
New Hampshire 2009-10 Land Use Law in Review

Cases and Statutes



OEP 17th Annual

Spring Planning & Zoning Conference

Nashua, NH

May 8, 2010



PART I

Recent Court Decisions

Planning Cases

- Elderly Housing
 - *Ferson-Lake, LLC v. City of Nashua*, __ N.H. __ (2009)
- Timing of Appeals
 - *Collden Corp. v. Town of Wolfeboro*, __ N.H. __ (2010)
- Sufficiency of Decision
 - *Motorsports Holdings, LLC v. Town of Tamworth*, __ N.H. __ (2010)

Planning—Elderly Housing

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

Planning—Elderly Housing

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

Planning—Timing of Appeals

- *Collden Corp. v. Town of Wolfeboro*, __ N.H. __ (2010)
 - 1993 subdivision approval—condition that all improvements be completed within six years; several phases; planning board exempts development from changes to subdivision regulations
 - Deadline extended to 2000, and phase one completed in 2000
 - Subdivision regulations amended in 2000 and 2003
 - 2004 letter indicating intention to complete remaining phases; planning board decides that its approval had expired
 - 2007 Collden files with court for declaratory judgment that it has vested rights or that town was barred by estoppel; court dismisses
 - RSA 677:15, I—30 days to appeal an approval or disapproval; claims it doesn't apply here; 2004 decision was neither an “approval” or “disapproval”
 - Supremes: planning boards make many decisions—“Collden’s interpretation of the statute would impede finality for those whose interests are affected by planning board decisions.” Same reasoning applies to estoppel claim; 17 years from approval and 3 years from planning board decision weighs heavily on the decision

Planning—Sufficiency of Decision

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

Planning—Sufficiency of Decision

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

Zoning Cases

■ Takings

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

■ Excavations

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

■ Non-conforming Uses: Abandonment

- *Pike Industries, Inc. v. Brian Woodward*, __ N.H. __ (2010)
- *Sutton v. Town of Gilford*, _ N.H. _ (2010)
- *Huard v. Town of Pelham*, _ N.H. _ (2010)

■ Variances

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

Zoning—Takings

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

Zoning—Takings

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

Zoning—Takings

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

Zoning--Excavations

- *Batchelder v. Town of Plymouth ZBA*, __ N.H. __ (2010)
 - Planning board approved site plan for Lowe's—77-½ acres in floodplain (FP), partly in “environmentally sensitive zone” (ESZ)(w/in 500' of Baker River); construction in FP requires structures to be above 100-year flood level—fill required to raise structures; 1-to-1 FP mitigation required under Federal law; “removal of fill” approved for site area in ESZ; 200,000 cubic yards of earth to be removed
 - Appeal to ZBA--“excavations” not allowed in ESZ. Prohibited:
 - Any disturbance for which an Earth Excavation permit issued under RSA 155-E (soil and gravel) is required
 - Any placement or removal of fill excepting that which is *incidental to the lawful construction or alteration of a building or structure* or the lawful construction or alteration of a parking lot or way including a driveway on a portion of the premises where removal occurs
 - Any placement or removal of fill excepting that which is incidental to agricultural or silvicultural activities, normal landscaping or *minor topographical adjustment*

Zoning--Excavations

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

Zoning--Excavations

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

Non-Conforming Uses: Merger

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

Non-Conforming Uses: Merger

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

Non-Conforming Uses: Merger

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

Non-Conforming Uses: Merger

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

Non-Conforming Uses: Abandonment

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

Non-Conforming Uses: Abandonment

- *Pike Industries, Inc. v. Brian Woodward*, _ N.H. _ (2010)
 - ZBA: production of asphalt is the “use” at issue; therefore non-conforming use was abandoned; intention to continue use was irrelevant; spirit of the ordinance important (as well as the “townspeople’s point of view”)
 - Superior court reverses—use is broader, intention should be considered
 - Supremes:
 - Spirit of the ordinance is relevant, but the language of the ordinance dealing with abandonment is what controls
 - “Use”: asphalt is produced when customers order it; other activities necessary to maintain a “state of readiness” to produce; Pike continued to use the plant, even without actual production
 - Intent: owner’s subjective intention to continue (i.e., not to abandon) a non-conforming use irrelevant where the ordinance defines what constitutes discontinuance. Ordinance: “for any reason”—negates intention (trial court opinion reversed on this point, but otherwise affirmed)

Non-Conforming Uses: Abandonment

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

Non-Conforming Uses: Abandonment

■ *Huard v. Town of Pelham* (cont'd)

□ Takings

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

Zoning—What's a Variance? RSA 674:33

1. The variance will not be contrary to the public interest.
2. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.
3. The variance is consistent with the spirit of the ordinance.
4. Substantial justice is done.
5. The value of surrounding properties will not be diminished (this one has not been statutory, but included by the Court)

Zoning—What’s “Unnecessary Hardship”?

