

**NEW HAMPSHIRE OFFICE OF STATE PLANNING**  
**ANNUAL SPRING PLANNING & ZONING CONFERENCE**

**APRIL 20, 2002**

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*Legal Update*

*Another Fun Year in the Courts  
and Under the Golden Dome*

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## I. STATUTES AND PENDING BILLS

### A. *Real Planning: Taking a New Look at the Master Plan*

#### Local Master Plans and Planning Coordination

RSA [674:2](#), [36:47](#), and [9-A](#) [HB 650 (pending) and HB 712 (pending)]

Companion bills HB 650 and HB 712 mainly will do two things: (1) Reorganize and restate the recommendations for local master plans found in RSA 674:2, and (2) Provide for an important element of coordination among local, regional, and state plans.

HB 650 addresses the content of local master plans, but does not change any of the statutory requirements found in RSA 674:2. As minimum master plan prerequisites for the adoption of zoning, municipalities have been required to adopt a general statement of objectives and a land use section. Other sections, such as housing, have been merely recommended—some obvious sections, such as economic development, have been unmentioned. HB 650 presents a list of recommendations that is consistent with the manner in which most communities are presently developing master plans, but also includes specific recommendations for sections dealing with *natural hazards, regional concerns, community design, neighborhood plans, and implementation*:

- A **natural hazards section** which documents the physical characteristics, severity, frequency, and extent of any potential natural hazards to the community. It should identify those elements of the built environment at risk from natural hazards as well as extent of current and future vulnerability that may result from current zoning and development policies.
- A **regional concern section**, which describes the specific areas in the municipality of significant regional interest. These areas may include resources wholly contained within the municipality or bordering, or shared, or both, with neighboring municipalities. Items to be considered may include but are not limited to public facilities, natural resources, economic and housing potential, transportation, agriculture, and open space. The intent of this section is to promote regional awareness in managing growth while fulfilling the vision statements.
- A **neighborhood plan section** which focuses on a specific geographical area of local government that includes substantial residential development. This section is a part of the local master plan and shall be consistent with it. No neighborhood plan shall be adopted until a local master plan is adopted.
- A **community design section** to identify positive physical attributes in a municipality and provide for design goals and policies for planning in specific areas to guide private and public development.
- An **implementation section**, which is a long range action program of specific actions, time frames, allocation of responsibility for actions, description of land development regulations to be adopted, and procedures which the municipality may use to monitor and measure the effectiveness of each section of the plan.

Finally, HB 650 calls for all sections of a master plan to be consistent, one with another.

In similar measure, HB 712 addresses the requirements of regional plans and the state development plan. One of the fundamental duties of the state's nine regional planning commissions is to create a regional development plan (RSA 36:47). Beyond this statutory exhortation, there has been little to guide the commissions in the fulfillment of this requirement. HB 712 recommends that the regional planning commissions rely upon the required content of the state development plan (RSA 9-A), which the bill spells out.

The elements that HB 712 would require to be in the state development plan find almost complete parallel to the sections recommended for local master plans (with the obvious exceptions of neighborhood plans and community design). This does not suggest that local master plans should mirror the state development plan—to the contrary, HB 712 calls for the state development plan to be created in consultation with “*local officials, representatives of the business and environmental community, and the general public.*” The goal of HB 712 is to create a state development plan that reflects the content and structure of local master plans. In this manner the plans of the state, the regions, and the municipalities can be realistically compared against each other.

## **B. Yes, the Zoning Laws Have Changed, Too!**

### **The “Village Plan Alternative Subdivision”**

#### **RSA [674:21](#),VI [HB 1344, pending]**

HB 1344 is the most interesting zoning bill to come out of this legislative session. It modifies the “innovative land use controls” statute by adding a new option for municipalities—the village plan alternative. While municipalities already had the general authority under RSA 674:21 to adopt such a measure as the village plan alternative, this bill lays out what such an ordinance should hope to accomplish. As defined in the bill, a village plan alternative subdivision is intended to

encourage beneficial consolidation of land development to permit the efficient layout of less costly to maintain roads, utilities, and other public and private infrastructures; to improve the ability of political subdivisions to provide more rapid and efficient delivery of public safety and school transportation services as community growth occurs, and finally, to provide owners of private property with a method for realizing the inherent development value of their real property in a manner conducive to the creation of substantial benefit to the environment and to the political subdivision's property tax base.

In the village plan alternative, while local ordinances and regulations relating to public health and safety concerns would still control, dimensional requirements dealing with lot sizes, building setbacks, and road frontage would not apply. The density of a development in the village plan alternative would be based upon the parcel's overall development potential under local and state regulations. Density of development would not increase beyond that “conventional” subdivision potential, unless the local ordinance permitted it.

HB 1344 provides for a developer's trade-off: if a village plan uses no more than twenty percent of the overall parcel, then the developed portion of the lot is forever exempt from local zoning dimensional standards. The exchange is that the remaining eighty percent of the parcel is subject to an easement granted to the municipality for "agriculture, forestry, and conservation, or for public recreation."

**Bismark, Law, & Sausage: Definition of "Abutter," and Maybe a Few Other Items  
RSA 672:3 [HB 1407, pending]**

This bill has gone through a remarkable evolution between its introduction in the House and the amendment passed by the Senate three days ago. The original bill dealt with the definition of "property," and also provided for municipal requirements that notice signs be posted on properties with applications pending before local land use boards (this is a good practice, and doesn't necessarily require a statutory amendment to accomplish it).

