

§ 2.13 Applicability of Zoning to Governmental Entities

Cities and towns in New Hampshire have only such powers as are granted to them by the state.¹⁷⁷ Municipalities have only such zoning powers as are granted to them by the State Zoning Enabling Legislation.¹⁷⁸ The statutes do not give municipalities the power to subject the state to local zoning ordinances. Zoning ordinances may not be applied to any subdivisions of the State of New Hampshire unless the legislature has clearly manifested an intention that they do apply.¹⁷⁹ The court has cited this doctrine in holding that the State Port Authority facility in Portsmouth is exempt from local zoning;¹⁸⁰ that counties are not required to comply with municipal zoning regulations;¹⁸¹ and that municipalities are not bound by their own zoning when acting in furtherance of their governmental function.¹⁸²

It is suggested that municipalities would be well advised not to disregard their zoning lightly, however. Although there are certainly times when a municipality is forced to take actions that might technically violate its zoning scheme (i.e, construction of sewerage pumping stations or water towers in residential districts), only as a matter of last resort should it engage in a use not permitted by its own zoning. If respect is to be generated for a zoning ordinance, a municipality should follow it unless there is absolutely no alternative. The municipality should not, for example, put an industrial use, such as a public works garage, in a residential district unless there is no alternative site available.

It is suggested that a better approach to the entire doctrine of the zoning of governmental property and of governmental preemption is by applying the balance of interests test which is being used in a number of other jurisdictions. Under this test, a state agency or an entity promoting a “state policy” is not automatically given immunity from zoning or allowed to preempt local land use controls. Rather, if there is a dispute, a reviewing court reviews such factors as the economic and environmental impact on the neighborhood, the kind of function or land use involved, the availability of alternate locations, and any attempts to minimize detriments to adjoining landowners.¹⁸³ Consideration is also given to competing interests, such as the nature and scope of the agency or entity, the essential use to the municipality and region, and the need for the specific Site as compared to the adverse impact, the social utility of the proposed use, and the possible frustration of a government function.¹⁸⁴

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¹⁷⁷ *Bisson v. Milford*, 109 N.H. 287, 289 A.2d 688 (1969).

¹⁷⁸ RSA chapters 672-77.

¹⁷⁹ *Opinion of the Justices*, 113 N.H. 217, 304 A.2d 872 (1973); *Portsmouth v. John T. Clark & Son, Inc.*, 117 N.H. 797, 378 A.2d 1383 (1977) (zoning not applicable to State Port Authority).

¹⁸⁰ *Portsmouth v. John T. Clark & Son, Inc.*, 117 N.H. 797, 378 A.2d 1383 (1977).

¹⁸¹ *Opinion of the Justices*, 113 N.H. 217, 304 A.2d 872 (1973).

¹⁸² *McGrath v. City of Manchester*, 113 N.H. 355, 307 A.2d 830 (1973) (city allowed to erect building in single-family residential district for the repair of fire department equipment).

¹⁸³ *City of Crown Point v Lake County*, 510 N.E.2d 684 (Ind. 1987). *See also* 5 Rohan, *Zoning and Land Use Controls*, § 35.05[5].

¹⁸⁴ *Id.*