- Use variance - *Simplex* analysis
 - i. The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.
 - ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
 - iii. The variance would not injure the public or private rights of others.
- Area (dimensional) variance - *Boccia* analysis
 - i. An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.
 - ii. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.
- **BEAR IN MIND! Ch. 307, Laws of 2009 (SB 147)**

Use Variances

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

Use Variances

■ *Farrar v. City of Keene (cont'd)*

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

Use Variances

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

Use Variances

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

Use Variances

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

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- **Questions on Cases**
 - **End of *Part I: Recent Court Decisions***
 - **INTERMISSION (go get a cookie)**
 - **Return at **2:15** for *Part II: Recent Statutory Changes***



PART II

Recent Statutory Changes

Zoning Variance Standards

- RSA 674:33, I(b) Ch. 307, Laws of 2009—SB 147
 - A rough codification of *Simplex v. Newington*, 145 N.H. 727 (2001), incorporation of the test in *Governor's Island Club v. Gilford*, 124 N.H. 126 (1983), and a rejection of the distinction between use and area variances in *Boccia v. Portsmouth*, 151 N.H. 85 (2004)
 - But see legislative purpose statement for treatment of post-*Simplex* cases, including *Boccia*.

Boards of adjustment may grant a variance if they find—

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and
- ...

Zoning Variance Standards (cont'd)

- RSA 674:33, I(b) (cont'd)
 - (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
 - (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - (ii) The proposed use is a reasonable one.
 - (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Zoning Variance Standards (cont'd)

- RSA 674:33, I(b) (cont'd)
 - The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance
 - This shall apply to any application or appeal for a variance that is filed on or after the effective date of this act
 - Effective January 1, 2010

Planning Board Waivers

- RSA 674:36, II(n) & 674:44, III(e) Ch. 292, Laws of 2009—HB 43
 - Addresses the limitation on planning board authority imposed by *Auger v. Strafford* (2007)(*Auger I*)
 - Restores board flexibility roughly to where it was under common law (*Frisella v. Farmington*, 1988)
 - Waivers may be granted if
 - (old law, roughly) Hardship is shown and granting would not be contrary to the spirit and intent of the regulation, **OR**
 - (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
 - Provisions for waivers to either subdivision (RSA 674:36, II(n)) or site plan regulations (RSA 674:44, III(e))

More-Than-4-Year Exemption

- RSA 674:39 Ch. 93, Laws of 2009—SB 93
 - 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)

Fluvial* Erosion Hazard Zoning

- RSA 674:56, II Ch. 181, Laws of 2009—HB 290
 - 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
 - Effective July 13, 2009

* “**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

Workforce Housing

- RSA 674:58 - :61 Ch. 299, Laws of 2008—SB 342
 - Primary aim is to codify Britton v. Chester (1991)
 - All communities must allow reasonable and realistic opportunities for the development of workforce housing that is “economically viable”, and including rental multi-family housing
 - Also adds a series of definitions as a means of providing greater guidance than the Court’s opinion
 - Affordable: 30% of gross income
 - Renter household at 60% area median income
 - Owner household at 100% area median income
 - Opportunity for WH development must exist in a majority of residentially zoned area in a municipality
 - Exceptions for those communities that can demonstrate that they have provided their “fair share” of current and projected regional needs for affordable housing
 - Accelerated appeals mechanism—hearing within 6 months, either by judge or by court-appointed referee
 - Effective January 1, 2010 (extended from 7/1/09 by Ch. 157 ‘09)