The House subsequently amended the bill to include the following amendment to the definition of "abutter" in RSA [672:3](#):

For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

Later, the bill was amended on the floor of the House to include the new criteria for zoning boards of adjustment to grant variances, based upon the NH Supreme Court's decision in Simplex Technologies v. Town of Newington.

Now, the Senate has completed the bill's evolution from one species to another by eliminating the entire content of the House's version, except for amendment to the definition of "abutter." I wonder if the bill's sponsor was thinking about this when she proposed it!

**Pardon, You're Standing in My Light: Zoning and Solar Skyspace Easements  
RSA 674:2, 674:17, and 674 [HB 701, effective 6/15/02]**

To encourage recognition of the specific needs of solar, wind, and other renewable power receptors, the legislature has modified the statutory purposes of zoning to address the possibility of unreasonable restrictions, and also to encourage the development of solar skyspace easements.

RSA [672:1](#) "Purpose of Zoning," has had the following statement added:

zoning ordinances should not unreasonably limit the installation of solar, wind, or other renewable energy systems or the building of structures that facilitate the collection of

renewable energy, except where necessary to protect the public health, safety, and welfare;

Similarly, the section that specifically describes the purposes of zoning ordinances, RSA [674:17](#), has also been amended by adding the following purpose statement:

To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height and placement of vegetation; encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.

Planning boards are also encouraged to address this issue through subdivision regulations, with a new option in RSA [674:36](#), II to include in regulations that is similar to the zoning purpose statement:

Encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height and placement of vegetation; encouragement of the use of solar skyspace easements under RSA 477.

RSA [477:50](#) deals with the creation of solar skyspace easements. The statute clearly states that planning boards cannot require such easements to be granted, but if they are granted voluntarily, they should provide a description of a three-dimensional space measured outward from the solar energy system and extending over real property, and including relevant times of day

### **Airport Zoning**

#### **RSA 424 [HB 482, effective 8/7/01]**

This bill fundamentally changed the exclusive nature of airport zoning, which had previously had separate adoption and enforcement procedures. While many distinctions still remain between airport zoning (because of its peculiar and narrow nature) and zoning generally, they are now almost indistinct, from a procedural standpoint. Appeals are made to the zoning board of adjustment, adoption and amendment procedures are the same as with all other zoning, and

*That's all true, but...* When a variance is requested from the terms of the airport zoning, the standard in RSA [424:6](#), II is different:

Such variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations.

This “practical difficulty or unnecessary hardship” standard is the same one that zoning boards must apply under RSA [674:41](#) when asked to grant a building permit for construction on an unbuilt or Class VI highway.

## C. A Grab-Bag of Unrelated Bills

### **It’s Not Your Father’s Building Code, It’s the State Building Code!**

**RSA [155-A](#), 674:51 [HB 285, generally effective 9/14/02]**

Without going into the details of the code itself, suffice it to say that New Hampshire at last has adopted a uniform building code for the entire state. It includes the International Building Code 2000, the International Plumbing Code 2000, the International Mechanical Code 2000, the International Energy Conservation Code 2000, and the National Electric Code 1999.

RSA [674:51](#) (adoption of building codes) is repealed and reenacted to reflect the change, and municipalities may enact amendments to the State Building Code that are more stringent (but not less!). Municipalities will have a year from the effective date of this law to make appropriate changes. The bill was careful to recognize and respect municipal authority, but where a municipality does not wish to enact and/or enforce the code, it will be the responsibility of the State Fire Marshal’s office to ensure that construction meets the new standards.

### **Building Permits on Private Roads?**

**RSA 674:41 [HB 1156, pending]**

In addition to serving as a clean-up bill to fix errors in HB 285 (State Building Code), HB 1156 also serves its original purpose by proposing new authority to grant permits on private roads. The bill amends RSA [674:41](#), by adding new subparagraph (d) to read:

...no building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:

...

(d) Is a private road, provided that:

- (1) The local governing body, after review and comment by the planning board, has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof;
- (2) The municipality neither assumes responsibility for maintenance of said private roads nor liability for any damages resulting from the use thereof; and
- (3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds for the lot for which the building permit is sought.

It is unclear how to distinguish between a “private road” and a common driveway, but it will still remain the governing body’s decision to make. If a municipality chooses to

grant permits under this proposed bill, it would be best to have the town attorney draft the language of the document that limits the municipal liability, rather than relying on the permit applicant.

### The CIP Alternative

#### RSA [674:5](#) [HB 1121, pending]

No, “the CIP Alternative” isn’t the latest Robert Ludlum spy novel—it’s authority for municipalities to create capital improvement programs using a committee other than the planning board. Here’s the relevant part of the bill (proposed new language in italics):

In a municipality where the planning board has adopted a master plan, the local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least 6 years. *As an alternative, the legislative body may authorize the governing body of a municipality to appoint a capital improvement program committee, which shall include at least one member of the planning board and may include but not be limited to other members of the planning board, the budget committee, or the town or city governing body, to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least 6 years.* The capital improvements program may encompass major projects being currently undertaken or future projects to be undertaken with federal, state, county and other public funds. The sole purpose and effect of the capital improvements program shall be to aid the mayor *or selectmen* and the budget committee in their consideration of the annual budget.

What this bill does is simply to recognize that in many communities, the planning board is not the group that is preparing the CIP, even today. True, it’s unlikely that an “improperly” prepared CIP (e.g., by a committee including various board members) would ever receive a direct legal challenge. But remember that a properly adopted CIP is a statutory prerequisite to the adoption of an impact fee ordinance (see RSA [674:21](#), V(b)).

