

The simple advice here is that whenever a land use board is accepting jurisdiction over an application, it must make a DRI decision. It shouldn't take more than a few seconds for each proposal, and making the decision will allow your board to properly notify the affected other municipality(ies) and regional planning commission(s), who then will be able to provide your board with comment.

Failure to make this determination when regional impact is likely from a development may result in avoidable litigation, cost, and delay. And yes, this applies to building inspectors too!

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**DRI notification – 2009 Ch. 49 (HB 210).** As part of other statutory changes aligning the timing of notifications with the requirements of RSA 91-A (the “right-to-know” law), this legislation requires that if a local land use board determines that a development has the potential for regional impact, it must notify the affected municipality(ies) and regional planning commission(s) within 5 business days. [Effective January 1, 2010]

- RSA 36:57, II

### **Conservation Commissions**

**Optional powers – 2008 Ch. 317 (HB 381).** These new optional powers of local conservation commissions are the Legislature's effort to clarify a legal question over the ability of a conservation commission to expend funds to assist in the acquisition of property interests by third parties, without the conservation commission or the municipality receiving a property interest as a *quid pro quo*.

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

## **Community Revitalization Tax Relief Incentive, RSA 79-E**

**Expansion to include replacement – 2009 Ch. 200 (HB 96).** This statute was originally adopted in 2006, and enables municipalities under certain limited circumstances to provide property owners with relief from property tax increases that are attributable to substantial rehabilitation of structures. [Effective July 15, 2009]

- Expanded to apply to allow incentive to be applied to *replacement* of structures, not just to their rehabilitation
- May be granted if
  - the structure has no significant historical, cultural, or architectural attributes, and
  - where the statutory public benefit of replacement would exceed that of rehabilitation
- Determination of historical, cultural, and architectural attributes to be made by Heritage Commission or Historic District Commission; if neither exists, then by NH Division of Historical Resources (DHR)
- Governing body may request a technical evaluation by DHR

**Thresholds and standards – 2010 Ch. 329 (SB 128).** The law was further modified last year to give municipalities the authority to set higher thresholds for the cost of rehabilitation, and also to allow them to establish stricter standards for identifying “qualifying structures.” [Effective July 20, 2010]

- See the flowchart below for a brief explanation of how this law works