Availability of Minutes and DRI Notice

- RSA 676:3, II; RSA 677:4; RSA 677:15, I Ch. 266, Laws of 2009—SB 189
 - Draft minutes must be available to the public no later than 5 business days after the meeting or vote (formerly 144 hours)
 - Now consistent with RSA 91-A (right-to-know law)
 - Nullifies three identical provisions in Chapter 49
 - Effective September 14, 2009
- RSA 36:57, II; RSA 677:2 Ch. 49, Laws of 2009—HB 210
 - Local land use board making a determination of regional impact must notify the affected municipality and the regional planning commission within 5 business days
 - Effective January 1, 2010

Recording Conditions of Approval

- RSA 676:3 Ch. 266, Laws of 2009—SB 189
 - Applicants must be notified with detailed written description of any conditions necessary to obtain final approval
 - Recorded plats shall include (on or with) the final written decision and all conditions of approval
 - Effective September 14, 2009

Third Party Review

- RSA 676:4-b Ch. 73, Laws of 2009—HB 156
 - Adds new RSA 676:4-b, providing detail to planning board practices of hiring consultants
 - during application review process, and
 - during project construction
 - 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 to the Joint Board of Licensure
 - Effective August 8, 2009

Dam Owner Notification

- RSA 676:4, I Ch. 31, Laws of 2009—SB 28
 - (b) Application requirements: “Since construction of **any structure near streams or rivers** downstream of a dam can increase the hazard classification of the dam established by the department of environmental services, **the application shall identify the nearest dam upstream** and include the name and address of the dam owners.”
 - (d) Certified mail notice required to upstream dam owners and DES dam bureau for development proposals “near rivers and streams and downstream from a dam.”
 - Effective July 14, 2009
 - UVLSRPC Notice to Planning Boards
 - <http://uvlsrpc.org/files/pdf/damownernotification.pdf>

Fines for Continuing Violations

- RSA 676:17, I Ch. 173, Laws of 2009—HB 106
 - New sentence: “Each day that a violation continues shall be a separate offense.”
 - 2006 changed fine of \$275 from maximum to minimum (but “shall be subject to...” gives court discretion)
 - Individual violations avoid accumulation of a single fine and escapes district court jurisdictional limit of \$25,000 (RSA 502-A:14, II)
 - Effective September 11, 2009

ZBA Member Selection & Alternates

- **RSA 673:3 Ch. 286, Laws of 2009—HB 534**
 - A municipality may now legally switch from an appointed to an elected ZBA—the statute previously only provided for a change from elected to appointed
 - Either change may be made without amending the zoning ordinance
 - Effective January 1, 2010
- **RSA 673:12, III Ch. 114, Laws of 2009—HB 44**
 - Local land use board chair may designate an alternate to fill a vacancy temporarily until the vacancy is filled
 - RSA 673:11 only addresses the appointment of alternates when a regular member is absent or disqualified
 - Effective August 21, 2009

Dark Sky Policy

- RSA 9-D Ch. 212, Laws of 2009—HB 585
 - 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 FHWA.
 - Same standards for public utility installation or replacement for roadway lighting; 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.”
 - Effective September 13, 2009

RPCs and Developments of Regional Impact

- RSA 36:56 Ch. 194, Laws of 2009—SB 29
 - Regional planning commissions enabled to develop guidelines to assist local land use boards in their DRI determinations
 - *II. Each regional planning commission may, with public participation following the public posting of notice of the intent to develop guidelines, including notice published in a newspaper of general circulation in the planning region, develop guidelines to assist the local land use boards in its planning region in their determinations whether or not a development has a potential regional impact. The regional planning commission may update the guidelines as needed and provide them, as voted by the regional planning commissioners, to all municipalities in the planning region.*
 - Effective September 11, 2009

Local Energy Commissions

- RSA 38-D Ch. 275, Laws of 2009
 - 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)
 - Effective September 27, 2009

Expansion of Community Revitalization Tax Relief Incentive

- RSA 79-E Ch. 200, Laws of 2009—HB 96
 - 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
 - Effective July 15, 2009

Electronic Records

- RSA 91-A, III-a Ch. 299, Laws of 2009—HB 206
 - Keep electronic records for the same period as their paper counterparts
 - Electronic records kept for longer than the required retention period shall remain accessible and available
 - Effective September 29, 2009

- And in case you didn't already know...
 - Records that must be kept for more than 10 years shall be transferred to paper and/or microfilm (RSA 33-A:5-a)