After *ad hoc* development exactions were banned by the Supreme Court in Simonsen v. Derry, formal impact fee ordinances have become an absolute must for all municipalities. Without an impact fee ordinance, planning boards cannot make developers pay for the off-site impacts of their projects (including road improvements in the immediate vicinity!). As a result, many communities have hurriedly adopted impact fee ordinances, probably without a second thought about the capital improvement program. A CIP adopted without following the proper statutory procedure is an easy way for a developer to challenge even the best of impact fee ordinances.

HB 1156 will give municipalities greater freedom in creating their CIPs. Just remember that whatever route you choose, planning board or CIP committee, legislative body authorization is required.

## **Keeping Your Ear to the Ground—Excavation Hearings**

**RSA [155-E:7](#) [HB 1112, pending]**

This is a simple and welcome change to the statute governing excavation hearings. What this bill proposes is to change the notice period prior to hearings from 14 days to 10 days, making it consistent with other land use board hearing procedures. Remarkably, there were no unrelated amendments to this bill, keeping it as simple as the day it was introduced.

## **Think Twice Before Erasing That Tape!**

**RSA 91-A [HB 550, pending]**

This bill establishes that knowing destruction of public records is a criminal act, where the destruction is for the purpose of preventing the records from being inspected. Read on...

[91-A:9](#) Destruction of Certain Information Prohibited. A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

Class A Misdemeanors carry a penalty of up to a year in prison, and a \$2,000 fine.

## **D. Water, Water, Everywhere?**

### **Large Scale Groundwater Withdrawals**

**RSA [485-C](#) [SB 410, modified & pending]**

As originally drafted, SB 410 would have granted municipalities significant authority to regulate large-scale groundwater withdrawals, in a regulatory scheme that potentially would have set up dual jurisdiction between municipalities and the State (Department of Environmental Services). Recent action in the House has changed the bill from one of action, and calls for the creation of a study committee, which will have the following charge:

study ways to clarify the hierarchy of water uses, while considering existing private property rights, to evaluate a balanced approach to water use among residential, public water supply, industrial, commercial, agricultural, recreational and other water users, and to review the current process by which all such new water users may reasonably and efficiently use state water resources, including consideration of potential regional impacts and local water management issues, in order to best protect and preserve an adequate supply of groundwater for the state. This study shall include consideration of issues such as potential impacts on New Hampshire's environment, other water users, municipalities, and the state's economy. The commission shall also evaluate whether there is a need for additional regulation to address different uses of water.

**Comprehensive Shoreland Protection Act (3 Bills)**

**RSA [483-B](#) [SB 451, pending]**

This bill proposes a variety of changes to the CSPA—mainly to clarify the original intent of the statute.

**RSA [483-B](#) [SB 452, pending]**

Proposed here is mandatory action by the DES Commissioner to fine individuals who violate the CSPA. The bill also provides for doubling the fine limit for “repeat offenders.”

**RSA [483-B](#) [SB 453, pending]**

This bill proposes to eliminate discretion in setting the primary building setback line less than the state standard. Here’s the current statutory language:

(b) Primary structures shall be set back behind the primary building line. This line shall initially be set back 50 feet from the reference line. Upon the establishment of a shoreland building setback by a municipality, that standard, whether greater or lesser than 50 feet, shall define the primary building line in that municipality.

And now proposed by this bill:

(b) Primary structures shall be set back behind the primary building line which is 50 feet from the reference line.

The bill also provides that

Municipalities having a setback of less than 50 feet prior to January 1, 2002 may maintain the defined primary building line in that municipality.

## II. NH SUPREME COURT CASES

### Scenic Roads and Class VI Highways

[Webster v. Town of Candia](#)

[Sanderson v. Town of Candia](#)

\_\_\_ N.H. \_\_\_ (May 21, 2001, revised August 28, 2001)

In a confusing opinion, the NH Supreme Court affirmed the Superior Court's decision upholding the Candia Planning Board's decision not to allow trees to be cut on a "Class VI Scenic Road." The Court accepted the Planning Board's judgment that cutting the trees would tarnish the scenic beauty of the road (and the town), and that it could cause erosion. The Court also found that the scenic road statute (RSA 231:157-158) was not unconstitutionally vague because of its failure to define "scenic beauty." Quoting the NJ and ME Supreme Courts, the NH Court said (and this is great stuff...) "

The Act contemplates that there is a certain basic beauty in natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or maintain. Although the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama. 'Scenic beauty' is concerned with such manifold possible situations that it does not lend itself to a more specifically detailed descriptive statement. A tabulation of the various possible elements constituting scenic beauty is well-nigh impossible."

The Court also found that the town did not effect a "taking" of the plaintiffs' property by refusing to allow the trees to be cut. Interestingly, the Planning Board considered the availability of alternative access in its decision—the owners could access their property from a non-scenic (ugly?) Class V highway, and so did not need to cut down the trees on the Class VI scenic road. There were a lot of other things going on in the case, too.

What is troublesome about this case is the Court's reading of the scenic road statute, RSA 231:157-158. This was a situation where a private property owner was trying to cut trees to improve the road for access. The Court quoted the statute:

Upon a road being designated as a scenic road as provided in RSA 231:157, any repair, maintenance, reconstruction, or paving work done with respect thereto by the state or municipality . . . shall not involve the cutting, damage or removal of trees [of a particular circumference], or the tearing down or destruction of stone walls, or portions thereof, except with the prior written consent of the planning board, or any other official municipal body designated by the meeting [of the town voters] to implement the provisions of this subdivision . . . .

Note that it reads "by the state or municipality..." I have always understood this to mean that designation as a scenic road would not prevent an owner of abutting property from cutting trees within the right-of-way. Indeed, the statute later reads, "Designation of a road as scenic shall not affect the rights of any landowner with respect to work on his own property..." (RSA 231:158,IV).

Bernie Waugh summed it up nicely: "I've heard scenic roads spoken of in hushed tones, as though these roads were covered by some sort of 'untouchable' teflon coating of pristineness. Given this confusion, let me start by saying what a 'scenic road' isn't: (i) It isn't a legal way to prevent landowners from cutting -trees or tearing down stone walls..." (from "A Hard Road to Travel"). Unless Candia owned the fee to the right-of-way (instead of a "viatic easement" which is common to old roads), then the scenic road statute should not have been enough to prevent the trees from being cut. Unfortunately, the Court's presentation of the facts seems incomplete, so we're left to wonder how they reached their conclusion.

### **Performance Bonds and Road Layouts**

#### [Wolfeboro Neck Property Owners Association v. Town of Wolfeboro](#)

\_\_\_\_. N.H. \_\_\_\_ (June 1, 2001)

In 1987, the Wolfeboro planning board approved a subdivision that involved road construction. The developer posted a \$361,240 bond for the road work, and at a point in the construction of the subdivision that met town standards, the developer sought to have the bond released. The director of public works inspected the roads and certified that they had been built to town specifications. The selectmen released the bond.

In 1995, the subdivision had been built out sufficiently for the development to request "layout" of the roads, the statutory process through which request for municipal assumption of maintenance responsibility can be made. The town determined that the roads had been constructed below town standards, and refused to lay out or accept the roads. The town estimated that it would cost about \$295,000 to bring the roads up to standard.

While the court ultimately found that the town was negligent in releasing the bond, and remanded the case for further proceedings, what is notable to planning boards is that there was no mention of the planning board's role in administering the bond. The planning board has exclusive jurisdiction over administration of bonds for subdivisions and site plans. Levasseur v. Hudson, 116 N.H. 340 (1976).

### **If the Reasons for Denial are Many, then Deny for Many Reasons**

#### [Star Vector Corporation v. Town of Windham](#)

#### [Windham Safety Coalition v. Town of Windham](#)

\_\_\_\_ N.H. \_\_\_\_ (June 14, 2001)

Star Vector sought site plan approval from the planning board for an indoor shooting range. The proposed location was in a commercial zone proximate to a residential zone, and within the watershed of Canobie Lake, the town's water supply. The planning board denied the site plan for the following reasons:

- (1) an unacceptable risk to public safety existed from accidental discharge of firearms and Star Vector did not propose any safeguards to diminish the risk;
- (2) the application failed to comply with the town's noise ordinance; and
- (3) an unacceptable environmental risk existed that hazardous substances would escape into the air, soil and watershed

Star Vector appealed both to the ZBA (for the denial based upon the noise ordinance) and to superior court (for improper denial of the site plan). The ZBA reversed the decision of the planning board, finding that the planning board had erroneously concluded that the application did not comply with the town's noise ordinance. The Windham Safety Coalition appealed the ZBA decision. The superior court determined that the ZBA had reasonably concluded that the application would not violate the noise ordinance, but also determined that the planning board's other reasons for denial were reasonable and lawful. Appeals ensued.

The supreme court assessed the voluminous evidence that the planning board had consider, including the testimony of different experts that was contradictory. Based on this, the supreme court concluded that the superior court's decision was reasonable, when it determined that the planning board 's decision "was not unreasonable or the result of legal error."

The court concluded: "If any of the reasons offered by a planning board to reject a site plan application support its decision, then an appeal from the board's denial must fail." The deeper lesson to take from this is that all reasons for denial should be stated by the board as part of its decision. It might seem like a scatter-shot approach sometimes, but there's wisdom to it. If you put up all of your reasons for making a decision, especially a denial, then something's bound to stick.

### **Condominium Approval ≠ Subdivision Approval**

[Town of Windham v. Lawrence Savings Bank](#)

\_\_\_ N.H. \_\_\_ (June 22, 2001)

In the late 1980s, the Windham planning board approved a condominium development known as the Villages of Windham. Phase I of the development was on 22 acres, separate on the plans from 141 acres of additional land. Subsequent modifications to the development split the remaining land into two non-contiguous tracts of land. In 1996, the new owner, Lawrence Savings Bank, independently sold one of the two tracts of additional land, claiming that the Condominium Act, RSA 356-B, gave them unfettered right to develop the land, and that the sold parcel had been subdivided through the act of incremental expansion of the condominium project.

The supreme court disagreed, stating

The fact that the Condominium Act allowed the developer to reserve the right to transfer property to the condominium association from the expandable land did not relieve the developer of the obligation to obtain subdivision approval from the planning board.

Moreover, the planning board's approval of a site plan showing a portion of the lot as "expandable land" did not relieve the developer of the obligation to obtain approval for further subdivision of that expandable land.

### **You Get What You Pay For**

#### [Sanderson v. Candia](#)

\_\_\_ N.H. \_\_\_ (July 6, 2001)

The planning board denied Sanderson's cluster subdivision because it lacked frontage on a Class V or better road (the property had frontage on a Class VI road). Sanderson appealed, alleging that the town's ordinance was an unconstitutional taking of private property. The supreme court recited the "takings" standard of review, noting that the same standard applies both to the N.H. Constitution and to the federal Constitution:

[A]rbitrary 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 . . . .