Public Buildings and Accessibility

- RSA 155-A:5 Ch. 285, Laws of 2009—HB 530
 - New construction, rehabilitation, alteration of public buildings must comply with accessibility standards of state building code
 - Contractors must certify (and be qualified to certify); or qualified 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
 - Effective January 1, 2010; applies to work commenced on or after July 1, 2010

Enforceability of Publicly-Owned Land Restrictions

- RSA 477:22-a Ch. 295, Laws of 2009—HB 130
 - “Any recorded restriction, order, covenant, or other interest in land held by the state, or any political subdivision of the state, shall be enforceable against any owner of the affected land or structure, including subsequent purchasers, heirs, or assignees, notwithstanding lack of privity of estate or contract, or lack of benefit to particular land, or the benefit being assignable or being assigned.”
 - Compare with RSA 674:21-a Enforceability of open space designation as part of a land use board approval; also broader enforcement by owners of “specially damaged” properties
 - See also 2009’s HB 262, retained in House committee: as introduced, it would require Registry recording of any such restriction
 - Effective September 29, 2009

Federal SAFE* Act and Municipalities

- RSAs 397-A & -B Ch. 290, Laws of 2009—HB 610
 - Modifies mortgage licensing/servicing laws to include a wide range of activities
 - Includes any consensually granted interest in real property made in exchange for a loan, action, or forbearance from action
 - Includes some municipal actions, such as liens for CDBG-funded home rehabilitation (and possibly PACE loans—HB 1554)
 - Requires licensing of individual employees as loan originators, and municipalities as mortgage bankers
 - 2 bills pending in Legislature would provide municipalities a way out of licensing—statutory exemption, order of Banking Commissioner, or hiring a licensed mortgage broker, depending on circumstances (SB 339 & HB 1279)
 - *But individual employees will still require a license!*
 - Effective July 31, 2009

A Look Ahead—Pending Bills

- HB 1174: Terms of office of appointed officials
- HB 1380: ZBA fees for third party review
- HB 1554: Property Assessed Clean Energy (PACE)
- SB 59: School siting (and funding) policy
- SB 128: RSA 79-E & ARRA-like expenditures
- SB 448: Role of alternate members

- Interim Study
 - HB 487: Green building property tax exemption
 - SB 516: Rail-trail liability limitations
 - SB 316: Statewide transportation policy

Legislative Tracking

- Legislature's website
 - http://www.gencourt.state.nh.us/bill_Status/
- Local Government Center (NHMA)
 - www.nhmunicipal.org
- New Hampshire Planners Association (NHPA)
 - www.nhplanners.org

2008 Session Pending Legislation														
NHPA Priority Explanations below: Enacted Interim Study/Rereferred ITL/Killed														
Bill	LSR	Sponsor	Description	House Comm	Action	Date	Time	Room	Sen Comm	Action	Date	Time	Room	Gov's Action
HOUSE														
HB 76	282	Ryan	creating an environmental policy for New Hampshire.	E&A	Tabled									
HB 185	285	Ryan	(New Title) relative to economic revitalization zone credits.	W&M	Passed w/amend				W&M	Passed				
HB 255	706	Patten	establishing a committee to study the implementation and use of growth management ordinances.	M&CG	ITL									
HB 270	322	Renzullo	allowing municipalities to adopt a homestead exemption for property tax assessments on a person's principal principal place of residence.	M&CG	ITL									
HB 310	916	Chase	(New Title) allowing municipalities to regulate small wind energy systems.	M&CG	Passed w/amend				P&MA	Hearing	3/25	8:30	101 LOB	
HB 331	928	Skinder	(New Title) relative to time limits on design review.	M&CG	Passed w/amend				P&MA	Hearing	3/25	8:45	101 LOB	
HB 427	696	Ryan	(New Title) establishing a state climate change policy commission and developing a climate action plan and to report on climate change issues.	ST&E	ITL									

Finding the Law

NH Cases

- NH Supreme Court website
 - www.courts.state.nh.us/supreme/opinions/index.htm

NH Statutes

- Revised Statutes Annotated (RSA)
 - www.gencourt.state.nh.us/rsa/html/indexes/default.html

For Other Jurisdictions

- Cornell Law School
 - www.law.cornell.edu/

For More Information:

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www.nh.gov/oep/programs/MRPA/PlanLink.htm

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