[A zoning] ordinance is not confiscatory if it has a reasonable tendency to promote the public welfare and gives due regard, under all the facts and circumstances, to plaintiff's property rights.

The extent to which a regulation 'has interfered with distinct investment-backed expectations' is a particularly relevant consideration in determining when a taking has occurred. (Citations omitted).

Sizing up the situation, the court found that the applicant had bought the property with full knowledge of the ordinance's frontage restriction and that the property lacked the required frontage. Therefore, she bought the hardship of which she now complains. The court concluded that the market adequately accounts for such zoning limitations, by discounting the value of property restricted in this manner.

### **...Get Me to the Church On Time!**

#### [Hoffman v. Town of Gilford](#)

\_\_\_ N.H. \_\_\_ (October 9, 2001) (slip opinion [modification](#), December 4, 2001)

Hoffman is an abutter to Fay's Boat Yard, which receive site plan approval from the planning board in 1998 to expand its marina. Hoffman appealed the planning board's decision to the ZBA, claiming problems with both zoning and the site plan. The ZBA gave Hoffman clear information that it could only hear the zoning issues, which it reviewed, affirming the decision of the planning board. Reconsideration was denied by the ZBA.

Hoffman then appealed to superior court, claiming both the zoning and planning issues. The superior court agreed to hear the zoning portion of the appeal, as that had been timely filed, but dismissed the planning portion, as the planning board's decision had not

been directly appealed to superior court within thirty days of the planning board's decision being filed.

In the appeal to the supreme court, the only issue raised was the dismissal of the planning portion of the appeal to superior court (this was an interlocutory appeal, which means that the action in superior court is still pending). The supreme court carefully looked at RSA 676:5 (appeals to ZBA) and 677:15, I (appeals of planning board decisions). Hoffman claimed that because the case involved both zoning and planning matters, it would be cumbersome to have to file appeals to different portions of the same case in different forums. Because of this inconvenience, Hoffman asserted that the superior court should not have dismissed the planning claims as being untimely filed.

The court said: "The statutes do not, on their face, provide for a different review process when a planning board decision resolves both zoning and planning issues. The aggrieved party must still take zoning issues to the ZBA and planning issues to superior court. Indeed, the last sentence of RSA 677:15, I, expressly prohibits direct superior court review of zoning decisions. Accordingly, parties must first appeal zoning issues to the ZBA and planning issues to the superior court. . . . While there is some merit to the argument that it is undesirable to have related issues in the same case in different forums, the statutes simply do not contain that flexibility. It is not our task to rewrite the statutes. Of course, where there is an appeal to the ZBA and a simultaneous appeal to superior court, the superior court may, in its discretion, stay its proceedings and decide the planning board and subsequent ZBA appeal at the same time."

Applicants and appellants must watch the clock carefully, and simultaneously pursue all avenues of appeal. He who snoozes, loses.

### **Penalties Can Add Up**

[Nottingham v. Newman](#)

\_\_\_ N.H. \_\_\_ (November 1, 2001)

In this significant pro-enforcement case, the supreme court upheld the imposition of fines and costs against a zoning violator. Basically, these are the facts: Newman had two mobile homes on her land. She lived in one, and her parents lived in the other; the two homes were connected under one roof, but seemed to be universally regarded by all parties and the courts as two structures/homes. The court noted that

According to the Town's zoning ordinance, when more than one dwelling unit is constructed on a single tract of land, each unit must be located on a plot that satisfies all of the requirements of the ordinance and subdivision regulations, and a building permit must be obtained before any existing structure on the property may be relocated."

Newman filed a permit to replace one mobile home with a house. The town granted the permit, under the condition that both mobile homes be removed. The house was built, but both mobile homes remained. A certificate of occupancy was granted for the house,

upon the condition that the mobile homes would be removed in approximately one month. Newman signed an agreement with the town that read as follows:

I further understand that if I default on this agreement and it becomes necessary for the Town of Nottingham to remove the two said mobile homes, I will be responsible for any and all moving costs, attorney's fees and legal expenses that the Town may incur.

You can guess what happened. After both mobile homes were removed from the property, one subsequently reappeared, and the town sought an injunction. Ultimately, the second mobile home was removed (and apparently hasn't yet returned).

The issue before the court was penalties and fees. Newman openly admitted to violating the zoning ordinance, but contested the imposition of fines that started accruing on the date of the town's initial notice of violation. Her contention was that RSA 676:17 (fines for zoning violations) was unconstitutional because it allows fines to start upon notice of a violation, and while the matter was being litigated. The court disagreed with this position, noting that the fine was the result of a superior court hearing, though its ultimate amount was influenced by the passage of time. The fine imposed was \$14,650, or \$10/day of violation. The town had sought \$100/day (you do the math).

The court also upheld the assessment against Newman of \$6,000 attorney's fees to the town. Newman argued that there had been no bad faith at issue, so attorney's fees should not be required, but the court addressed the certificate of occupancy's condition (read it again, above) as a private contract between two parties, and hence, enforceable!

Two points for towns:

- (1) this is a great condition to put on certificates of occupancy, but
- (2) if you don't issue conditional CO's, you won't get into these messes.

### **Protest Petitions**

#### [Handley v. Hooksett](#)

\_\_\_ N.H. \_\_\_ (November 14, 2001)

In this case, the court upheld the town's actions on compiling zoning amendments and on its treatment of a protest petition. There are important lessons here for planning boards (and planners) and boards of selectmen/councils (and administrators) alike.

Here's what happened: the town proposed a series of amendments to its zoning ordinance that would affect the lot size and frontage requirements in medium and high density residential districts, based upon provision of municipal water and sewer. The changes could be divided into six discrete amendments, but the planning board chose to put them all together as a single question--the town council then put that question on the warrant for town meeting.

The town received a timely protest petition, notice of which was properly posted at the polling place, and announced by the moderator. The town did not, however, determine the validity of the protest petition until after the town meeting. After town meeting, it was determined by the town that the protest petitioners did not own the requisite 20% of the land area affected by the proposed amendment (see RSA 675:5, I-a(a)). The amendment passed by simple majority, and would have failed the 2/3 majority required if the protest petition had been valid.

Handley argued that: (1) the town should have determined the validity of the petition prior to the town meeting; (2) the town council did not have jurisdiction to determine the petition's validity after the town meeting; (3) the town administrator (not a town resident) did not have standing to direct the review of the petition's validity; (4) the town illegally combined the various amendments; and (5) the totality of the circumstances rendered the town's action unconstitutional.

The Supreme Court held:

(1) RSA 675:5 does not require the validity of a protest petition to be determined prior to town meeting--it only states that notice of receipt of the protest petition has to be posted at the polling place and announced, which is exactly what the town did. The court didn't get into this, but there are practical good reasons not to try to calculate the land area of the petitioners prior to town meeting: if the amendment fails to get even a simple majority, or gets more than a 2/3 supermajority, then the exacting exercise of determining the petition's validity is pointless.

(2) the court affirmed the council's jurisdiction to determine the petition's validity after town meeting;

(3) the court rejected as without merit the argument that the town administrator could not direct the process of determining the petition's validity;

(4) looking into the combination of amendments under one article, the court went into some detail in affirming the town's action. The trial court had determined that the combination was OK, because even if the amendments had been separated into two distinct articles (remember: medium and high density districts were affected), neither would have had the support of owners of 20% of the area affected--thus separate protest petitions would have been found invalid. The supreme court agreed with the result (upholding the town's action), but used different reasons: looking at its own earlier decision on other municipal matters, as well as decisions from other states, the court held that the "single purpose" rule of amendment proposals held here:

Under this rule, it is not the number of amendments grouped together under one "single subject" that is important; rather, it is the interrelated nature of the amendments and the subject at issue. . . . Concluding that changes to multiple sections of a charter may be done by a single amendment, as long as each section is germane to the subject of the amendment, we held that the town's proposed amendment did not violate this rule.

(5) the argument of unconstitutionality was rejected as without merit.

### **Creative Interpretations Can Get You Into Trouble**

#### *Old Street Barn, L.L.C. v. Peterborough*

\_\_\_ N.H. \_\_\_ (December 20, 2001)

The case involved water withdrawal for commercial purposes, and depends in part upon the court's April, 2001 decision in KSC v. Town of Freedom. In roughly 1990, the plaintiff's predecessor started pumping and trucking water from his residentially-zoned site, and the town responded with a cease and desist order. On appeal to the ZBA, the board vacated the cease and desist order, finding that "as proposed by the applicant, that trucking of water is permitted as an adjunct to the common law right to pump and is not prohibited by the ordinance."

However, the ZBA limited the amount of permitted water removal to two 7,000 gallon trucks per day, finding that without the limitation, "the proposed use could and perhaps would exceed the common law right and be a greater intrusion than the uses permitted by the ordinance for this property."

Fast forward to 1998 when the new owner wanted to roughly double the amount of water removed from the property and asked the ZBA to modify its 1990 order. The ZBA refused, the Superior Court agreed with the ZBA, and the case wound up in the Supreme Court.

Old Street first argued that the ZBA didn't have jurisdiction to modify its earlier order. The Supreme Court made quick business of this by relying exclusively on its reading of RSA 674:33, I(a), and this is an important point to remember: the ZBA has jurisdiction over any decision by any local official who is interpreting the zoning ordinance. Its authority includes conditionally vacating a cease and desist order, as was done here.

Old Street's second argument involves the concept of "collateral estoppel," a legal doctrine that means that anything that is fully and finally litigated in a prior proceeding cannot be brought up by the same parties again in a subsequent action. Old Street was apparently arguing that because the ZBA had found that water removal was not prohibited by the ordinance, then it couldn't now say that exceeding certain specified limits was also prohibited (this point is not entirely clear in the court's opinion).

The Court took a different approach, stating that the essential question presented by Old Street (namely, is doubling the removal of water OK?) was never actually litigated in 1990. The Court wasn't clear on this point either, but I believe that it was relying on the conditional language in the ZBA's 1990 order: "...the proposed use could and perhaps would exceed the common law right..."

If the ZBA had simply said in 1990 that increasing the removal would exceed the common law right, then there would be no basis for arguing that the matter hadn't been

decided earlier. But because the board said "could or perhaps would," then it left the well uncapped, so to speak.

Finally, Old Street challenged the failure of the ZBA to develop formal findings for its denial to modify the order. This was apparently a mistake by the ZBA, but it got lucky: the issue wasn't brought up in Superior Court, so the Supreme Court refused to hear it.

Some observations:

1. I don't think that the Supreme Court was buying the idea that commercial water withdrawal is an acceptable common law right in the face of a legitimate zoning ordinance (e.g., the Court referred to it as an "alleged" right), but that wasn't being litigated.
2. It's clear that, under the terms of the town's zoning ordinance, the Court didn't like this scale of operation. Reading between the lines, I got the feeling that the Court wasn't thrilled with the idea of water withdrawal at a lesser scale either--that is, this Court might not have upheld the original decision of the ZBA, if it had been appealed in 1990.
3. This case is fact intensive, so don't put too much stock in its applicability to other issues you may have cooking, but do recognize the beautiful flexibility (lawyer's perspective) of conditional language--"could" and "perhaps" gave us this case. If the ZBA had put its foot down 1990, and said that removing more water would violate the common law right, then it would have saved itself the trouble of this litigation (and I don't mean "perhaps").

### **Find Those Facts!**

#### [NBAC v. Town of Weare](#)

\_\_\_ N.H. \_\_\_ (December 27, 2001)

NBAC sought to establish a gravel operation in Weare. When it appeared before the ZBA for a special exception, NBAC presented information that indicated the property was not in the Town's aquifer protection zone. The ZBA granted the special exception, then NBAC went to the Board of Selectmen for the excavation permit (under RSA 155-E:1, III, the Planning Board is the "regulator" of gravel operations, unless town meeting specifies otherwise--which was apparently the case in Weare).

As it turned out, the property was over an aquifer. The Town's own experts, however, determined that the proposed gravel operation met the standards of the Town's excavation ordinance. Nonetheless, the Board of Selectmen denied the permit on the grounds that:

- it would be injurious to the public welfare and would be visible from the road;
- it could have a profoundly detrimental impact on the environment, a pond, and the aquifer;
- a false statement was presented to the ZBA; -

- the operation was not in the best interests of the community;
- the application did not fully comply with the gravel ordinance; and
- it would have a long-term negative impact on the aquifer and would be injurious to the residents of the Town.

The Board of Selectmen did not go any further to establish findings of fact.

NBAC moved for a rehearing, which the Selectmen denied. NBAC appealed to Superior Court, arguing that there was insufficient evidentiary basis for the Selectmen's decision, and that the Selectmen were collaterally estopped (remember this from Old Street Barn v. Peterborough? collateral estoppel = the issue has already been decided, and can't be relitigated by the same party in a different action). The Superior Court upheld the Selectmen's decision.

On appeal to the Supreme Court, NBAC argued that the Selectmen failed to provide adequate reasons for its decision, instead relying on the minutes of a public hearing. NBAC argued that this meant that the Superior Court had to speculate as to what portion of the public record the Selectmen were using as basis for their decision. The Town argued that this issue was waived, as it was not raised in NBAC's motion for rehearing by the Selectmen. The Court agreed with the Town.

NBAC also argued that the Superior Court applied the wrong standard of review, with the suggestion that the Court should have weighed all of the evidence to establish "on the balance of the probabilities" that the Selectmen's decision was correct (RSA 677:6 and 15). Instead of putting all of the evidence into one pot and assessing it, the Supreme Court held that the individual points upon which the Selectmen based their decision should be assessed to determine "...if a reasonable person could have reached the same decision..." If any one of the findings of the Selectmen could be upheld, then its decision would stand. Here, the Supreme Court held that NBAC had failed to prove that all of the reasons used by the Selectmen were wrong.

Finally, NBAC argued that the Selectmen couldn't decide upon the same issues considered and resolved by the ZBA (collateral estoppel). The Court dodged this question sufficiently, by saying that there were reasons supporting the Selectmen's decision that had never been considered by the ZBA (I don't use "dodged" as a criticism: the court only decides those things it really must).

***Some thoughts:***

**Public Welfare:** the Court reiterated its understanding of "public welfare" as a broad and inclusive concept, embodying values that are "spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled," quoting Asselin v. Conway, 137 N.H. 368,371 (1993). This is important stuff--too often, local boards are faced with the question, "How

can you define THAT?" In a sense, the Court is saying that public welfare is like art: you know it when you see it. But...

**Fact Finding:** it's clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers, because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time.

**More Fact Finding:** the important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good, too, but you have to have the conclusions on the record--say what you mean, and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason!"). Local boards must give any and all reasons.

### **Vesting and Divesting**

#### [Morgenstern v. Town of Rye](#)

\_\_\_ N.H. \_\_\_ (December 21, 2001) ([modification order](#) issued April 15, 2002)

In this case that parallels the US Supreme Court's decision in Palazzolo v Rhode Island in 2001, the NH Supreme Court further staked out its position as a moderate court by dividing the baby. This is an unusually long and complex opinion, with a convoluted procedural history, much of which is relevant to the outcome of the case.

I'll outline the case with a timeline, and apologize in advance for the length of this commentary:

(Pay attention, there will be a quiz)

- 1967: Town approves 20-lot subdivision
- 1971: All subdivision roads complete and accepted by town
- 1975: All but four lots built or permitted; subject lot is unbuilt
- 1975: Town adopts new zoning standards, leaving subject lot with nonconforming size and frontage
- 1983: Prior owner of subject lot receives a tax abatement because the lot was unbuildable
- 1985: Town adopts zoning provision allowing for variances for construction of residences on non-conforming lots of record
- 1992: Plaintiff acquires lot for \$20,000
- 1993: Plaintiff applies for variance to build; ZBA denies request; no motion for rehearing
- 1994: Plaintiff applies for building permit, claiming that he didn't need a variance; permit denied
- 1995: ZBA upholds denial; rehearing denied; no further appeal

1997: Plaintiff files petition for declaratory judgment in superior court, claiming that the variance portion of the town's zoning ordinance was unconstitutional both on its face and as applied to his property

1998: Plaintiff files new application for variance; ZBA refuses to hear the case, stating that there was no material change from the previous variance request; plaintiff appeals to superior court, which joins the action with the petition for declaratory judgment; superior court rules for the town on all claims; plaintiff appeals to supreme court.

Preliminary issue: the Town argued that the petition for declaratory judgment on the constitutional issues was barred by the doctrine of res judicata ("the thing has been decided," so go away), given that the plaintiff failed to appeal the 1993 and 1995 ZBA decisions. This may sound weird, but the Court said that because the ZBA decisions weren't appealed, the issues were preserved! The Court said that if the plaintiff had appealed the earlier denials, he would have been required to raise all issues in the appeal, but that in the absence of an appeal, a declaratory judgment action asserting that the ordinance is unconstitutional could be taken at any time. This finding reflects the Court's understanding of the importance of constitutional issues, and the need to give opportunity to challenge allegedly bad laws.

**Facial Unconstitutionality** ("facial," meaning that it's a bad law, regardless of how it's applied): Addressing the 1985 variance provision in the zoning ordinance, the Court noted that "a property owner has no right to the continued existence of any particular zoning classification of his property, because all property is held in subordination to the police power of the municipality." Absent from this opinion is a recognition that this section of the ordinance is irrelevant--the ZBA's power to grant variances does not come from any ordinance, but from RSA 674:33, I(b). This power acts as a safety valve to prevent unconstitutional takings of property through unreasonable imposition of zoning ordinances. Of course, the Town may have enacted this provision in response to property owners' claims and/or local administrative officials' practices that suggested that nonconforming lots of record are always buildable (a position that is ardently supported by property rights advocates). Regardless, the Court thought that the zoning provision was OK on its face.

**Unconstitutional as applied to plaintiff's property:** Among other things, the plaintiff asserted that he had vested rights to develop the property (this was probably also the basis of his applying for a building permit in 1994), because the subdivision had already been almost completely built out when the zoning was changed in 1975.

Reviewing past cases, the Court set itself up to agree with this argument, noting that "...the developer of a subdivision approved under a prior zoning ordinance that has undergone substantial construction under the approved plan acquires a vested right to complete the project in accordance with the original subdivision despite the subsequent adoption of a contrary ordinance. . . . This right may run to the developer's successors in interest." But first, the Court proposed a test: (1) was there a vested right? and (2) did it pass to the new owner? The key on remand is that the right must have vested prior to the

1975 change in zoning. Subsequent investments in the property don't count (e.g., plaintiff's purchase price) [Before you continue, go back to the time line and pick out the critical date for this case's vesting consideration. Correct guessers will get a prize!]

Next, the Court addressed the plaintiff's takings claim, which was based on the refusal of the ZBA to consider the new variance request. The superior court had agreed that although there were changes in the application, there were "no changes in the neighborhood or upon the plaintiff's property between the first and second applications which would constitute a material change in circumstances [a]ffecting the merits of the application." The Supreme Court instead focused on the changes to the application itself (engineering, site layout, etc) and found that these changes were sufficient. The Court went over many differences between the old and new variance applications, and concluded that the ZBA must consider the application on its merits (remember that the ZBA hadn't denied the application, it had simply refused to hear it). Without addressing the takings claim, the Court vacated the superior court's decision and remanded for further proceedings. So back it goes to the ZBA.

Some observations: The Court was clearly unhappy that the ZBA wouldn't consider the new variance application, given that there were changes made in response to the ZBA's earlier denial. I think the message the Court is sending is for boards not to shut out applicants who are making legitimate attempts at responding to earlier criticism or bases for denials. Of course, I'm sure there's another side to this story.

Remember the point about the ZBA's powers: the ordinance doesn't need to specify them, as they come from statute.

For property owners: That tax abatement can come back and bite you sometime. Today's choices are tomorrow's consequences.

### **RSA 91-A: The Right-to-Know Law**

[\*Hawkins v. NH Department of Health and Human Services\*](#)

\_\_\_ N.H. \_\_\_ (December 31, 2001)

The case involved a request for records of dental services provided to NH Medicaid patients. The plaintiff sought to have the records declared to be subject to RSA 91-A; to have information copied from the HHS computer system onto a tape; and to pay only the cost of copying the tape. HHS said that the information that was stored on computer was not "documents" in the sense of RSA 91-A, but was discrete bits of information, and that it would be very costly to create the type of data set sought by the plaintiff.

The superior court dismissed the case, observing that HHS would have been required to create a new program to compile the data sought, and that its cost was prohibitive.

On appeal, the Supreme Court relied on its 1973 opinion in *Menge v. Manchester*, which held that computer records are documents subject to RSA 91-A, but that the public agency is only required to make a copy of its own database, not to create an entirely new

format or system. The Court said, "Likewise, a Medicaid claim form does not lose its status as a public record simply because it is stored within a computer system."

The following passage from the opinion is very relevant for municipal tax collectors and assessors, who periodically get asked for copies of their property computer files. It is also important for any government agency that is considering computerizing the data it receives on paper: "RSA chapter 91-A does not require HHS to compile data into a format specifically requested by a person seeking information under the statute. It does, however, require that public records received by HHS be maintained in a manner that makes them available to the public." Ergo, that paper might still be important!

The Court said that the cost of preparing the information is not a concern when determining whether or not a document is subject to RSA 91-A, but declined to say who should pay the cost in this particular case.

The Court closed its opinion with the following plea to the Legislature:

The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis. It is our hope that the legislature will promptly examine the Right-to-Know Law in the context of advancing computer technology.

Sounds like a good idea.